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Netherlands Yearbook of International Law 2012

Legal Equality and the International Rule of Law: Essays in Honour of P. H. Kooijmans

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Janne E. Nijman · Wouter G. Werner
Volume Editors

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Legal Equality and the International Rule of Law: Essays in Honour of P. H. Kooijmans

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Aims and Scope

The Netherlands Yearbook of International Law (NYIL) was first published in 1970. It offers a forum for the publication of scholarly articles in the area of public international law including the law of the European Union. In addition, each Yearbook includes a section *Dutch Practice in International Law*. The NYIL is published under the auspices of the T.M.C. Asser Instituut.

T.M.C. Asser Instituut

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Preface

We take this opportunity to share with our readership the completion of a transition process, which the *Netherlands Yearbook of International Law* (NYIL) has undergone during the past few years. The results of the transition process first became visible with the introduction of a new cover for volume 41 (2010), when Springer-Verlag got involved in the Yearbook, resulting in a cooperative endeavor between T.M.C. Asser Press, Cambridge University Press, and Springer-Verlag.

During the transition period four important substantive decisions were taken by the Editorial Board: the introduction of a specific theme for every volume of the NYIL, the removal of the 'Documentation' section, the introduction of a new section in the book entitled 'Dutch Practice in International Law', and the introduction of double-blind peer review. Each decision is briefly explained below.

Starting with volume 41 (2010) specific themes were introduced to encourage debate by addressing a topic from different perspectives. Volume 41 (2010) focused on the theme of 'Necessity Across International Law'; volume 42 (2011) addressed the topic 'Agora: The Case of Iraq: International Law and Politics'. The present volume focuses on 'Legal Equality and the International Rule of Law: Essays in honour of P. H. Kooijmans' and volume 44 (2013) will consider 'Crisis and International Law: Decoy or Catalyst?'. Future themes will be announced on the T.M.C. Asser Press website (www.asser.nl/yearbooks). The Editorial Board encourages the submission of unsolicited manuscripts on the annual topic. For further information, please, contact Dr. Monika Ambrus, Managing Editor of the NYIL at nyil@asser.nl or m.ambrus@asser.nl where manuscripts may also be submitted.

The Documentation section was removed because of the ample electronic availability of state practice related documentation, such as case law, legislation and other decisions of the government of The Netherlands related to international law. Since 2011 documents regarding the state practice of The Netherlands are available in electronic format atwww.asser.nl/nyil/documentation.

The present volume contains the first 'Dutch Practice in International Law', which consists of commentaries on salient developments in the practice of international law in The Netherlands. Hence, it emphasizes the link between the NYIL and The Netherlands.

Finally, we are pleased to announce that the NYIL has now formally instituted double-blind peer review. For more details you may visit www.asser.nl/nyil/authors.

We are confident that over the last few years we have laid a solid foundation for a strong NYIL, which can be flexible to future challenges and opportunities.

The Editors-in-Chief

Pieter Hendrik Kooijmans (1933–2013)

On February 13, 2013, Pieter Hendrik (Peter) Kooijmans passed away.

The idea for this volume was born at a Restaurant in The Hague. At the end of our lunch, which we would have a few times a year ever since my doctoral defence, Peter gave me a copy of the sales edition of his dissertation. It was still wrapped as if printed yesterday. He and his beloved wife, Jeanne, had cleared out their studies and found another copy of *The Doctrine of the Legal Equality of States*: *An inquiry into the Foundations of International Law* (1964). It is to this day a standard work on the subject of sovereign equality. It struck me then that 'something should come of this'.

The current volume thus started out as a project to celebrate Peter Kooijmans' life, career, and scholarship by way of an active contemporary engagement with his 1964 study. This volume of the *Netherlands Yearbook of International Law* would be launched festively in his presence somewhere in 2013, the year of Peter's eightieth birthday. However, things turned out differently and with this celebrative volume now comes our sad duty to honour his memory. As Volume Editors, Wouter Werner and I decided not to change the envisaged contents of this volume, but rather to add the words spoken by Dame Rosalyn Higgins during the funeral service together with this In Memoriam. The book has indeed become a tribute to Peter Kooijmans and his work, while at the same time it is highly relevant to current and future international (law) questions. Peter himself was much moved by the project and—in his own words—'greatly appreciated its intellectual objective'. We are very happy he has been able to see the final prints.

For Peter, profound happiness and gratitude coloured the last days and weeks of his life. First of all, happiness and gratitude for the love and support of his beloved wife, children and grandchildren, and for his many lifelong friends. But he also felt deep gratitude for his extraordinary career. He had enjoyed his work so much, all of it, that he felt truly privileged also on this account.

For our part, we lose an extraordinary member of the international law community both inside The Netherlands and abroad, who has given a lot in the different responsibilities he bore during his six decades-spanning career.[1] Peter Kooijmans has

[1] For more details about Peter Kooijmans' career see infra Nijman and Werner 2013, at 4–6.

made a difference in many ways. As an international human rights law expert and Chairman of the Dutch delegation to the UN Commission on Human Rights he contributed to the development of the human rights apparatus within the United Nations; and then became the first to fulfil the post of Special Rapporteur on Torture. In this latter role, Peter reconciled diplomacy and human rights advocacy. He operated well-considered and steadfast and as such managed to impact also in a very concrete and positive way the lives of people. As Dutch Minister of Foreign Affairs, he did not fail to take the human rights framework on board and have it influence and shape Dutch foreign policy to a significant degree. All of this experience with the practice of international law and international relations Peter Kooijmans brought into his lectures on public international law, and to the academic community at large as a professor, a dean, and later as the President of the University of Leiden Supervisory Board. He was not only a highly respected but also a much beloved professor, who impacted generations of law students at the VU and Leiden University with his inspiring way of teaching and with a well-defined perspective on international law and its function within international society. For us as doctoral candidates, he was a wise mentor; he challenged our views but also respected the academic freedom needed to grow into an independent researcher. Finally, Peter Kooijmans also brought his extensive human rights experience and expertise to the International Court of Justice. From his days in international political practice, he was used to deal with sensitive political issues traditionally placed behind the veil of state sovereignty, and during his time on the bench—as later he would proudly point out—the World Court broke through the strict separation between the national and the international with regard to the rights of convicted persons in case of capital punishment. The Court found that even though international law did not prohibit the death penalty, it did require that necessary safeguards for the protection of the individual's rights be provided, among which consular assistance. The fact that the International Court of Justice pierced the sovereign veil and spoke out on the protection of the rights of individuals informed, according to Kooijmans, the attitude of national judges deciding in similar cases. The protection of human dignity defined Peter Kooijmans' view on the function of law in the international society, as well as his own position when implementing the law in action. In brief, in all public functions which Peter Kooijmans held—and of which we have mentioned far from all—he aimed to serve the community at large. This was rooted in a genuine conviction, and Peter much enjoyed the work that came with it; all who have had the privilege of working with him in any of these functions will recollect his characteristically sparkling eyes.

Peter Kooijmans did his work with intelligence, diplomatic talent, a sharp pen and pointed tongue where necessary, human interest and empathy, a great sense of humour, and—not least—intellectual and political courage. In Peter, we lose an outstanding and internationally recognised international law expert, a highly esteemed colleague, a truly pro-Europe statesman, an inspiring mentor and exceptional teacher, and a great and loving friend. Peter remains in our thoughts, and may also be an inspiration to our work.

Janne Nijman

Speech by Rosalyn Higgins—20 February 2013

Pieter Kooijmans was a Member of the International Court of Justice from 6 February 1997 to 5 February 2006. How profoundly fortunate it was for me that we should have been seated as neighbours for the Court's hearings and deliberations. I learned so much from Pieter these years. Our *sotto voce* exchanges throughout these nine years developed into lasting friendship.

He came with a large reputation in the field of international law and his qualities rapidly made themselves felt. In spite of his high standing in Dutch public life and in academic international law, it was early apparent, and welcome, that he was 'a team player'. He enjoyed the discussions of the Bench and played a full part in them—but also listened with courtesy and interest to the views of all his colleagues. It was not his way to insist upon things, but having deployed his viewpoint, he might later expand on it in a well-reasoned Separate Opinion.

He was often in demand as a Member of the Court's Drafting Committee, he though did not hesitate to write Separate Opinions or Declarations when he believed elaboration of his ideas was called for. These Separate and Joint Opinions, taken together, form an important corpus of law for all who care about international law.

I do not wish to given the impression that he was rigid in the exchanges with his colleagues. I recall to this day that in one case he strongly argued for a particular view, though several of his colleagues had a different view. When it came to voting, he seemed to vote in a manner quite inconsistent with the point of view he had been contending for. When his colleagues noted this, with astonishment, he quietly said, 'But you have convinced me with your arguments'.

Pieter Kooijmans' Opinions are to be understood as reflecting his legal philosophy. He was not a Judge who thought that the Court should decide the very minimum possible in order to dispose of the dispute before it. He was disposed towards judicial activism, though not, he said, in circumstances that would cause harm. But—as he explained in a lecture shortly after he left the Court—'I [am not] in favour of a form of judicial restraint that closes windows which need to be opened'. In the *Congo v Uganda* case, Judge Kooijmans thought that the Court had missed an opportunity to pronounce on certain difficult issues relating to the use of

force—and in his view these issues were of primordial importance but not yet judicially resolved. He thought that the principal judicial organ of the world community *could* usefully have provided guidance in the legal field.

A propensity towards judicial activism did not mean that Kooijmans had pre-set answers in mind. He never confused quiet, moderate judicial activism with what he would have termed substantive wishful thinking. This is well illustrated by what he had to say on the contemporary state of the law on State immunity and universal jurisdiction. He was a complex thinker—liberal, but hard-headed, too—an attractive amalgam.

If Pieter Kooijmans was liberal but head-headed, he was also unopinionated while at the same time being an intellectual leader. And he seemed to me to have a remarkable sense of the 'right' and 'wrong' of things. He seemed to find such matters simple, certain and straightforward—qualities I admired, and rather envied.

He was greatly valued—and indeed loved—by his colleagues. His modesty was such that he studied closely every word that his colleagues wrote as they prepared their Notes on a case, that is, their preliminary views on all they had read and heard. But the reality was that it was to Pieter Kooijmans' Note that we so often first turned. We knew how persuasive it was sure to be.

Pieter Kooijmans was the least pompous or self-important of men. Where he was seated at a reception, or what should be his position as the Court lined up, was of no interest to him.

All of these many qualities—deep scholarship, friendliness, humility, quiet confidence—combined to give the Court, for nine precious years, this popular colossus. His work, and our memory of this special, special man, live on.

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Part I
Legal Equality and the International Rule of Law
Essays in honour of Pieter H. Kooymans

Chapter 1
Legal Equality and the International Rule of Law

Janne E. Nijman and Wouter G. Werner

Abstract Legal equality of states is a fundamental principle of international law. The contributions in this special volume examine this principle in today's international law context while engaging also with Pieter Kooijmans' book *The Doctrine of the Legal Equality of States*. This chapter introduces this 1964 book and briefly discusses the various contributions in the present volume against the background of this book.

Keywords Cosmopolitanism · Human rights · International community · Legal equality · Sovereignty

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> A correct understanding of the principle of equality can certainly contribute towards the view that international relations, too, are legal relations and that the establishment of a legal order, comprising the whole world, will bring peace and security to each individual and every nation, a peace and security in which all share equally.[1]

1.1 Introduction

With this observation, Pieter Hendrik Kooijmans concludes his book *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*. It reflects well the import of his work. On the one hand, rigorous legal analysis in order to enhance our understanding of international law as it is, while, on the other hand, barely hiding to what his normative agenda purports. The advancement of an international rule of law to promote peace, justice, and security in which all states as well as individuals share equally around the world.

With this issue on *Legal Equality and the International Rule of Law*, the NYIL aims to celebrate Pieter Kooijmans' academic, diplomatic, and judicial career by picking up on an important subject in his early writings, the principle of legal equality of states, and addressing it almost fifty years later in the context of the contemporary debate on the international rule of law. The latter is indeed a concept – an ideal, even – that permeates Kooijmans' work and career.[2]

With a revisit of *The Doctrine of the Legal Equality of States*, we return to the beginnings of a long and distinguished career. The book is Kooijmans' doctoral thesis, which he defended (*cum laude*) in 1964 at the *Vrije Universiteit* in Amsterdam. His supervisor, Gesina van der Molen, wrote its preface wherein she observed: '[o]ne of the most important and at the same time most knotty questions with regard to the position of the state in present international society is doubtless the problem of legal equality.' That said, she proceeded: '[t]his is all the more the case as legal equality is a qualified equality.' To conceive legal equality of states as a '*qualified* equality' was a rather bold thing to do even in the mid-1960s. With this characterisation van der Molen captured the scope and complexity of the study and also pointed to Kooijmans' intellectual courage in taking it up: '[d]r. Kooijmans has not shrunk from dealing with this thorny problem.'[3] The attitude to

[1] Kooijmans 1964, at 247.

[2] Cf. Marcel Brus' description of Kooijmans' career as 'a lifelong dedication to the promotion of the rule of law in international society. Brus 2006, at 699.

[3] Van der Molen 1964, at viii.

which Gesina van der Molen testified here – not shrinking back from action necessary 'to contribute to the establishment of a world-order which will bring peace [justice] and security to each individual and every nation' – even when things are 'knotty' and 'thorny' may in hindsight be seen as characteristic of Peter Kooijmans in the various responsibilities of his career.

As a Minister for Foreign Affairs of the Kingdom of The Netherlands in 1993–1994, this attitude of *faire face* is reflected for instance in how Kooijmans 'remained faithful to the cause of human rights'.[4] In his own words spoken at the 50th session of the United Nations Commission on Human Rights in Geneva on February 10, 1994: '[h]uman rights: a challenge you cannot refuse.'[5] Hence, he did not shy away and talked (human rights) law to power, whether conversing with e.g. Chinese, Indonesian, Iranian, or Salvadoran officials.[6] While in governmental service twenty years earlier, as State Secretary (*Staatssecretaris*) for Foreign Affairs, in particular disarmament matters (1973–1977), Peter Kooijmans worked closely together with then Minister for Foreign Affairs Max van der Stoel, himself a patient and determined lifelong human rights protagonist. Van der Stoel was instrumental in Kooijmans' service to the UN. He asked Kooijmans to succeed him as Chairman of the Netherlands delegation to the UN Commission on Human Rights. Once on the Commission he was soon elected Vice Chairman (1983) subsequently Chairman (1984).[7] In 1985, Kooijmans was appointed UN Special Rapporteur on Torture for the UN Commission on Human Rights.[8] One may observe that in this capacity and with the dedication to enhance the implementation of human rights law, torture in particular, Kooijmans actually contributed to the shrinking of the *domain reservé* of the state and thereby to the further qualification of sovereign equality (i.e. the derived duty not to intervene in a state's domestic affairs), in favour of the rule of international (human rights) law. The 'duty to respect the personality of other States', one of the duties enlisted in the Friendly Relations declaration as an element of the principle of sovereign equality, is challenged by human rights law and the development of *ius cogens* in particular. Kooijmans encountered the trend of international law increasingly impacting the internal legal order first hand again on the bench of the World Court from 1997-2006. In this context, Kooijmans himself talks about a 'millennium shift' which he illustrates with the 1999 *La Grand* case.[9] Shortly after he retired from the ICJ, he gave a talk at the British Institute of International and Comparative Law in which he laid down his view on the role of the international judge in relation to serving the rule of law in the international society: not judicial activism, not judicial restraint, but proactive judicial policy was the best approach for judges to fulfil

[4] Lammers 1997, at 124.

[5] As quoted in Flinterman 1997, at 126.

[6] Lammers 1997, at 124.

[7] Flinterman 1997, at 127.

[8] Flinterman 1997, at 126-133.

[9] 'Op de koffie bij Kooijmans', Interview with Pieter Kooijmans, *Juncto* 2007, at 55-59.

their responsibility. Again, we find this attitude of *faire face*, here coupled with judicial wisdom:

> The Court increasingly is dealing with cases concerning what President Higgins called 'cutting-edge' issues. This allows the Court to play a more preponderant role in delineating the law than it was able to do in the past.
>
> I am certainly not in favour of judicial activism which may turn into a destructive trap. But neither am I in favour of a form of judicial restraint that closes windows which need to be opened and thus becomes barren. Earlier I used the word 'proactive'. In one of my dictionaries I found the following meaning of that term: 'Having an orientation to the future, anticipating problems and taking affirmative steps to deal positively with them rather than reacting after a situation has already occurred.'[10]

Again, it shows a dedication to the law as it is, but also an intention to serve the rule of law in the international society, which requires 'room for imaginative interpretation'.[11] He was not shrinking back from 'affirmative steps' to address 'the needs and aspirations of the international community', to put it in the words of his colleague Judge Rosalyn Higgins.[12] Those of us who had the privilege to sit in his classes, will recognise this attitude towards contemporary legal problems. Kooijmans was a professor of public international law at the *Vrije Universiteit* from 1965-1973 and at Leiden University from 1978-1997, with a short interruption in 1993-1994 to serve in the Dutch Government.[13] Former students still remember with great enthusiasm his engaging lectures introducing international law. During the selective course, Kooijmans demanded rigorous legal analysis as well as an eye for the real issues behind the legal arguments which the law needed to address. Implicitly, he instilled in us this attitude that characterises his career: respect the law as it is while not shying away from law's functional purpose. This balancing act – Kooijmans uses the word 'tightrope-walking' with respect to the ICJ when it assesses its jurisdiction – is the responsibility of the international lawyer. Already in *The Doctrine of the Legal Equality of States* this responsibility is taken up.

1.2 Kooijmans' 1964 Book

The book starts with the observation that equality is what may be called an 'essentially contested' notion, which nonetheless plays an important role in the '*Rechtsbewusstsein* of the majority of mankind' and therewith in social, moral and political thought – besides of course its role in legal thought. It examines the meaning of equality in international law, the origins of the notion and its function

[10] Kooijmans 2007, at 753.

[11] Ibid., at 742.

[12] Ibid., cited at 741.

[13] Brus 1997.

throughout legal history. Written in the early sixties,[14] the study is among other things a response to the influence of 19th century thinking on international law as it aims 'to reflect upon the highly exalted but at the same time deeply scorned principle of the legal equality of states.'[15] At the end of the 19th century, in which factual inequality of states predominated, 'there developed a trend of thought which attempted to break radically with the principle of the equality of states.'[16] On the other hand, the book comes at a time which found the international community to have changed considerably in the course of only a few decades. With the United Nations the organisation of the international society had come to be based on both legal equality and inequality. The UN Charter stipulates the principle of legal equality right at the beginning, yet Great Powers obtained the right to veto in the Security Council.

For Kooijmans, these developments in the organisation of the international society put the principle of equality 'to the test'. Either the principle was to prove its value for the development of the international legal order and manages to have legal meaning independent from power politics, or it would remain to be 'radically discarded'.[17] While the appeals to equality in the context of decolonization may add to the topicality of his study at the time of writing, for Kooijmans the principle of equality could not be the basis for new states to opt out of the international legal order. Rather the essence of their newly gained international legal personality was their subjection to international law. This points to the core of the study, that is the relation between sovereignty and the rule of law.

Sovereign equality and the international rule of law have a complicated and sometimes strained relation. It is too easy to regard the former as being part of the realm of international politics and the latter as belonging to international law. After all, the former still is one – if not the only – of the fundamental principles of international law and international legal order. However, the idea that 'sovereign equality furthers the rule of law by restricting the rule of mere power'[18] also is really only part of the story. Sovereign equality also hampers the international legal order's repudiation of – couched in contemporary terms – 'might makes right'.

For Kooijmans the post-WWI depreciation of state sovereignty is connected to the rule of law ideal:

> the institutionalization of the international society [has] contributed towards the birth of the idea of a universal legal order, wherein the states no longer decide for themselves what is law and therefore are superior to law, but wherein they are subjected to law.[19]

[14] See for a re-situation of the book in its historical context, Dunoff 2013.

[15] Kooijmans 1964, at 3. See also, at 37.

[16] Ibid., at 2-3.

[17] Ibid., at 4.

[18] Kokott 2011, para. 81.

[19] Kooijmans 1964, at 192.

This means that sovereignty is no longer conceived of as absolute. And the qualification of sovereignty has consequences for the principle of sovereign equality. Kooijmans' normative agenda was that conceptions of international society as a society of individual, absolutely sovereign and equal states be rejected for their denial of the international rule of law: 'essentially [it] denies the existence of a law that stands above the states.'[20] Here, the old Hobbesian problem emerges: who decides what is law and what is just? In the absence of a single standard of morality and law in the international society, international life is marked by perpetual conflict in which each state is its own judge. In Vattelian terms: '[a] Nation is … free to act as it pleases',[21] without a sovereign of the world society ascertaining an objective standard of morality and law, an international law above and binding on sovereign states – an international rule of law – is impossible. To save international law from the logically ensuing annihilation many scholars have defended an independent basis of obligation of international law during the first decades of the 20th century. And in doing so the source of the standard had to be addressed. Tackling the problem of legal equality as a problem of valuation – i.e. which actual (in)equality is relevant according to the applicable legal standards – and thus at a deeper level as a problem of the relation between sovereignty and the international rule of law, Kooijmans was challenged to explain his concept of (international) law, and in doing so he did not shy away from articulating what he saw then as law's ultimate source of validity. Without it, there would not be standards to go on.

The young Kooijmans is indeed rather straightforward about the extra-legal foundation of his normative agenda. International law, like all law, should be about man as '[he] is centre of Creation and as such the centre of each legal system, therefore also of international law.'[22] Man, thanks to his capacity for reasoning and for taking responsibility in the communities of which he is a member, is able to discover the norms 'that are valid for this life from the directives given by God.'[23]

> Law, then, can be described as a complex of norms, positive or to be rendered positive, regulating the relations between men and human institutions by means of a careful balancing of their interests, in conformity with the social structures as given in Creation.[24]

Today, one rarely finds such an explicit Christian perspective in international legal scholarship. This explicitness, however, makes the work transparent. In an important way the author gives a real account of his understanding of the underlying standard of justice and authority that leaves not much room for speculation about where he is coming from. In this sense, Kooijmans is fully in line with the latest views on the responsibility and accountability of the international lawyer and

[20] Ibid., at 247.

[21] De Vattel 1916, para. 18-20, at 7.

[22] Kooijmans 1964, at 37.

[23] Ibid., at 12.

[24] Ibid., at 12.

scholar.[25] At the same time, when leaving the particular source of his ethical perspective aside – as Kooijmans did in most of his subsequent scholarship – many non-Christian international legal scholars could subscribe to his ultimately rather straightforward cosmopolitan perspective on international law, i.e. law inherently in service of human dignity and humanity's 'great world-wide community'.

Kooijmans' concept of (international) law thus grounds on man's individual capacity to reason as well as on his innate responsibility for the communities in which he lives. As such, man is capable of knowing justice and thus of formulating law. The deduction of the 'necessary rules for society' by reason provides norms for conduct, including state conduct, however, this leaves the question which social norms are *legal* norms? Moral norms and legal norms draw on the same source, but what distinguishes the two is 'positivization': legal norms are rendered positive in legal rules and they take human development and social change into account. Positivization of (international) law and legal institutions is essential to 'do justice to the element of historicity, to the principle of development, which is one of the tasks of man, created in responsibility.'[26] Such positivization is not the same as law made *within* the state only; that would lead to 'a negation of international law'. For international law, according to Kooijmans, this positivization (of international justice)[27] occurs within and is established by the international community that is ultimately 'the community of the entire human species'.[28] The basis of this world-wide community is in his view that we all are created *equal* in the sense that all are 'created after God's Image and of one blood'.[29] At the same time, a community of people who are *different* from, as well as dependent on, each other, they are individual persons with their own human dignity as well as members of communities by their social inclination. The mutual dependency of humanity at large determines – or should determine – the international community as a *legal* community,[30] man's social and creative nature provokes the positivization of international justice into international legal rules reflective of the various interests that have to be balanced. International law is responsive and adjustable to

[25] Cf. Paulus and Tasioulas quoted in Paulus 2001, at 753-754: 'The point is, however, not to be ashamed of those underlying choices but to make them in the open, to open them up for critique and rebuttal. In the words of John Tasioulas, "by making explicit, and reflectively articulating, the genuine reasons on which decisions are based […] self-consciously value-based adjudication can enhance, rather than corrode, the realization of the rule of law." If the lawyer stops to pretend that the outcome of her analysis is the result of a purely objective analysis, if she admits and demonstrates the element of (conscious) choice and individual commitment, the legal enterprise wins much credibility and loses little of its normativity, understood not as a simple conformity of life to general rules but as the quest for public accountability of the exercise of all sorts of power over human beings.'

[26] Kooijmans 1964, at 15.

[27] 'Law is nothing but the embodiment of justice, its fixation in concrete rules; justice, in its turn, is the highest standard to which the law should conform as far as possible.' Ibid., at 16.

[28] Ibid., at 18.

[29] Ibid., at 39.

[30] Ibid., at 194 et seq.

temporal reality. States and international organisations function between man and international law in service of the (international) interests of man and his communities.[31] They are the organs of the international community and as such have to develop international law proceeding from the moral ideal of *societas humana*. Legal equality then has a special function in (the positivization of) international law and justice. It enables a plurality of actually unequal states to function as organs of a real world community and to be awarded international rights and duties. International law, which is equally valid for all members of the world community, offers 'inherent standards' (namely, standards defined by the 'realization of an international legal order' of the *societas humana*) to evaluate the legal relevance of the factual inequalities of states.

In Kooijmans' view, validity of legal rules depends both on their deduction by human reason from 'the directives along which life on earth should be conducted' (according to the Christian worldview) as 'necessary rules for society', and on their positivization, which prevents eternal dictates as man's reason should be sufficiently relativized for it is fallible. If a rule conflicts with these directives of justice, it is invalid. Throughout Kooijmans' scholarship, this conception of the function of international law to serve justice will remain discernible, even though we will no longer find such an explicit reference to the Christian roots of his concept of justice.

With his view on law in general and international law in particular, Kooijmans provides an answer to the void that may be called the Hobbessian problem of international law.[32] He thus challenges the purely formal definition of the legal equality of states and introduces a 'standard of valuation' in order to assess which (in)equality is relevant to the law *vel non:* '[t]he law values the actual inequalities and attaches certain consequences to them when they are essential for the realization of the legal order.'[33] The state's duties to protect national interests and to advance the international legal order sometimes clash, however, according to Kooijmans, 'the safeguarding of national interests may never be realized at the expense of the universal legal order.'[34] The principle of legal equality is important to this realization, the legal principle accommodates sovereignty and political inequality but it is not the consequence of sovereignty conceived of as 'intrinsically unrestricted, free power of the will' of the state.[35] Legal equality serves the equal subjection to and equal protection by international law, Great Powers and small states.

In short, legal equality has a formal and material side to it. Without the formal side of legal equality of states, 'equality before the law', 'law is no longer law but

[31] The complicated factor today as well as in Kooijmans' days is the relation of states with their citizens. See ibid., at 41.

[32] Ibid., e.g. at 42.

[33] Ibid., at 32.

[34] Ibid., at 41.

[35] Ibid., at 150.

degenerates to arbitrariness.'[36] As for the material meaning of legal equality – which factual (in)equalities should international law take into account? –, according to Kooijmans, this has to be determined by the structure of the international community. The standard of this valuation then is the advancement of the international community's legal order that grounds universally on man's *humanitas*.[37] The international community – as the legal community of states representing the world community of mankind of which each and every individual is a part – defines the standard of juridical valuation with which the relevance of political inequalities is assessed e.g. in the case of the special responsibilities of Great Powers: whether – and if so to what extent is – the inequality of power reason for differentiation in terms of legal rights and duties within the UN? The standard to deal with this question is the international legal order and community itself, material legal equality demands that inequalities are taken into account so as to serve the international legal order and the world community at large. With this legal standard at hand, 'proportionate differentiation' is just; hence, superpower is relevant to the law whereas it ensues special capacities to secure the international legal order and guarantee peace to its world community and therefore the law may grant major powers a special position – special responsibility comes with special rights and duties – within the UN.[38] All states have a formal 'equal capacity for rights' and the material meaning of legal equality is thus determined by the international legal order and community, structured by states that represent mankind of which man is a part.

Kooijmans developed his theory of legal equality in relation to the field of international organizations, but during the following decades the positivization of equality in other fields of law took off, as in the final pages of his book Kooijmans suggested would happen:

> It is … incorrect to think that equality in international law coincides with the equality of states. Equality is a legal principle which requires 'positivization' in every field of law. Since the states are no longer the only subjects of international law there is also a need for realization of equality elsewhere. And since the individual in particular will play an increasingly important role in international law, a closer study of the demands of justice and equality is not superfluous here. But this may never – unless at the expense of the intrinsic structure of the international community – take the place of a study of the equality of states.[39]

Almost 50 years later, this observation still holds truth. Today, as this edition of the *Netherlands Yearbook of International Law* shows, *The Doctrine of the Legal Equality of States* still is an inspiring work of international legal scholarship relevant to a variety of legal fields, *inter alia* the law of international organisations, international criminal law and international human rights law. We have asked a

[36] Ibid., at 101.

[37] Ibid., at 237.

[38] Ibid., at 242.

[39] Ibid., at 246.

number of currently leading international legal scholars from various fields to engage with legal equality and Kooijmans' 1964 book, in particular in the context of contemporary international law and legal theory. To be sure, this special volume of the *Netherlands Yearbook of International Law* is not another *Liber Amicorum*,[40] but really an attempt to revisit this crucial principle of international law while taking Kooijmans' book as a starting point. We have invited the authors on the basis of their expertise relevant to this topic. Most were already familiar with the book because of their own research. But none worked closely with Peter Kooijmans except for Rosalyn Higgins.

In the next sections we will introduce the contributions and briefly elaborate on their engagement with the book in today's international legal context. Within the debate on the rule of law at the international level, the emphasis on the principle of legal equality seems to be partially based on the 'legal conviction'[41] that legal equality in the relations of states *should* be part of the rule of law at the international level just as the legal equality of human individuals is part of the rule of law at the national level. In this context, the principle of legal equality is reconfirmed by those scholars who envision states as the beneficiaries of the international rule of law.[42] Others, however, who too consider legal equality as one of the core requirements of the international rule of law, do not stop at the inter-state level and regard human beings, not sovereign states, as the rightful beneficiaries of the international rule of law and call to rethink the principle of legal equality in international law in this respect.[43] In other words, also today, the relation between the international legal order and the principle of legal equality comes with tensions, problems and paradoxes, many of which were already identified and discussed in Kooijmans' study. This special volume revisits these tensions, problems and paradoxes, both at the foundational level and at the level of specific legal regimes in which the principle of legal equality has been spelled out. Focus is on four subtopics, in particular.

1.3 Relevance and Impact of the Notion of Sovereign Equality

Throughout the history of international law, the principle of sovereign equality has been connected to two, partly contradictory, normative positions. On the one hand, sovereign equality has been invoked as an antidote to factual inequalities in terms

[40] Kreijen 2002, at 1.

[41] Ibid.

[42] E.g. Beaulac 2007.

[43] Waldron 2009, at 20. 'Certainly attempts in the IL literature to argue for sovereign equality on grounds used in arguments that are appropriate for legal equality among human individuals are simply embarrassing.'

of, for example, military power, economic development, etc. In this context, sovereign equality works as a weapon of weaker states that seek protection against imperial ambitions and the greed of greater powers. Whatever the differences in terms of culture, geography, military and economic power, the law demands that states be treated as equals. This line of formal reasoning links sovereign equality to prohibition of intervention, the right to self-determination, etc. More on the material side, the principle of sovereign equality has been connected to the right of states to judge for themselves what justice, morality and law demand in concrete situations. Sovereign equality then boils down to the idea that no state has the right to arrogate the power to determine for one of its peers what certain legal and moral obligations entail. This reading of sovereign equality figured prominently in classical European international law, which endowed sovereign states with the prerogative to decide whether they wanted to settle disputes through war. The idea that other states could pass legal judgment upon this decision was seen as contrary to the idea of sovereign equality. In more general terms, this reading of sovereignty formed the basis for the theory that states themselves are the judges of their legal obligations - a theory that constitutionalists such as Lauterpacht regarded as contrary to the very idea of the rule of law in international relations.

The dual face of sovereign equality is also traceable in Kooijmans' dissertation. On the one hand, Kooijmans embraces sovereign equality as a legal principle that offers protection against interventionist agendas by powerful agents.[44] At the same time, Kooijmans is wary of readings of sovereign equality that run contrary to the idea of an objective, overarching legal and moral order within which states have their proper place and function.[45]

The contributions to this volume build on the tension identified by Kooijmans and reconsider it in light of developments in the international society since the 1960's;[46] with one article taking the normative, protective value of sovereign

[44] See e.g. Kooijmans 1964, at 114-116.

[45] See e.g. Ibid., at 194 et seq. With an elaboration on how South Africa's Apartheid policy 'runs counter to the most fundamental principles of law, the most important which implies respect for human dignity. We may also assume that a considerable portion of the South-African subjects shares this opinion, but that in spite of this the South-African government does not intend to change its policy, notwithstanding the pressure brought to bear in that direction. At that moment the greater community, i.e. the international community, organized as it is in the United Nations, of which the Union of South Africa is a member, may concern itself with the case, and on various grounds. In the first place, because the larger community cannot remain indifferent to the fact that there is a sore spot within its sphere, which for that reason alone may mean a threat to its order. In the second place, because an exceedingly gross violation of the general principles of law legitimates actions on behalf of those who are deprived of their right. We refer here to the doctrine of humanitarian intervention, which we may accept as justified, provided it is exercised by the larger community.' Ibid., at 209.

[46] In her contribution to this volume, Higgins too underscores this dual face of legal equality of states, on the basis of a more specified analysis of one area in international law, sovereign immunities. She stresses the importance of the principle of sovereign equality while at the same time she warns of the dangers of a fully classical reading of sovereignty and sketches an

equality as its starting point and one article taking the individualizing, subjective reading of sovereign equality as its main focus of analysis.

The first article, by *Brad Roth*,[47] starts off from the notion of sovereign equality as signifying three legal presumptions: (a) states are only bound to norms they have accepted through consent; (b) it is up to states to determine the effects of international law in their domestic legal orders; (c) norm-violating states do not forfeit their right to territorial integrity or political independence. This reading of sovereign equality, Roth argues, should not be misread as a-moral or state-centric only. It reflects a particular moral understanding of international relations grounded in mutual respect and the belief that keeping nations peacefully apart is beneficial to the international community as a whole. Roth situates the heydays of this conception of sovereign equality between the 1950-1980's when decolonization and the Cold War resulted in a strong adherence to a 'pluralistic' understanding of international relations, which was based on an agnostic take towards the internal organization of states. Especially since the 1990's, however, the pluralistic reading of international society has come under strain because of preference for a human rights oriented understanding of global relations.[48] This is evidenced inter alia in the invocation of *ius cogens* norms as originating in natural law, an expansion of universal jurisdiction,[49] a relativised understanding of state immunity for international crimes,[50] a breakdown of the standard of neutrality in civil strife and the emergence of the responsibility to protect. While Roth acknowledges that strict adherence to pluralism in inter-state relations comes with a price, he warns that the turn towards humanitarianism, universalism and interventionism 'overcorrects by far'. According to Roth, setting aside a pluralistic conception of sovereign equality would be both unrealistic and morally problematic.[51] Unrealistic because international society may not have moved so much towards universalism and human rights as its advocates want to believe; morally problematic because eroding the protection offered by sovereign equality paves the way for hegemonic projects in the name of objective justice.

The article by *Anthony Carty and Xiaoshi Zhang*[52] departs from Kooijmans' critique of the so called absolute conception of sovereign equality, which left it for each state individually to determine its standards of conduct. For Kooijmans, this idea was most forcefully articulated in Vattel's theory of international law where the equality of states essentially implied that 'each possesses the right of judging, what

(Footnote 46 continued)
alternative interpretation of sovereignty as rooted in global notions of order and justice. Higgins 2013.

47 Roth 2013.

48 See also Simpson 2013.

49 See also Nouwen 2013.

50 See also Higgins 2013.

51 For Kooijmans' pluralistic conception of sovereign equality see his discussion of Schaumann's view on equality of states and international law. Kooijmans 1964, at 235-236.

52 Carty and Zhang 2013.

conduct she is to pursue'. Such radically pluralist conceptions of international society, Kooijmans contended, fatally undermine the very idea of authority and law in inter-state relations.[53] Carty and Zhang accept Kooijmans' critique of Vattel and seek to set out more fully the devastating consequences of a Vattelian reading of sovereign equality. They situate Vattel's theory of sovereignty in the Enlightenment idea that the freedom and equality of selfish, interest-maximizing individuals will somehow bring about an equilibrium; a harmonization of interests. In international law, the legal form through which this harmonization is to take place is the treaty (contract); a legal form that reinforces the idea that relationships are consensual. However, since it is for each state to determine what the obligations in a treaty entail, it is eventually coercion and force that finally decides. The role of law is then to portray such coercion as rooted in the free will of states; as the outcome of a process of harmonization. Carty and Zhang illustrate the effects of this conception of sovereign equality through a discussion of the British-Chinese relationships in the 19th century. They show how China, through the use of international law and the conclusion of treaties, 'had to be taught equality';[54] an equality which came with intrusive and interventionist policies legitimatised on the basis of freely given consent. At the same time, they seek to illustrate how the Vattelian logic of freedom, equality and desire has affected domestic Western societies through a feminist critique of James' erotic bestseller *Fifty Shades of Grey*. According to Carty and Zhang, this novel contains all the elements of the logic of desire, contractualism, presumed freedom and master-slave relationships that have plagued relations between states and sexes since the Enlightenment. The parallel they draw is based on the element of coercion or pressure affective when equal parties consent 'freely' to a relationship of domination and subordination, of inequality, as in the case of both the Unequal Treaties and the Master-Slave type of contract of the novel. The most powerful will be able to impose his moral and legal outlook.[55] Political inequality comes to determine legal equality, something for which also Kooijmans repeatedly warned and which is also behind his rejection of such a notion as 'legalized hegemony'.[56]

1.4 Sovereign Equality and International Organization

One of the core problems of modern international law has been to square the principle of equality between states with the need for international organization, be it in the form of ad hoc coalitions, semi-permanent informal arrangements or

[53] On the implications of this so-called Hobbesian-Vattellian structure of international society, in the field of international criminal law see Nouwen 2013.

[54] Carty and Zhang 2013.

[55] In her contribution to this volume, Nouwen too points to pressures of greater powers put on smaller states *in casu* to ratify the Rome Statute: 'for some states parties, "consent" to the creation of the Court's jurisdiction is more fiction than real.' Nouwen 2013, at 165.

[56] Kooijmans 1964, at 123.

formalized international organizations. The tension between state equality and international organizations also figures prominently in Kooijmans' dissertation. In most general terms, Kooijmans' takes issue with those that seek to protect sovereign equality as the first and only grounding principle of international law. Instead, he grounds the principle of sovereign equality in a more encompassing cosmopolitan order that also seeks to protect other forms of equality and that assigns states their proper place and authority (see also under Sect. 1.6).[57] As a consequence, the idea of equality between states should not be used as a bar to the further development of international law, because 'to give the idea of community its proper place and to enable it to fulfil its purpose, some sort of organization is desirable, even essential.'[58] One could even argue that the very principle of equality between states requires some forms of organization to make it possible and effective.

All this, however, does not solve the more practical issues that arise when the authority of international organizations are challenged in the name of sovereign equality. The tension between equality between states and forms of international organization has structured many debates throughout the history of international law, as the examples of the Concert of Europe, the League of Nations, the United Nations or the coalition against Libya attest. In the 1960's, debates regarding this tension mainly focused on two issues: the power of the Security Council and the voting rules of international conferences and organizations.[59] Both issues also dominated Kooijmans' discussion of the relation between sovereign equality and international organization. While Kooijmans acknowledged the need to assign special responsibilities (and rights) to certain states, he also sought to limit the exercise of those powers in order to protect the rule of law and the equality between states.

Similar debates about the need to enable *and* constrain forms of international organization have occurred in more recent times, as the chapter by *Gerry Simpson*[60] demonstrates. Reflecting on the reception of his own book, Simpson sets out the dangers of thinking about international law in terms of inequalities between states and expanded prerogatives for those acting in the name of global security or universal values. Simpson argues that interventions such as those in Iraq 2003 have been defended in two distinct ways: as extensions of already existing structures of legalized hegemony into new areas or as more loosely organized regimes that are deemed necessary for international security.[61] Both justifications thus build on the felt need to transcend the equality between states in the name of international order and justice. However, such claims are not always successful, as the example of the Iraq intervention attests. They may well spur calls for further restrictions on the

[57] Kooijmans 1964, at 194-210.

[58] Kooijmans 1964, at 200.

[59] See also Dunoff 2013.

[60] Simpson 2013.

[61] On 'legalized hegemony' see Kooijmans 1964, at 235-236.

powers of (legalized) hegemony, be it in the name of the equality between states and the principle of non-intervention (as in the Iraq war) or in the name of human rights (as in the case of the practice of listing by the Security Council).[62]

The contribution by *Jeffrey Dunoff*[63] deals with an even more fundamental question in relation to the tension between state equality and international organization. In light of the foundational changes in the law and practice of international organizations since the 1960's, what use is the traditional focus of international law scholars on the principle of sovereign equality? Dunoff's chapter starts off with a contextualization of Kooijmans' dissertation in terms of the law of international organizations as it was in the mid-20th century. The dominant view at the time, Dunoff shows, was that international organizations should be understood in intergovernmental terms, as created by states and essentially governed by state representatives. This view also informed Kooijmans discussion of the United Nations and the voting rights in international fora. Since the 1960's however, international organizations have taken a radically different form and meaning in international law, with an ever-expanding scope of law-making activities, an increase in decision-making on the basis of (qualified) majorities, a more important role for adjudication and supervision, standard-setting by international organizations, as well external referencing and administrative decision-making by international organs. This all forces international lawyers to leave their exclusive focus on relations between states and be more aware of relations between international organizations. Although Dunoff holds that sovereign equality is still an important principle in the 21st century international law, he also maintains that 'the notion of sovereign equality sheds very little light on current developments or debates over the activities of twenty-first century IO's'.[64] If we stick to the traditional focus on sovereign equality, Dunoff claims, we run the risk of missing one of the most important challenges of contemporary international law, 'which revolve around the normative results when IO's interact *among* each other'.[65]

1.5 Sovereign Equality and Equality Between Individuals

Writing in the 1960's, Kooijmans rightly foresaw the rise of the individual as a subject of international law. Alongside states, individuals would increasingly be empowered to substantiate equality claims on the basis of international law, in particular human rights law. The ever-growing field of human rights law has affected the principle of sovereign equality in at least two fundamental ways. First

[62] On 'legalized hegemony', with respect to Security Council and ICC, see also Nouwen 2013.

[63] Dunoff 2013.

[64] Ibid., at 121.

[65] Ibid.

of all, State claims based on sovereign equality could now increasingly be countered by claims based on human rights, especially before international supervisory organs such as the European or American Court of Human Rights. Secondly, and at a more fundamental level, the rise of human rights has spurred attempts to redefine the very basis of sovereign equality. According to a growing number of writers, state sovereignty was no longer a matter of effective control and independence, but eventually a matter of sufficient respect and protection of basic human rights. Under this reading, the ultimate foundation of the sovereignty of the state lies in its respect for the basic human rights of its citizens. States that fail or refuse to protect these basic rights, forfeit their sovereign rights or even their status as equal sovereign under international law.[66] Although Kooijmans was careful not to do away with the protection for sovereign states too easily, he too held that state sovereignty should not be taken as the absolute starting point for legal and normative analysis. Instead state sovereignty should be regarded in functional terms; as a means to realize legal equality between individuals:

> The world-community is a given fact that should be accepted by the states when drawing up the rules of international law, for which they are the competent organs. … the state then becomes nothing more and nothing less than the body, which, through its organs, formulates the rules for the world-community, and in doing so acts, not exclusively but also, on behalf of its own subjects. For these subjects live in community with other representatives of the human race, sharing the same needs and interests. … Seen in this light the international community is not a forum where each tries to safeguard his own interests, but a real community, whose members can attempt to achieve a legal order where cases are dealt with in accordance with the standards of a universal law that is valid equally for everyone. … Proceeding from this viewpoint, the principle of legal equality must be given a place in international law.[67]

More recently, Michael J. Glennon described the tension in trenchant terms:

> Treating states as equals prevents treating individuals as equals: if Yugoslavia truly enjoyed a right to nonintervention equal to that of every other state, its citizens would have been denied human rights equal to those of individuals in other states, because their human rights could be vindicated only by intervention.[68]

Especially since the 1990's, however, human rights had another impact on international law as well. There was an increasing call upon states and institutions to respond to human rights violations through the mechanisms of (international) criminal law. Human rights, in other words, were portrayed as a decisive reason for intrusive action by states and international organizations, in order to 'end impunity'. This has resulted in two developments that have reopened debates on the scope and meaning of sovereign equality in international law: the exercise of (universal) jurisdiction by states and the prosecution of individuals by international courts and tribunals.

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[66] See, inter alia, Reisman 1990.

[67] Kooijmans 1964, at 39-40.

[68] Glennon 2003, at 33.

The exercise of jurisdiction by states in relation to sovereign equality is the topic of the article by former ICJ President *Rosalyn Higgins*.[69] Sovereign equality, Higgins contends, is often regarded as a basic axiom, or even a *Grundnorm*, of the international legal order. The basic norm of sovereign equality, however, is underdetermined when it comes to issues of jurisdiction. On the one hand, it entails the right of all states to exercise jurisdiction over their respective territories; the power 'to exercise … the functions of a state' in the famous wording of the *Island of Palmas* award.[70] On the other hand, it entails a fundamental restriction on the jurisdiction of states in the form of sovereign immunities for states and their representatives. How has international law dealt with the tension between these two corollaries of sovereign equality? The answer to this question is different in different areas of law. In the field of tort law and contract law, Higgins argues, states have come to accept that sovereign immunities should not be treated as absolute. If it comes to acts other than *acta imperii* the entitlement to territorial jurisdiction outweighs the entitlement to sovereign immunity. In the field of criminal law, however, the right to sovereign immunities still prevails. Based on a reading of domestic and international legal practice, Higgins concludes that states seeking to exercise criminal jurisdiction are still limited by the existence of sovereign immunities: '[i]t has simply been accepted that State acts are immune from the exercise of jurisdiction in other States, no matter how contrary to international law and violative of human rights they might be'.[71] The result is an unsatisfactory situation where international law allows for restrictions of immunity in matters of private law, but not in matters of criminal law. Higgins calls upon states to close this gap and to allow for the exercise of jurisdiction in the face of serious international crimes. In order to underpin her arguments, Higgins moves beyond arguments based on positive law and invites the reader to consider an alternative *Grundnorm* of international law; a *Grundnorm* based on the idea that the State is an instrument for the protection of the rights of individuals. She finds a recent articulation of this *Grundnorm* in Judge Trindade's dissenting opinion on the *Germany v. Italy* case.[72] However, as was set out above, the very same idea is close to Kooijmans' contention that state sovereignty should be viewed in functional terms; as a way to realize legal equality between individuals.

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[69] Higgins 2013.

[70] *Island of Palmas case (Netherlands v. US)*, sole arbiter Max Huber, 4 April 1928, Reports of International Arbitral Awards, Volume II, 829-871, at 838. 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.' Available online: http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf. Accessed 16 January 2013.

[71] Higgins 2013, at 143–144.

[72] *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening),* Judgment of 3 February 2012, Dissenting opinion Judge Cançado Trindade. Available online: http://www.icj-cij.org/docket/files/143/16891.pdf. Accessed 16 January 2013.

The contribution by *Sarah Nouwen*[73] deals with the relationship between sovereign equality and individual equality in the context of international criminal courts and tribunals. Nouwen starts out with Kooijmans' observation that, with the development of a richer and thicker international order, 'the value of the principle of the legal equality of states is now put to the test'. This observation has particular force for international criminal law; a field which is often described in terms of progressive development; as the replacement of the rule of power by the rule of international law. Through a discussion of international criminal courts and tribunals since 1945, however, Nouwen shows how international criminal law is actually shaped by and, in turn, reinforces power politics. In addition, she sets out the different ways in which international courts and tribunals have furthered inequalities between states and individuals. While Nouwen acknowledges that international criminal law also contains equalizing elements – such as the lifting of immunities in international criminal proceedings – her contribution contains several examples of institutional frameworks and practices that put both states and individuals in positions of inequality. These examples include selective justice in Nuremburg and Tokyo, the role of the Security Council in the set-up of tribunals and the referral of cases to the International Criminal Court, the way in which international courts ally with domestic governments engaged in armed conflicts, the *de facto* exclusion of states in the drafting of legal texts, the pressure on governments to sign up to the Rome Statute, a selective exercise of prosecutorial discretion or the exclusive focus on Africa by the International Criminal Court so far. None of these inequalities between states and individuals, Nouwen argues, can be defended on the basis of what Kooijmans regarded as 'juridically relevant inequalities'; inequalities that can be defended as being 'of intrinsic value for the existence of legal order'.

1.6 Sovereign Equality and World Community

One of the founding ideas of Kooijmans' dissertation is the existence of an overarching, global community which includes states, individuals and other groups and organizations alike. For Kooijmans, neither state-centric positivism nor individualistic liberalism is able to do justice to the existence of such a world community. Instead, Kooijmans seeks to ground international law in the community of the entire human species:

> [o]nly when we take the oneness of the entire human species as our starting point, we can look upon the international community as not merely the result of the growing together of individual states. For on this basis the international community becomes a postulate whose given-ness in the world we have to accept as a basis for our thoughts and deeds.[74]

[73] Nouwen 2013.

[74] Kooijmans 1964, at 18-19.

As mentioned above, Kooijmans' cosmopolitanism is ultimately religiously based; the world community is rooted in the act of creation, an act that not only constituted men equally after God's image, but also established pre-given norms meant to regulate human interaction. These norms, therefore, are to be discovered by men through reason. Given the limitations and fallibility of human intellect, however, no human can arrogate the power to claim absolute knowledge about these norms or immunity to critique and further learning. In this way, Kooijmans seeks to escape from the pitfalls of relativism without falling prey to the dangers of hegemonic thinking. His notion of normative validity as a regulating idea, which is always to be discovered, is thereby intrinsically linked to his belief in the existence of a world community governed by the principle of equality.

Today, not many international lawyers will readily subscribe to the Christian underpinnings of Kooijmans' 1964 theory of international law. However, as several contributions in this volume attest, the deep structure of Kooijmans' arguments transcend his Christian reading of international relations and appeal to international lawyers coming from different traditions as well. This was already shown in our brief discussion of the contribution by Carty and Zhang, who build their argument upon the idea of a world community that by its nature demands mutual respect of all members and seeks to constrain human desire and behavior. In a less explicit way, the idea of an overarching world order that determines the proper function of sovereign states also informed Higgins' plea for a different *Grundnorm* of international law; one that does not take the state as its absolute starting point, but the need to realize certain substantive values.

As the contribution by *Geoff Gordon*[75] indicates, the appeal of Kooijmans' conception of world order may not come as a surprise. Gordon discusses how Kooijmans' idea that the international legal order is rooted in an objective global community has a long history in international law and continues to inspire scholars and practitioners up until the present day. According to Gordon, Kooijmans' work can be regarded as part of a tradition of 'innate cosmopolitanism';[76] a form of cosmopolitanism that starts out from the existence of an objective, holistic order determining the proper place of sovereignty and authority. Innate cosmopolitanism comes in different forms, including the Christian interpretation as set out in Kooijmans' 1964 study. Other forms of innate cosmopolitanism take a more sociological form or invoke different metaphysical assumptions, or simply leave the ultimate foundation of the pre-given world community undiscussed. Gordon shows how innate cosmopolitanism has affected scholarly writing, opinions of judges and treaty law. At the same time he sets out how and why this branch of cosmopolitanism has so far gone relatively unrecognized. One of the reasons for the lack of scholarly attention for innate cosmopolitanism, Gordon contends, is our inclination to equate 'cosmopolitanism' with either liberal cosmopolitanism or international constitutionalism. While both schools have important things to say

[75] Gordon 2013.

[76] Ibid., at 184.

about the international legal order, they fail to do justice to the particular structure and content of innate cosmopolitanism. Rereading Kooijmans' dissertation helps to understand and unveil the structure and content of this influential yet relatively unchartered form of thinking.

The chapter by *Gregor Noll*[77] starts out by a recap of Kooijmans' Christian interpretation of legal and political life; a way of thinking that Noll regards 'so much more robustly structured than that of many contemporary international constitutionalists'.[78] The main question Noll seeks to answer is whether it is possible to reinvigorate this robust thought-structure in secularized form. Based on a study of proportionality in the law of armed conflict, Noll answers this question in the affirmative. According to Noll, taking up the basic structure of Kooijmans' thought is helpful for an understanding of what international law requires from a commander who is to determine whether the civilian damage likely to be caused by a specific attack is proportionate to the military advantage gained by that attack. According to Noll, military commanders should view their own being as analogous to that of other beings, so that what they 'have in common with others is a relation, and this relation is the third that we have in common'.[79] The commander should then take into account the relation between potentiality and actuality of political will-formation of *both* parties to an armed conflict; when that relation is derailed by a particular attack, it violates the principle of proportionality. In other words, even in armed conflict, the idea of the lawful enemy, with its capacity of political will formation should be guiding. In this context, the notion of the civilian is pivotal. Borrowing from Ranciere, Noll conceives of the *demos* of civilians as the potentiality that is able to transform the political structure and content as it actually exists. Noll thus places the military commander in an overarching community where the relationship between potentiality and actuality of both one own's state and that of the enemy state is to be taken into account.

1.7 Conclusion

The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law became one of the classics of twentieth century international legal scholarship. At the time, Kooijmans considered it to be the moment of truth for the principle of legal equality of states:

> [t]he value of the principle of the legal equality of states is now put to the test. While in the past, in the unorganized society of states it may have been possible to explain certain encroachments upon equality through the factual conditions of power politics etc., now

[77] Noll 2013.

[78] Ibid., at 207.

[79] Ibid., at 218.

> that the first steps have been taken towards an international legal order, the principle of equality shall either have to prove its value or be radically discarded.[80]

As the contributions to this volume show, the principle of legal equality of states has stood the test of time but as Pieter Kooijmans assumed not without being challenged in various ways. Most notably, *human* equality as a value of global justice underlying many foundational developments in international law since the 1960s has put strain on the principle of sovereign equality in various fields of international law. However, far from being radically discarded, contributions to this volume also show that the latter principle is subject to trends of reconceptualization. From the re-examination of the legal equality of states in this issue, we may conclude that fifty years after Kooijmans' seminal work the author's insights and concerns with respect to the principle of legal equality of states are still relevant and may assist us when we have to *faire face* to new – knotty and thorny – questions.

References

Beaulac S (2007) An inquiry into the international rule of law. EUI working papers MWP No. 2007/14. http://ssrn.com/abstract=1074562. Accessed 16 January 2013

Brus M (1997) Peter Kooijmans: Professor of public international law. Leiden J Int Law 10:132–136

Brus M (2006) Judge Peter Kooijmans retires from the International Court of Justice. Leiden J Int Law 19:699–717

Carty T, Zhang X (2013) From freedom and equality to domination and subordination: feminist and anti-colonialist critiques of the Vattelian heritage. Netherlands Yearbook of International Law 43:53–82

Dunoff J (2013) Is sovereign equality obsolete? Understanding twenty-first century international organizations. Netherlands Yearbook of International Law 43:99–127

de Vattel E (1916) The Law of Nations [Le Droit des Gens, 1758] [translation by J. Brown Scott] Classics of International Law Series. Carnegie Institute Washington, Washington

Flinterman C (1997) Peter Kooijmans and human rights. Leiden J Int Law 10:126–131

Glennon MJ (2003) Why the Security Council failed. Foreign Aff 82:16–35

Gordon G (2013) Legal equality and innate cosmopolitanism in contemporary discourses in international law. Netherlands Yearbook of International Law 43:183–204

Higgins R (2013) Equality of states and immunity from suit: a complex relationship. Netherlands Yearbook of International Law 43:129–149

Kokott J (2011) States, sovereign equality. Max Planck Encyclopedia of Public International Law. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1113&recno=2&searchType=Quick&query=Kokott. Accessed 16 January 2013

Kooijmans PH (1964) The doctrine of the legal equality of states: An inquiry into the Foundations of International Law. A.W. Sythoff, Leiden

Kooijmans PH (2007) The ICJ in the 21st century: judicial restraint, judicial activism, or proactive judicial policy. Int Comp Law Q 56:741–753

Kreijen GPH (2002) (ed.) State, sovereignty, and international governance. Oxford University Press, Oxford/New York

[80] Kooijmans 1964, at 1.

Lammers JG (1997) Peter Kooijmans: Minister for Foreign Affairs. Leiden J Int Law 10:122–126
Noll G (2013) Analogy at war: proportionality, equality and the law of targeting. Netherlands Yearbook of International Law 43:205–230
Nouwen SMH (2013) Legal equality on trial: soveregins and individuals before the International Criminal Court. Netherlands Yearbook of International Law 43:151–181
Paulus AL (2001) International law after postmodernism: towards renewal or decline of international law? Leiden J Int Law 14:727–755
Reisman WM (1990) Sovereignty and human rights in contemporary international law. Faculty Scholarship Series, Paper 872. http://digitalcommons.law.yale.edu/fss_papers/872. Accessed 28 January 2013
Roth B (2013) Sovereign equality and non-liberal regimes. Netherlands Yearbook of International Law 43:25–52
Simpson G (2013) Great powers and outlaw states *redux*. Netherlands Yearbook of International Law 43:83–98
Van der Molen GSJ (1964) Preface. In: Kooijmans PH, The doctrine of the legal equality of states: an inquiry into the foundations of international law. A.W. Sythoff, Leiden, pp vii–ix
Waldron J (2009) Are sovereigns entitled to the benefit of the international rule of law? NYU IILJ working papers no. 2009/3. http://www.iilj.org/publications/documents/2009-3.Waldron.pdf. Accessed 16 January 2013

Chapter 2
Sovereign Equality and Non-Liberal Regimes

Brad R. Roth

Abstract A quarter-century ago in the *Nicaragua* judgment, the International Court of Justice insisted that to disallow a state's adherence to any particular governmental doctrine 'would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State' (para 263). The Court invoked the 1970 Friendly Relations Declaration and related documents that 'envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies' (para 264). Although the continued relevance of this model of sovereign equality has since been called into question – above all, in the name of human rights, international criminal justice, and the 'responsibility to protect' – no systematic replacement has emerged. Notwithstanding some modification and erosion, the sovereign equality principle continues to have significant (and worthy) implications for legal relations between liberal and non-liberal states.

Keywords Sovereignty · Sovereign equality · Non-intervention · Immunity · *Jus Cogens*

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2.1 Introduction

The concept of sovereign equality that grounds the international legal order presents a series of puzzles and paradoxes. The term itself is semantically inept: it demands a reciprocal renunciation of the same unlimited authority that it nominally invokes. Yet, the complexities run far deeper. Not only are a state's legally acknowledged prerogatives to be limited by the identical prerogatives of all other members of the state system, but that system's reconciliation of equal sovereigns has it own distinctive *telos*. The system does not merely acknowledge, but also affirmatively protects and not infrequently establishes the sovereignty of its members (in cases of decolonization, secession, and state dissolution), and distinguishes authentic from inauthentic articulations of sovereign will (in disallowing usurper regimes from exercising a state's sovereign prerogatives).[1] To do so, it needs to be guided by a substantive vision.

As Pieter Kooijmans noted nearly a half-century ago, sovereign equality must be understood as part of a larger project of international community, for a mere 'free association of separate, individual states' is incompatible with 'the existence of a law that stands above the states.'[2] Yet, even where the international legal order regards a given exercise of state authority as a violation of international law and authorizes countermeasures to induce compliance, that order may continue to acknowledge the ultimate implementation of its own demands as 'indisputably reserved to the competence of the state.'[3] Thus, an understanding of sovereign equality requires nothing less than an understanding of the complex of purposes, principles, and policies embodied in the international legal order as a whole.

The modern doctrine of sovereign equality is a product of a world where consensus on political morality is elusive. However true it may be that, as David Mitrany famously proposed, 'the problem of our time is not how to keep nations peacefully apart but how to bring them actively together,'[4] keeping nations

[1] For a book-length examination of the international legal order's responses to perceived inauthentic articulations of sovereign will, see Roth 1999. Although skeptical about the liberal-democratic legitimism touted by such scholars as Franck (Franck 1992), and Fox (Fox 1992), the book details and analyzes a range of instances in which a ruling apparatus, albeit exercising 'effective control through internal processes', has, by virtue of its perceived unrepresentativeness, been denied legal standing to assert rights, incur obligations, and confer immunities on behalf of the sovereign state.

[2] Kooijmans 1964, at 247.

[3] Kooijmans 1964, at 209-210.

[4] Mitrany 1966, at 28.

peacefully apart is indispensable to bringing them actively together. In the words of Robert Jackson, 'perhaps the most fundamental [concern of modern international society] has been … to confine religious and ideological *weltanschauungen* within the territorial cages of national borders', the goal being 'to prevent unnecessary confrontations and collisions between different states that are inspired and driven by the assertion of their own preferred values.'[5] The Charter and its subsequent glosses thus reconcile communal purpose with guardedness about unilateral invocations of universal principles. The United Nations Charter's embrace of 'the principle of … sovereign equality' derives directly from the purpose '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.'[6]

Accordingly, over a quarter-century ago in the *Nicaragua* judgment, the International Court of Justice insisted that to disallow a state's adherence to any particular governmental doctrine 'would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.'[7] The Court invoked the 1970 Friendly Relations Declaration and related documents that 'envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies'.[8]

In the current period, however, the continued relevance of this model of sovereign equality has since been called into question. Putting aside the uncertain juridical impact of the increased role of non-state actors in international relations, new developments in human rights, international criminal justice, and the 'responsibility to protect' have come to challenge the premise that all states equally possess a core set of inviolabilities. The international order's pluralism in regard to what counts as legitimate and just internal public order – never truly unbounded – has narrowed significantly in the post-Cold War era. This narrowing is reflected not only in political pronouncements and formal instruments, but above all in failures of the dogs to bark[9]: intrusive measures that in past eras would have

[5] Jackson 2000, at 368.

[6] 1945 Charter of the United Nations, 1 UNTS XVI, arts. 2(1) and 1(2). Owing to its normative foundations, sovereign equality as conceived in the Charter precludes any prerogative (however 'equal') to impose the sovereign will of one state upon another; sovereignty as freedom gives way to sovereignty as exclusivity of territorial control. See Charter of the United Nations, arts. 2(4) and 2(7). Moreover, this post-World War II scheme of sovereign rights, based on a logic of states as manifestations of the self-determination of 'peoples', has from its inception entailed responsibility for observance of human rights, Charter of the United Nations, arts. 1(3), 55(c) and 56, even though nothing in the Charter's language conditions sovereign rights on external judgments about whether sovereign responsibilities have been met.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* ICJ, Jurisdiction and Admissibility, Judgment of 26 November 1984, para 263.

[8] Ibid., para 264.

[9] The failure of a dog to bark was a famous clue in the Sherlock Holmes mystery, 'Silver Blaze'. Doyle 1967, at 277 (indicating that a horse was stolen by someone familiar to the dog).

drawn noisy opposition in international fora are today met with acquiescence, if not express approval.

Going forward, institutions purporting to implement international legal norms face a fundamental dilemma: Will they construe international law as a framework for accommodation among bearers of diverse conceptions – both liberal and non-liberal – of internal public order, or will they construe it as a device for imposition of a predominant vision of public order?[10]

The present article will specify the legal implications of sovereign equality in a pluralistic global order that prioritizes constraint on cross-border impositions, and will highlight the growing challenges to the doctrine in an era in which pluralism has diminished salience. It will argue that, although sovereign equality has been increasingly compromised, no systematic replacement has emerged, leaving many of the patterns of state practice and *opinio juris* inspired by the pluralistic vision essentially intact. Notwithstanding both modification and erosion of the sovereign equality framework, the underlying principle continues to have significant implications for positive legal relations between liberal and non-liberal states. Moreover, the discussion below will contend, the principle embodies a vision of global order that – appropriately modified – remains both morally and prudentially defensible.

2.2 Sovereign Equality's Three Legal Presumptions

The terms sovereignty and sovereign equality, historically and to the present day, have admitted of far too many usages to catalog. In this article, sovereign equality denotes the conception of state sovereignty embedded within the UN Charter-based order – that is, sovereignty within international law, rather than against it. The doctrine embodies, not a mere aggregation of the rules produced from time to time by the concurrent wills of individual states, but an animating vision of global order traceable to the *opinio juris* of 'the international community of states as a whole.' The doctrine reconciles national and supra-national authority on the basis of substantive principles attributable to that community – principles that are, of course, subject to change as the underlying conditions of international order develop.

Pieter Kooijmans sketched the basic model in his 1964 work on *The Doctrine of the Legal Equality of States*. In general, the state is 'exclusively entitled to draw up rules for the internal sphere', whereas 'in its external relations it is subject only to the international legal order and not also to another, national, legal order'.[11] Yet, sovereignty is understood to be a matter of 'function' rather than of 'concrete

[10] Gerry Simpson has elaborated a similar contrast between the pluralist vision associated with the Charter and the 'liberal anti-pluralism' of a set of leading U.S.-based international law scholars (i.e., Thomas M. Franck, Anne-Marie Slaughter, W. Michael Reisman, and Fernando Tesón), Simpson 2001. For related defenses of sovereign prerogative grounded in a qualified pluralism, see Cohen 2004; Kingsbury 1998.

[11] Kooijmans 1964, at 218, approvingly citing Freiherr von der Heydte 1958.

rights'; the particular rights associated with sovereignty are 'determined by historical events and therefore variable'. What endures is the 'fundamental relationship upon which those rights are based', a relationship that 'will continue to exist, as long as … the structure of international society continues to exist in its present form.'[12] In this structure, 'the particular function of the state is to look after the establishment of a legal order for the benefit of its subjects within the internal sphere'; notwithstanding its embeddedness in the international order, 'the state, on whose cooperation the international legal order still depends so greatly, will not have itself pushed into the background.'[13]

The distinctive principles underlying the Charter-based conception of sovereign equality, reflected most prominently in the UN General Assembly's glosses on Charter norms – and above all, in the 1970 Friendly Relations Declaration – were shaped to a considerable extent by East–West and North–South dynamics over the generation immediately following both the stabilization of the Cold War rivalry and the achievement of decolonization. The principles include distrust of unilateral cross-border exercises of power (including those rationalized by reference to commonly-held values) and respect for the self-determination of territorially-based political communities (including those economically challenged, politically crisis-prone, and militarily vulnerable units that had emerged from colonialism).

The resultant emphasis was on the duty of non-intervention, characterized in the Friendly Relations Declaration as correlative of every State's 'inalienable right to choose its political, economic, social and cultural systems.'[14] Contrary to what is sometimes imagined, the 'State' here referred not directly to the ruling apparatus that exercises effective control through internal processes, but to the underlying territorial political community in whose name that apparatus governs. The 'inalienable right' is the post-decolonization successor to the previously proclaimed right of all (including colonized) 'peoples' to 'freely determine their political status and freely pursue their economic, social, and cultural development.'[15] The idea was that the territorial political community must work out its internal conflicts, however raggedly, without foreign (and especially neo-colonial) interference. Deference to the outcome of internal conflict was thought to embody respect for popular self-determination under circumstances in which the question of legitimate governance lacked uncontested criteria and impartial arbiters – though this deference has never been absolute in practice, and has become less so over time.[16]

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[12] Kooijmans 1964, at 219.

[13] Ibid., at 204.

[14] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (hereafter 'Friendly Relations Declaration'), UNGA Res. 2625, 24 October 1970 (adopted without a vote).

[15] UNGA Res. 1514 (XV), 14 December 1960 (adopted eighty-nine to none, with nine abstentions); International Covenant on Civil and Political Rights (hereafter ICCPR), 999 UNTS 171, art. 1(1).

[16] See generally Roth 1999, 2011.

In juridical terms, the modern doctrine of sovereign equality of states boils down to three strong, but not irrebuttable, legal presumptions: (1) a state is presumed to be obligated only to the extent of its actual or constructive consent; (2) a state's obligations, while fully binding internationally on the state as a corporative entity, are presumed to have legal effect within the state only to the extent that domestic law has incorporated them; and (3) the inviolability of a state's territorial integrity and political independence, as against the threat or use of force or 'extreme economic or political coercion', is presumed to withstand even the state's violation of international legal norms.[17]

The first presumption is the most familiar. Lawmaking in the international order remains presumptively predicated on the notional 'consent' of the individual states subject to it. No international legislature has authority to impose norms on a non-consenting state. To be sure, consent to international lawmaking is often imputed through ingenious methodological devices, rather than derived from an actual expression of governmental will. Nonetheless, a state's freedom of action and exclusivity of territorial control remain the default positions that a claim of international legal obligation must, by some authoritative justification, overcome.[18] Relatedly, amenability to international adjudication is subject to rigorous standards of formal consent, and domestic-court adjudication of a foreign state's breach of international obligation is largely blocked by international norms of sovereign immunity.[19]

Second, international and domestic systems operate on different legal planes, and their interconnections are highly differentiated and complex. To be sure, a state 'may not invoke the provisions of its internal law as justification for its failure to perform' its international legal obligations.[20] Yet, a state's adoption of international obligations is not necessarily self-executing internally; it is the domestic legal order that dictates which organs will be responsible for implementing the obligation, and the manner by which implementation will be carried out. More importantly, the undertaking of an international obligation need not in itself, from the standpoint of domestic law, entail renunciation of the ultimate authority to violate the obligation for the sake of what domestically authoritative organs deem, unilaterally, to be the national interest – thereby incurring whatever sanctions the

[17] I have devoted a book to these presumptions and their moral justifications, Roth 2011. The present section synopsizes some of the basic points of Chapters I and III.

[18] Though substantially misleading even when it was first articulated, the so-called '*Lotus* Principle' remains a viable starting point for international law-finding: '[r]estrictions on the independence of States cannot … be presumed.' *S.S. 'Lotus' (France v. Turkey)*, PCIJ Ser. A, No. 10, 7 September 1927, at 18.

[19] As Kooijmans noted, 'the principle of *par in parem non habit iudicium*, meaning that no state has to subject itself to the jurisdiction of another state, is … an essential outcome of the structure of international society' (except in respect of the state's commercial transactions). Kooijmans 1964, at 246. See also Higgins 2013.

[20] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 352, art. 27. The provision applies expressly to treaty obligations, but the same principle applies to customary obligations.

international community may duly inflict on the wrongdoing state. Furthermore, an exercise of state authority, albeit in breach of international obligation, may nonetheless generate legal facts cognizable in the international order: certain of international law's own doctrines – including permanent sovereignty over natural resources, *nullum crimen sine lege*, immunity *ratione materiae*, and privileged belligerency – require (at least presumptive) regard for governmental acts that, irrespective of their international unlawfulness, have internal legal validity. Regardless of whether one views interactions of the legal orders through the theoretical lens of 'dualism' or 'monism', there remains a gap – or firewall – for which one must somehow account.

Third, the international system's foundational norms stress the inviolability of a state's territorial integrity and political independence, both as against the threat or use of force and as against extraordinary forms of economic or political coercion.[21] This inviolability is presumed to hold even where the target state is in breach of international law. Whereas intuition may associate one actor's obligation to obey a norm with another actor's license to do whatever is necessary to effect compliance with the norm, the international order, while providing some scope for recourse in the face of wrongdoing, places durable limits on unilateral cross-border exercises of force and coercion. Apart from the special powers entrusted to the United Nations Security Council under Chapter VII of the Charter, no state or intergovernmental organization has – or even claims – law enforcement authority within the territory of a foreign state.[22] Moreover, although the express prohibition was deleted from the final version of the International Law Commission's Articles on State Responsibility, the range of permissible countermeasures still appears to exclude 'extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act.'[23]

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[21] See, e.g., Friendly Relations Declaration. 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'

[22] 'A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.' Restatement (Third) of Foreign Relations Law of the United States, para 432(2) (1987). See also Jennings and Watts 1992, para 119, at 387-388. ('It is … a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime.'). The transboundary use of force in self-defense is not properly viewed as an exception, since it is limited to action necessary and proportionate to repulsing an armed attack (or, perhaps, to thwarting an imminently anticipated attack), and so should be regarded as a stop-gap measure rather than as law enforcement.

[23] See International Law Commission, Draft Articles on State Responsibility (1996), UN Doc. A/51/10, art. 50 (b). The ILC's final (2001) version omitted this language, but remained highly restrictive of countermeasures. See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Act*s*, UN Doc. A/56/10 (2001), art. 49 ('An injured State may only take countermeasures… in order to induce [the wrongdoing] State to comply with its obligations'), art. 51 ('Countermeasures must be commensurate with the injury suffered'), and

The international legal order's primarily horizontal nature explains the paradoxical doctrinal limitations on the imposition of that order's own dictates. Absent centralized instruments of communal will, cross-border enforcement of international norms would ordinarily require unilateral exertions by untrusted (and often untrustworthy) implementers of the collective order. The international order has thus eschewed broad licenses for such cross-border exercises of power, even at the cost of shielding violators of international norms.

The primary beneficiaries of these doctrinal limitations have been weak, often non-liberal, states, and in particular, the lesser developed countries that have historically banded together, in such formations as the Non-Aligned Movement and the Group of 77, to confront the perceived threat of neo-colonialism. Whereas in past eras, the international order made states' standing as sovereign equals contingent on normative requisites,[24] the period from the late 1950s to the late 1980s represented a high point of pluralism in the international order, in which the three presumptions were at their strongest. The fruits of that pluralistic era continue to be reflected in authoritative documents, including decisions of the International Court of Justice.

Nonetheless, the bases for rebuttal to the three presumptions are firmly established in positive international law. The principle of state consent, residually manifested in the doctrine of 'persistent objection' that allows a state to resist a crystallizing customary norm, yields in the face of insistent near-consensus – a 'peremptory' norm (*jus cogens*) 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'[25] State authority's presumptive mediation of the applicability of international norms gives way to direct effect where the international norm specifies individual penal responsibility, and to the extraterritorial reach of foreign-state courts where treaty or custom establishes universal jurisdiction. And of course, the United Nations Security Council, with nine affirmative votes out of fifteen and the acquiescence of each of the five Permanent Members ('P5'), has virtually unlimited discretion to impose crippling economic sanctions or to authorize the use of force in response to perceived threats to the peace – now authoritatively interpreted to include, under the Responsibility to Protect ('R2P') rubric, localized humanitarian catastrophes. (The P5 veto, while seemingly at odds with the principle of sovereign equality,[26] actually reinforces that principle by requiring an extraordinary consensus to overcome the anti-interventionist default position.)

(Footnote 23 continued)
art. 54 (mentioning only 'lawful measures,' rather than countermeasures, in regard to responses by '[a]ny State other than an injured State' to breaches of those obligations recognized in Article 48 as being 'owed to the international community as a whole').

[24] See generally Simpson 2004, elaborating the historical tendency of the international system to cast particular states as non-right-bearing outlaws.

[25] Vienna Convention on the Law of Treaties, art. 53.

[26] Kooijmans, while acknowledging the underlying logic that 'there is not much chance of the guarantee of peace and security if those who have been entrusted with peace and security do not

The crucial question is whether, following the dissipation of familiar Marxist-Leninist and Bandung-nationalist ideological challenges, the resulting absence of a coherent and assertive alternative to liberal-democratic conceptions of public order has so eroded the foundations of global pluralism as to weaken substantially, or even to overturn, the legal presumptions of the sovereign equality-based order. The demise of pluralism augurs expansive interpretations of *jus cogens*, greater scope for extraterritorial impositions of liability predicated on international human rights law, and the relaxation (if not evisceration) of the non-intervention norm. Yet, the problem of untrusted (and untrustworthy) implementers of international legal order remains salient.

2.3 The Expansion of *Jus Cogens* and the Diminution of Pluralism

Notwithstanding consensualism's centrality to the history of modern international law, there is considerable pedigree to the idea that some core set of unquestionable norms is indispensable to the project of international legal order.[27] As Kooijmans put it in 1964, there are 'general principles of law [that] are obligatory for all,' and even where they have been 'ignored [in] positive law, … the legal subject is [not] entitled to ignore them.'[28] Thus, international law is widely thought to include, along with the great bulk of '*jus dispositivum*,' a '*jus cogens*' that binds states irrespective of their individual wills. Accord on this point, however, masks lingering dispute about the derivation, content, and legal consequences of that set of peremptory norms.

What norms count as indispensable to international public order ultimately depend on one's conception of the *telos* of that order – in particular, on the extent

(Footnote 26 continued)
agree with each other', found the veto problematic from the standpoint of sovereign equality, since 'any Great Power may now make the application of the law upon itself impossible.' Kooijmans 1964, at 242-243. However, it is problematic to regard the Security Council as a law enforcement organ; it is a political body empowered to respond to threats to the peace by light of its own policy determinations. A violation of international law is neither a necessary nor a sufficient condition of the invocation of Chapter VII powers, and the Security Council's demands upon states need not match any pre-existing legal obligations. A Chapter VII action less resembles domestic law enforcement than it resembles a domestic 'state of exception', and a veto of the latter is not subject to the same objection as a veto of the former.

[27] See, e.g., Schwelb 1967, at 949.

[28] Kooijmans 1964, at 212. 'In order to avoid boundless skepticism and a merely formal concept of law, it must be conceded that the word "law" contains certain values … like regularity, balance, equality, authority, respect for the legal subject, etc., … without which a legal order is unthinkable.' Although these elements in themselves 'lack a precise content', they nonetheless have a 'clear legal meaning' and are 'made concrete in a certain legal order', despite the 'varying character' of law in different places and times. Ibid., at 213.

to which the project is thought to embody a pursuit of objective justice as opposed to a framework for accommodation among actors who cannot be expected to agree about justice. This is not an either/or choice, nor is the balance between these two objectives likely to hold constant as international conditions change. Thus, the states parties to the 1969 Vienna Convention on the Law of Treaties saw fit to acknowledge open-endedly, in the words of Mexico's representative, 'rules which derive from principles that the legal conscience of mankind deemed absolutely essential to the co-existence of the international community at a given stage of its historical development.'[29]

In recent years, the rhetoric of *jus cogens* has shifted dramatically in its orientation toward the sovereign equality framework. The norm's specification in Article 53 of the Vienna Convention appears to have been contemplated as, above all, a safeguard against treaty terms at odds with sovereign equality that might, given the continued admissibility of disparate leverage (other than the unlawful threat or use of force) in treaty negotiation, result from an imbalance of bargaining power among treaty parties. States from the global East and South welcomed the provision as consistent with their far broader campaign to invalidate 'unequal treaties' associated with neo-colonialism.[30] And indeed, probably the most prominent controversial treaty during the lead-up to the Vienna Convention was the 1960 Treaty of Guarantee that subordinated Cypriot independence to a right of unilateral armed intervention by any of the treaty parties – the United Kingdom, Greece, and Turkey – should the inter-communal balance fixed in the state's original constitution be disturbed.[31] Cyprus's denunciation of the treaty, as inconsistent with the UN Charter's prohibition of the use of force, had received considerable but not overwhelming support in the international community.[32]

In recent literature, however, *jus cogens* has come to be associated almost exclusively with human rights, nearly to the point where equal sovereignty, non-intervention, and self-determination go unmentioned.[33] The neglect of the latter is

[29] van Hoof 1983, at 153.

[30] Schwelb 1967, at 961-962, 966.

[31] For other examples of treaties called into question, though not officially challenged, see Czaplinski 2006.

[32] Schwelb 1967, at 953, citing UNGA Res. 2077 (XX). 8 December 1965, which indirectly condemned the treaty by a less than rousing vote of 47 to 5 with 54 abstentions. See also Doswald-Beck 1986, at 246-247 (detailing the Cypriot government's early objection to the Treaty of Guarantee); MacDonald 1981, at 17 (posing the question of whether the treaty was void since a state cannot contract out sovereignty and at the same time keep it). The Treaty of Guarantee also potentially ran afoul of Article 103 of the UN Charter, but the *jus cogens* provision of the Vienna Convention is stronger, voiding an incompatible treaty entirely. Vienna Convention on the Law of Treaties, art. 53.

[33] See, e.g., Bianchi 2008, at 491-492 ('more revealing is that students, whenever they are asked to come up with examples of peremptory norms, invariably answer either "human rights", without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture.').

not accidental, for the authors most typically seek to establish and to expand exceptions precisely to these norms through their invocations of *jus cogens*.[34]

Along with this association of peremptory norms with human rights comes a tendency to derive *jus cogens* from naturalistic rather than positivistic sources. This entails a substantial departure from Article 53 of the Vienna Convention, which establishes *jus cogens* as a category of positive law,[35] rooted (however indefinitely) in the insistence of 'the international community of states as a whole'.[36] Although a modicum of teleological interpretation is inevitable, peremptory norms can most plausibly be read into communal will where they appear indispensable to the functioning of the system of international cooperation.[37] Previous versions of naturalistic legal thought, drawing on an anthropomorphic image (now justly discredited) of the state as an organic entity, facilitated the derivation of peremptory norms of just this kind. But more recent natural law thinking is unhinged from the project of international cooperation, and asserts rather the primacy of the individual. And since the UN Charter – the one positivistic source of supranational authority definitely relegating the prerogatives and inviolabilities of the state – assigned human rights a subordinate position in the overall scheme, human rights-oriented scholars have had to draw on other sources for implicit acknowledgment of higher authority.

The rhetorical association of *jus cogens* with natural law and of natural law with human rights tends, in turn, to give the impression that whereas norms reflecting coordination of state interests derive their validity from the will of states, by virtue of which they are mere *jus dispositivum*, moral norms of the international order derive their validity from a higher source, are therefore *jus cogens*. Any such generalization would constitute a fundamental jurisprudential misunderstanding. Moral questions are no less subject to disagreement than other questions; they find provisional resolution, for a particular legal community at a particular time, in the form of positive law. And not all of the international legal community's answers to moral questions come in the form of the insistent near-consensus that trumps the principle of persistent objection.

Another striking feature of contemporary *jus cogens* rhetoric is that the use of the term is often disconnected from any call for the legal consequences authoritatively associated with its application; the designation frequently serves the lone purpose of trumpeting the moral significance of the norm in question. In reality, *jus*

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[34] Schwelb's study of the deliberations on the Vienna Convention notes the irony of the Ecuadorean representative's effort to list as *jus cogens* norms both respect for human rights and 'the prohibition of intervention in matters which are essentially within the domestic jurisdiction of states.' Schwelb 1967, at 965.

[35] See Nieto-Navia 2003.

[36] Vienna Convention on the Law of Treaties, art. 53.

[37] The Vienna Convention *travaux préparatoires* include such descriptions as 'rules which derive from principles that the legal conscience of mankind deemed absolutely essential to the co-existence of the international community at a given stage of its historical development.' van Hoof 1983, at 153.

cogens has had few practical uses, its legal consequences seldom being dispositive of any actual legal problem:[38] most often, there is no persistent objector to be bound against its will, no offending treaty provision to be voided,[39] no exorbitant countermeasure (or other claim of 'circumstance precluding wrongfulness') to be condemned as a wrongful derogation,[40] and, given the turn away from sovereign equality concerns, no 'illegal situation' (such as a pretended exercise of sovereignty in violation of norms on the use of force or self-determination) to be denied recognition.[41] A political drawback of such superfluous usage is a debasement of the currency of legal obligation, with *jus cogens* coming to be identified with norms that genuinely require compliance, and *jus dispositivum* with norms that are somehow routinely 'derogable'.

International bodies have rarely invoked *jus cogens* to bind states against their clearly expressed will. In the most prominent case, the Inter-American Commission on Human Rights in 2002 deemed the juvenile death penalty – and more specifically, the imposition of capital punishment on those convicted of having committed murder at the age of sixteen or seventeen – to violate a norm binding on the United States,[42] notwithstanding that state's reservation to the applicable provision of the International Covenant on Civil and Political Rights and its non-ratification of the American Convention on Human Rights and the Convention on the Rights of the Child.[43] To its credit, the Commission articulated a rigorous requisite to its determination:

> as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of *jus cogens*, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence. … Therefore, while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.[44]

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[38] In reality, 'in most … cases where peremptory norms have been recognized, the legal consequences of this classification were essentially imperceptible.' Shelton 2006, at 306. Notably, '*jus cogens* is a term often used for rhetorical purposes – to confer *pathos* on legal arguments that otherwise would appear less convincing.' Linderfalk 2007, at 255.

[39] Vienna Convention on the Law of Treaties, art. 53.

[40] Articles on State Responsibility, art. 50(1)(d).

[41] Articles on State Responsibility, art. 41(2).

[42] A US Supreme Court decision three years later ended this practice. *Roper v. Simmons*, 543 U.S. 551 (2005).

[43] *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., 22 October 2002, Doc. 5 rev. 1, para 913.

[44] Ibid., at 49-50.

The evidence proffered here was significant,[45] though not incontrovertible. For example: eleven states had objected to the U.S. ICCPR reservation on this matter, but all of them were Western European states; the Human Rights Committee's General Comment 24 had deemed the U.S. reservation both invalid and severable from the instrument of ratification,[46] but that General Comment was, in multiple respects (including, but not limited to, its assertion of the severability of reservations likely indispensable to the consent to ratification), less than a model of positivistic rigor;[47] the right against the juvenile death penalty was 'non-derogable' within the ICCPR's provisions on exigencies of 'public emergency',[48] but that scheme of non-derogability is conceptually distinct from the requisites of *jus cogens*. Although there could be little question that treaty law, intergovernmental resolutions, and near-universal domestic practice had established eighteen years of age as a limit, the execution of those convicted of having committed aggravated murder at the age of sixteen or seventeen scarcely seemed to jeopardize either the practical or the moral foundations of international order.

If the Inter-American Commission's 2002 assignment of *jus cogens* status to the age-eighteen requisite for capital punishment might be regarded as at the methodological borderline, the following year's Advisory Opinion of the Inter-American Court of Human Rights on the rights of undocumented migrants may be seen to have stepped over the borderline.[49] While conceding that 'the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights',[50] the Court went on, without any specific showing of state practice or *opinio juris*, to interpret peremptory norms of equality and non-discrimination as dictating that '[u]ndocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice', and that 'States may not subordinate or condition observance of the principle of equality before the law

[45] Ibid., at 51-76.

[46] Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994. That General Comment was a thinly veiled response to the provocatively elaborate package of 'Reservations, Understandings, and Declarations' (RUDs) attached to the US instrument of ratification, and it drew a highly vituperative response from the U.S. Department of State.

[47] Among other provocation assertions, the Committee concluded that 'a State may not reserve the right … to permit the advocacy of national, racial or religious hatred', even though ICCPR Article 20 is directly at odds with a time-honored, if controverted, conception of the freedom of expression. Ibid, para 8.

[48] ICCPR, art. 4.

[49] *Juridical Condition and Rights of the Undocumented Migrants*, Inter-Am. Ct. H.R., Advisory Opinion, OC-18/03, 17 September 2003.

[50] Ibid., para 119.

and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.'[51] In the words of a highly sympathetic commentator, 'the somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law, is unlikely to foster the cause of *jus cogens*, particularly among the sceptics.'[52]

It is noteworthy that the above examples took aim at the United States, a state that distinguishes itself among powerful states by clearly articulating its non-conforming practices. Broad invocations of *jus cogens* in these instances have a righteous air of 'speaking truth to power'. It stands to reason, however, that such methodological innovation will end up being most amenable in the longer term to use as a bludgeon against weaker and more marginal states that do not conform to the prevalent liberal-democratic ideology.

2.4 The Expansion of Direct Effect and the Disparagement of the Sovereign Decision

The presumption in favour of state mediation of international law's application within national territory has unquestionably undergone substantial revision since Kooijmans wrote on *The Doctrine of the Legal Equality of States* in 1964. In keeping with a then-prevalent interpretation of UN Charter Article 2(7)'s proscription of non-intervention in matters 'essentially within the domestic jurisdiction', Kooijmans offered the following thoughts on the relationship between international anti-*apartheid* norms and South African public order:

> What can the larger community, i.e., the United Nations, do in this instance? It may make all attempts to make South Africa, one of its members, turn back from the course it has taken; it may apply sanctions in the proper cases, but it may never put its decisions in the place of those of the South African government. The care for and the treatment of its subjects is and remains essentially the task of the national authorities and can never – *other than provisionally* – be taken over by the organs of another, i.e., the international community. The latter may point out that a certain legal system is in conflict with the general principles of law; it may never prescribe for the national authorities how they *must* act. The 'positivization' of the material directives for this field remains a task that is indisputably reserved to the competence of the state.[53]

It is difficult to imagine so blunt a statement being offered today, especially in regard to *apartheid*, from which the protections of the sovereign equality order were soon afterward expressly withheld.[54] In the half-century since, the

[51] Ibid., para 173 (10) and (11).

[52] Bianchi 2008, at 506.

[53] Kooijmans 1964, at 209-210.

[54] Friendly Relations Declaration, preamble ('subjection of peoples to alien subjugation, domination and exploitation … is contrary to the Charter'); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243, (108 states parties as of

international community has established a range of mechanisms, both centralized and decentralized, for direct external implementation of norms where the states in question are unwilling or unable to prevent or redress the most grave atrocities occurring in their territories. Yet, Kooijmans' statement remains largely valid as applied to 'garden-variety' lawbreaking regimes.

There can be little question that most international legal norms are addressed exclusively to states in their corporative capacity, and do not provide for individuals within states to be held liable, even for taking the official decisions to breach their states' obligations. To be sure, the International Military Tribunal at Nuremberg, in famously noting that unlawful state acts are 'committed by men, not by abstract entities', held that '[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.'[55] But there is a difference, in this usage, between a state breaching a legal obligation and a state, in purporting to authorize internationally recognized war crimes, 'moving outside its competence' – i.e., acting *ultra vires* of acknowledged sovereign authority. A state's renunciation of a practice does not, in itself, equate to its renunciation of the legal capacity to authorize the practice, and thus to immunize participants in the practice from external exercises of jurisdiction; renunciation of that legal capacity is specific to international criminal law.

The international order cannot be analogized to a federal system of domestic governance, in which something akin to the United States Constitution's Supremacy Clause simply nullifies all exercises of legal authority in contradiction to the overarching scheme. As Kooijmans observed, the idea that '[f]ederal organization need not stop at the state level, but may be carried through to the international level … is based upon a misunderstanding of the structure of the international society.'[56]

As Louis Henkin starkly put it, '[i]nternational law … recognizes the power – though not the right – to break a treaty and abide the international consequences.'[57] This comports with the Bodinian conception of sovereignty: a prince is

(Footnote 54 continued)
2012, though notably excepting the core Western liberal democracies); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res. 36/103, 9 December 1981, (4) (non-intervention norms shall not 'prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes').

[55] International Military Tribunal (Nuremberg), Judgment and Sentence, 1 October 1946, 41 *American Journal of International Law* (1947) 172, at 221.

[56] Kooijmans 1964, at 233. Kooijmans analogized the relationship of the international and national legal orders to that of the state to 'other human social relationships, such as family, industry, church, etc.': '[e]ach social relationship has its own sphere and … competences should be executed within this sphere. If the state occupies itself with the regulations in industry or in the church without due regard for the boundaries of its own sphere, it makes an improper inroad on the sphere of competence of business or church.' Ibid., at 206-207.

[57] Henkin 1972, at 168.

bound by the covenants he undertakes, yet retains the unchallengeable authority to contravene them when, in his unilateral judgment, 'they cease to satisfy the claims of justice.'[58] Sovereignty thus does not negate the existence of a legal obligation, but rather consists, above all, in retention of the capacity to act in breach of the obligation, at whatever lawful cost this might entail. As Carl Schmitt put it, '[t]he authority to suspend valid law – be it in general or in a specific case – is … the actual mark of sovereignty';[59] Schmitt went so far as to say that '[i]f individual states no longer have the power to declare the exception, … then they no longer enjoy the status of states.'[60] And while the extent and manner of incorporation of international law into domestic legal systems vary widely, domestic orders typically do, indeed, to one extent or another, contemplate the possibility of authoritative decisions to breach international obligations.

The same act, therefore, can be lawful and unlawful simultaneously – lawful within the domestic system, while unlawful within the international system. One can insist on seeing this phenomenon through the lens of 'monism', and thus on characterizing the breaches of international law as unequivocally unlawful, so long as one acknowledges that international law – understood as a framework for accommodation embodying distrust for unilateral implementation of universal norms – does not broadly license external actors to treat the unlawful state acts in question as legal nullities.

Accordingly, the doctrine of immunity *ratione materiae*, or functional immunity, impedes an external court's exercise of jurisdiction over both current and former state agents for acts that those agents committed inside their national territory within the scope of their governmental functions, except insofar as those acts have been established as international crimes subject to an external system's jurisdiction.[61] Antonio Cassese construed immunity *ratione materiae*, not as a procedural bar to jurisdiction, but as a 'substantive defence', available to 'any de jure or de facto State agent' performing official acts, establishing that the 'violation is not legally imputable to [the agent] but to his state.'[62] Cassese may have overstated the case slightly; it may be more precise to characterize the doctrine as

[58] Bodin 1955, at 30.

[59] Schmitt 1985, at 9.

[60] Ibid., at 11.

[61] See, e.g., Akande 2004, at 412-413; Akehurst 1972-1973, at 240-244. This immunity follows from the traditional view that '[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.' *Underhill v. Hernandez*, 168 US 250, 252 (1897).

[62] Cassese 2003, at 266; *accord* Akande 2004, at 412-415. Indeed, as Hazel Fox has pointed out, even the International Criminal Tribunal for the former Yugoslavia has acknowledged that the immunity *ratione materiae* of state agents trumps the Tribunal's contempt powers (in response to an official's failure to comply with a subpoena *duces tecum*). Fox 2003, at 299-300.

coinciding with the limitations of substantive international norms,[63] and also as a procedural bar that has substantive implications under particular circumstances.[64]

In anti-pluralist circles, however, this paradoxical phenomenon draws antipathy, at least inasmuch as it affects moral norms of the international order – human rights – as opposed to the mere legal coordination of interests. This antipathy, in turn, is manifested in claims for an additional legal consequence of *jus cogens*. As W. Michael Reisman reports (with no indication of either endorsement or disavowal):

> [i]n human rights discourse, *jus cogens* has acquired a much more radical meaning [than that contained in the Vienna Convention on the Law of Treaties], evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity. This new understanding of *jus cogens* renders national law that is inconsistent with it devoid of international and national legal effect, such that national officials who purport to act on the putative authority of that national law may now incur direct international responsibility.[65]

Such claims are not limited to the realm of advocacy rhetoric. The ICTY Trial Chamber in *Prosecutor v. Furundžija* notably posited, as automatic consequences of *jus cogens*, the establishment of universal criminal and civil jurisdiction and the voiding of immunities.[66] More famously, the 3-2 decision of the first House of Lords panel in the *Pinochet* extradition matter sweepingly nullified the former Chilean dictator's immunity *ratione materiae* on the ground that torture, being a *jus cogens* violation, cannot count in international law as a state function.[67]

These assertions draw encouragement from the increasing prevalence of the ambiguous term '*jus cogens* crimes.'[68] This term tends to encourage a conflation of *jus cogens* and international crimes – phenomena that do frequently coincide –

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[63] Fox 2003, at 301.

[64] Insofar as an individual's criminal or civil liability is dependent on a foreign state's jurisdiction to legislate, that jurisdiction to legislate is blocked for as long as immunity *ratione materiae* exists. It therefore logically follows that in such cases (i.e., in cases where the act did not constitute a fully established international crime when committed), a state waiver of immunity *ratione materiae* cannot have retroactive effect, for in respect of the application of another state's extraterritorial legislation to those acting within the scope of official capacity, it represents a substantive rather than merely procedural bar to prosecution.

[65] Reisman 2000, at 15, n. 29.

[66] *Prosecutor v. Furundžija*, Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998, para 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.

[67] *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet I)*, 1 A.C. 61 (2000). That judgment was vacated after the disclosure of one Law Lord's ties to a human rights group participating in the litigation.

[68] See, e.g., Bassiouni 1996; Sadat 2006, at 966, n. 31.

notwithstanding that, as the International Law Commission has noted, 'the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime.'[69]

As a logical matter, a prohibition's *jus cogens* status in no way implies the same status for the duty to prosecute the offense, and therefore in no way implies that the *jus cogens* character of the offense sweeps away immunities or other limitations on cross-border exercises of power.[70] Indeed, the great bulk of juridical authority, both on state immunity and on the immunities *ratione personae* and *ratione materiae* of state officials, reaffirms that *jus cogens* alone does not trump immunity.[71]

What vitiate the immunities of state officials in international criminal tribunals are the authorizing statutes for those tribunals, and what vitiates the immunity *ratione materiae* (but not *ratione personae*) of state officials in external domestic criminal prosecutions is the manifest establishment, by treaty or custom, of universal penal jurisdiction. Lord Browne-Wilkinson's lead opinion in the ultimate *Pinochet* judgment – representing the prevailing middle view among the Law Lords – made the immunity *ratione materiae* point as follows:

> I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.[72]

The international system's decisive refusal to allow even this carefully grounded rationale to override the immunity *ratione personae* of sitting diplomatic officials is explained in the Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the ICJ *Arrest Warrant* case:

> the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by

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[69] International Law Commission, Commentary to the Draft Articles on State Responsibility, UN Doc. A/51/10, 1996, art. 19, para 62, quoted in Byers 1999, at 184-185, n. 95. See also Brown 2001, at 392-393, cautioning against the over-identification of *jus cogens* with universal jurisdiction.

[70] Ferdinandusse 2006, at 182; Shany 2007, at 867. Indeed, the International Criminal Court Statute seems to counterindicate *jus cogens* status for such prosecutorial obligations, since its call for surrender of suspects expressly yields to states parties' contrary treaty obligations to non-parties. Rome Statute of the International Criminal Court, 2187 UNTS 90, art. 98.

[71] See *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, ICJ, Merits, Judgment of 3 February 2012, para 95. To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.'

[72] *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 AC 147, 204-05 (2000).

> making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value … . International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials.[73]

Moreover, even the UK House of Lords has refused to apply its own *Pinochet* international crimes exception to immunity *ratione materiae* in the context of civil litigation against current or former foreign state officials who acted within the scope of official capacity.[74] Less accepted still is any *jus cogens* or human rights exception to immunity that would subject foreign states themselves to civil litigation in domestic courts.[75]

The limitations on the capacity of a domestic court to impose extraterritorial direct effect on foreign state officials are central to international order conceptualized as a framework of accommodation. Exercises of residual sovereign prerogative reflect moral difference at the moment of decision; states jealously guard 'the authority to suspend valid law' in those situations in which the end – potentially associated with the very survival of a system of public order – is deemed to justify presumptively inadmissible means. States have renounced the capacity to authorize acts that do not figure to be useful in this regard – means that most typically, by their very nature (e.g., genocide, crimes against humanity, and gross or systematic violation of the laws and customs of war) embody or suggest ends that are not cognizable in the present international order – but these same states evince reluctance to expose their agents to accountability at the hands of foreign legal systems that lack commitment to the ends of the official acts in question and that act unilaterally. Moreover, from the standpoint of international peace and cooperation, it is a fateful step to license domestic courts to exercise jurisdiction over a foreign-state agent acting inside the latter's national territory

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[73] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Merits, Judgment of 14 February 2002, Separate Opinion of Higgins, Kooijmans, and Buergenthal, para 79.

[74] *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia,* 2006 U.K.H.L. 26.

[75] *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, paras. 93-94. 'The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State', and therefore hold even the in the face of – because they are uncontradicted by – both *jus cogens* violations and the duty to make reparation. See also *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001. In this case a closely divided Grand Chamber of the European Court of Human Rights held that human rights law does not require a state court to void foreign state immunity in civil suits for torture. The joint dissenting opinion insisted that 'the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.' Ibid., Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para 3.

within the scope of official capacity; treating a foreign government as an outlaw within one's own courts does not augur well for acceptance of the outlaw's international legal prerogatives as a constraint on more direct (and likely the sole potentially effective) efforts to redress the grievance.[76]

As the international order becomes less willing to acknowledge the legitimacy of disagreement over serious human rights violations, however, obstructions to unilateral impositions of direct effect come to appear more at odds with the international rule of law. Insofar as impunity displaces widespread and unregulated self-help as legality's perceived s*ummum malum*, freelance law enforcement becomes more broadly 'deputized'. A stripping away of obstructions to unilateral enforcement of purportedly universal norms would predictably, at least in the long run, enhance the position of the most dominant and efficacious members of the international state system at the expense of weaker and less influential states.

2.5 The Erosion of the Non-Intervention Norm and the Crisis of Sovereign Equality

Sovereign equality's mantra is found in the 1970 Friendly Relations Declaration:

> No 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. … Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.[77]

Although these were always overstatements in relation to actual international practice, and although Security Council acted coercively and forcibly in internal matters long before the official adoption of the 'R2P' doctrine,[78] a cross-cutting majority of states for decades expressed strong support for the norm of territorial inviolability, both in the abstract and in application to specific cases.[79] This strong support reflected the Cold War-era divisions of 'First, Second, and Third Worlds', and a general appreciation of distrust and dissensus in matters relating to the legitimacy of internal systems of public order. As noted above, the non-intervention norm found forceful and authoritative expression in the ICJ's 1986 *Nicaragua* decision.[80]

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[76] I have given book-length treatment to this theme, Roth 2011.

[77] Friendly Relations Declaration.

[78] In its 2005 invocation of R2P theme, the U.N. General Assembly obviated the need for such elaborate rationalizations, acknowledging that the Security Council's extraordinary authority extends to circumstances where 'national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.' UNGA Res. 60/1, 24 October 2005 (adopted without a vote), para 139; UNSC Res. 1674, 28 April 2006 (reaffirming same).

[79] Instances and patterns are elaborated throughout Roth 1999, 2011.

[80] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, at 263-264.

The former systematic emphasis on non-intervention should not be understood as entailing indifference either to humanitarianism or to popular sovereignty. Rather, given the era's geopolitical and ideological conflicts, the bulk of states tended to see exploitive or partisan intentions behind even the most plausibly humanitarian interventions – for instance, of India in East Pakistan,[81] Vietnam in Cambodia,[82] or the United States in Grenada[83] – and dismissed any externally-specified normative formula for ascertaining 'the will of the people' that was to be 'the basis of the authority of government'.[84] A regime's legal capacity to assert the right of non-intervention stemmed from the test of 'effective control through internal processes', a trial by ordeal; the non-intervention norm amounted in practice to a right of territorial political communities to be ruled by their own thugs and to fight their civil wars in peace.[85]

During this era, internal armed conflict was widely perceived, not as an anomaly or as evidence of 'state failure', but as a legitimate way for questions of public order to be worked out within states. Internal wars typically succeeded in presenting themselves as struggles between ideologically-motivated factions for standing to speak for the undivided population, rather than as ethno-nationalist bloodletting or as the simple thuggery of armed gangs.[86] After all, during this period, most governments in the world traced their origins more or less directly to a *coup d'etat*, insurrection, or decisive civil war. In the prevailing imagination, a winning faction – absent unlawful assistance from a foreign power – demonstrated its worthiness of representing a given political community by achieving and maintaining effective control, i.e., acquiescence of the bulk of the populace in that faction's project of public order.[87] Civil strife, far from generating exceptions to

[81] UNGA Res. 2793 (XXVI), 7 December 1971 (calling 'upon the Governments of India and Pakistan to take forthwith all measures for an immediate cease-fire and withdrawal of their armed forces on the territory of the other to their own side of the India-Pakistan borders,' thereby indirectly repudiating the Indian intervention that resulted in the establishment of Bangladesh).

[82] UNGA Res. 34/22, 14 November 1979 (demanding an 'immediate withdrawal' of Vietnamese forces).

[83] UNGA Res. 38/7, 2 November 1983 (denouncing the invasion as a 'flagrant violation of international law').

[84] Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948, art. 21(3).

[85] For elaboration of and evidence for this assertion, see Roth 2011, at 81-85, 200-205.

[86] There is no doubt that the latter frequently masqueraded as the former, often for the sake of procuring weapons and other assistance from the rival blocs. Somali dictator Mohammed Siad Barre and Angolan rebel leader Jonas Savimbi are two notorious examples of leaders who shifted ideological affectations, as convenient, to enlist foreign support for essentially non-ideological agendas. For an empirically supported argument that the cross-era difference in the character of civil wars was more appearance than reality, see Kalyvas 2001.

[87] See generally Roth 1999, at 136-149, 160-171, 253-364 (detailing the history of that era's practice and pronouncements on civil wars, recognition contests, and political participation).

the non-intervention rule, was precisely the circumstance in which the non-intervention norm was most strongly emphasized.[88]

Perhaps for better and perhaps for worse, neutrality in internal conflicts is no longer the international community's standard, as leading governments and intergovernmental organizations increasingly appear to regard coups, insurrections, and civil wars as outbreaks of criminal violence and as justifications for imposing something akin to international trusteeship. Meanwhile, internationally brokered solutions to conflicts typically, if rather raggedly, seek to predicate governmental legitimacy on liberal-democratic electoral mechanisms.[89] Obstruction of the mechanisms so established has thereupon drawn sharply – and at times, decisively – non-neutral impositions by the UN and other external actors, in turn generating international practice and *opinio juris* on questions of governmental illegitimacy once considered to be 'essentially within the domestic jurisdiction'.[90] Although the international community initially took great care to avoid any implication that such practice would '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',[91] this insistence has ebbed over time, lending increased credibility to Franck's 1992 proclamation of an 'emerging right to democratic governance'.[92]

Even a very short time ago, the evidence that these episodes augured the demise of the basic principle of neutrality in civil strife seemed highly equivocal. Jean d'Aspremont's 2010 assertion that 'the recognition of overthrown democratic

[88] See Friendly Relations Declaration. 'Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State'; Convention on Duties and Rights of States in the Event of Civil Strife, 134 LNTS 45, (Inter-American treaty forbidding 'the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied').

[89] In some cases, such as Cambodia, Kenya, and Zimbabwe, the international community has promoted or at least abided power-sharing between electoral winners and losers that entailed, from a liberal-democratic perspective, undue concessions to losers. In Bosnia, an Office of High Representative administers what is effectively an international trusteeship, occasionally removing elected leaders (including two members of the collective Presidency) for obstructionism in the implementation of the consociational settlement.

[90] See generally Roth 1999.

[91] UNGA Res. 45/150, 18 December 1990. Resolutions of this nature, endorsing the international promotion of liberal-democratic mechanisms, not only contained such qualifiers, but were also accompanied by counterpart resolutions, passed by majority over the objection of the most strongly liberal-democratic states, that reaffirmed 'respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes', acknowledging the plurality of approaches, reserving to the domestic jurisdiction control over implementation, and criticizing unwelcome external influences on local processes. UNGA Res. 45/151, 18 December 1990; UNGA Res. 49/180, 23 December 1994; UNGA Res. 54/168, 25 February 2000. Fox and Roth 2001, at 344-345.

[92] Franck 1992; see also Fox 1992. For a balanced attempt (co-authored by a proponent and a skeptic) to evaluate Franck's claim just short of a decade later, see Fox and Roth 2001.

governments is generally not questioned and the recognition of putschists [is] systematically denied'[93] could be still questioned as reliant on cases bearing exceptional circumstances[94] or inclusive of cases where the international community, even if condemning the coup, did not manifestly treat as a nullity the coup regime's authority to represent the state.[95] And it remains true, as Mikulas Fabry has noted, that responses to coups 'have varied not just across different organisations or countries, but also in the course of the same organisations' or countries' treatment of nominally like cases.'[96]

However, the most recent cases – responses since 2010 to crises in Cote d'Ivoire,[97] Libya,[98] Mali,[99] and Guinea-Bissau[100] – reflect strikingly little regard

[93] d'Aspremont 2010, at 455-456; see also d'Aspremont 2006.

[94] For example, in Haiti in 1994 and Sierra Leone in 1997-1998, there had been a landslide victory of the ousted President in a very recent, internationally-monitored election, as well as notorious brutality and demonstrable unpopularity on the part of the forces involved in the coup. As a result, a vast diversity of international actors, cutting across the international system's plurality of interests and values, were able to perceive in common a population's manifest will to restore an ousted government. See Roth 1999, at 366-387, 405-409.

[95] Roth 2011, at 208-217.

[96] Fabry 2009, at 735.

[97] UN peacekeepers, deployed under UNSC Res. 1967, 19 January 2011, took partisan military action after the Southern-based government of Laurent Gbagbo, defeated in internationally supervised elections by 54 to 46 %, refused to yield power to the Northern-based opposition movement led by Presidential candidate Alassane Ouattara. One could still characterize this as an exceptional case, since the election had been part of an internationally-brokered agreement to end an internal armed conflict that had drawn a Chapter VII intervention. See UNSC Res. 1880, 30 July 2009; UNSC Res. 1893, 29 October 2009; UNSC Res. 1911, 28 January 2010.

[98] North Atlantic Treaty Association (NATO) forces, authorized in UNSC Res. 1973, 17 March 2011 'to take all necessary measures … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya', successfully pursued regime change. That interpretation of the Security Council mandate was highly controversial. The Western powers' alleged breach of faith in the Libyan case has been invoked (whether ingenuously or opportunistically) to explain Russian and Chinese vetoes of Chapter VII measures in the ensuing Syrian crisis.

[99] See S/PRST/2012/9 of 4 April 2012 (UN Security Council Presidential Statement that affirms the Council's 'strong condemnation of the forcible seizure of power from the democratically-elected Government of Mali [and] renews its call for the immediate restoration of constitutional rule and the democratically-elected Government and for the preservation of the electoral process'). To be sure, there is some irony in the fact that the same UN Security Council Presidential Statement that condemned the Mali coup in the name of constitutionalism and democracy also 'commends the work of President Blaise Compaoré, as ECOWAS facilitator, in promoting the return to full civilian authority and the effective reestablishment of constitutional order in Mali.' S/PRST/2012/9 of 4 April 2012. Compaoré has held power in Burkino Faso ever since his own coup in 1987.

[100] See UNSC Res. 2048, 18 May 2012 (demanding the 'immediate restoration of the constitutional order' and imposing Article 41 personal sanctions on Guinea-Bissau's coup leaders).

for the older standard of neutrality in civil strife.[101] Outcomes have been prejudged, to the point where the insurrectional faction in Libya won recognition from major states as the legitimate government, and consequent access to Libyan state assets held in foreign banks, even while its military prospects remained uncertain.[102]

Moreover, given that war crimes are almost inevitably endemic in internal armed conflict, the mandate for R2P action in any case where 'national authorities are manifestly failing to protect their populations from [*inter alia*] war crimes'[103] renders almost any civil war a candidate for forcible intervention. In Libya, the authorization of intervention appeared to stem more from anticipated than from verified killings.[104] This quickness to judge may, of course, be salutary insofar as it actually pre-empts rather than merely reacts to catastrophe. But the nebulousness of the substantive threshold is troubling, especially if the procedural safeguard – the Security Council's deadlock-oriented decision rule – comes to be delegitimated and, ultimately (as has been keenly advocated in many quarters), circumvented.

All of these developments cast doubt on the continued viability of the principle of sovereign equality of states governed by liberal and non-liberal governmental orders. Although liberal-democratic forms have scarcely achieved universality in the international community, and liberal-democratic substantive values even less so, the absence of an assertive alternative vision of legitimate political authority has led to acquiescence in solutions predicated on liberal ideological assumptions.[105] This process has produced no clear standards to replace the non-intervention norm, but it cannot be said to have left that norm intact. The international legal order is at a cross-roads; it remains to be seen whether and to what extent international law will continue to stand for a broadly pluralistic, as opposed to a more nearly hegemonic, approach to struggles over the terms of internal public order.

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[101] The question of a decisive collective response to the 2012 Syrian crisis remains unresolved at this writing.

[102] See, e.g., BBC News, 'US recognises Libyan rebel TNC as legitimate authority', 15 July 2011, available at <http://www.bbc.co.uk/news/world-africa-14164517>. 'The move means billions of dollars of Libyan assets frozen in US banks could be released to the rebels.'

[103] UNGA Res. 60/1, 24 October 2005, 139. It should be noted that the human costs of intervention by technologically sophisticated foreign military forces, while typically more likely to be attributed to 'collateral damage' than to war crime, can similarly amount to humanitarian catastrophe. One scholarly source places at 11,516 the number of civilians killed by Coalition forces in Iraq between March 20, 2003 and March 19, 2008. Hicks et al. 2011, at 3.

[104] According to one journalistic estimate, 'the death toll in Libya when NATO intervened was perhaps around 1.000-2.000.' Seumas Milne, 'If the Libyan war was about saving lives, it was a catastrophic failure', *The Guardian*, 26 October 2011, available at <http://www.guardian.co.uk/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>.

[105] An exception has been a small group of states (Venezuela, Bolivia, Ecuador, Nicaragua, Cuba, and for a time, Honduras), led by Venezuelan President Hugo Chavez, that has articulated a rival vision reminiscent of the state socialism and Bandung nationalism of a previous era. During his 2008-2009 Presidency of the UN General Assembly, veteran Nicaraguan diplomat Miguel d'Escoto vigorously sought to revitalize this critique of Western capitalist hegemony. The effort generated some debate, but failed to inspire a significant push-back against recent trends.

2.6 Concluding Remarks: Whither Sovereign Equality?

As Kooijmans indicated a half-century ago, a legal order's content depends on the specific character of the community that it seeks to regulate.[106] The modern doctrine of sovereign equality, rooted in the language of the UN Charter as glossed by the authoritative pronouncements of succeeding decades, draws its distinctive content from the pluralism that explicitly marked the international community in the period from the late 1950s to the late 1980s. Subsequent historical developments have called that pluralism into question, prompting doctrinal challenges. Most provocatively, the notion of 'sovereignty as responsibility' has been invoked, not merely to highlight sovereignty's compatibility with human rights obligations or its subordination to Security Council authority over apprehended instances of humanitarian catastrophe, but as a general nullification of a lawbreaking state's authority to resist impositions from self-styled guarantors of global order.[107] While no such sweeping assertion has gained widespread acceptance, insistence on respect for previously-upheld sovereign prerogatives has noticeably ebbed.

It is tempting to regard the erosion of the sovereign equality doctrine as a victory for moral principle over realpolitik. The barriers posed by that doctrine tend to interfere with redress of morally imperative grievances. If the doctrine favored weak states, one might say that this was so only in the sense that it favored armed factions that had usurped control over territorial political communities on the global periphery, and that therefore these very sovereign prerogatives were a bane to those states' inhabitants.

Such an attitude, however, reflects too uncomplicated a view of internal political conflict. To be sure, there are real instances of confrontation between 'the regime' and 'the people', and even more frequent instances in which the regime resembles a criminal enterprise or a street gang more than anything that can properly be called a government. A major problem with the conventional wisdom of the period from the late 1950s to the late 1980s was the tendency to dignify, as a manifestation of a political community's self-determination, whatever patterns of effective control might emerge from internal processes. However, the current conventional wisdom overcorrects by far, and tends to deny that coercion, force, and violence are natural consequences of societal polarization. Harsh measures

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[106] Kooijmans 1964, at 195.

[107] In the George W. Bush Administration's assertion: '[s]overeignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene.' Richard Haass, Director of Policy Planning for the George W. Bush State Department, quoted in Nicolas Lemann, 'The Next World Order', *The New Yorker*, 1 April 2002, available at <http://www.newyorker.com/archive/2002/04/01/020401fa_FACT1>.

and departures from liberal-democratic mechanisms have often had substantial bases of popular support.[108] It is frequently difficult to gauge these matters in real time – and sometimes difficult in retrospect, as participants and observers often re-write their histories. Even some of the more celebrated recent events have given rise to significant misperceptions about the popular support for, and real significance of, particular movements.

The sovereign equality doctrine is an unromantic set of norms befitting an unromantic global reality. While departures from it in extreme situations are clearly justified, extreme cases tend to generate exaggerated dicta. Global consensus on basic political values is easily overstated, especially given the complexity of application to unfamiliar contexts. Moreover, unilateral implementation of purported universal principles lies in the hands of untrusted – and, it is fair to say, untrustworthy – implementers. A world that jettisons the sovereign equality doctrine may turn out to be a more dangerous, rather than a more just or rule-of-law-oriented, world.

As Kooijmans' 1964 text timelessly teaches, '[w]e must … proceed from the structure of the international community as it actually is without, however, relapsing into a fatal empiricism.'[109] The critical question for the current period is to what extent recent historical developments have rendered anachronistic the pluralism that gave shape to the sovereign equality doctrine in its heyday. There can be no doubt that the international community today is far more capable of rendering authoritative judgments about domestic governance than it was amid the robust ideological contestation that grounded the 1970 Friendly Relations Declaration. Not only has the international human rights system established far more determinate public order norms, but international criminal justice and humanitarian intervention have, in a subset of instances, become legally valid instruments for human rights implementation. Yet it is always tempting for commentators to focus on how much of international life has changed, at the expense of how much has remained the same. The resulting idealism is not necessarily benign, as illusory consensus lends

[108] Latin America's many 'dirty wars' of the 1960s through the 1980s are quintessential in this respect, as in many cases both sides, notwithstanding their recourse to ruthlessness, maintained substantial and enduring popular constituencies. On the Right, Chile's General Augusto Pinochet and Peru's President Alberto Fujimori enjoyed substantial periods of widespread support, and El Salvador's death-squad-linked ARENA party won a long string of post-war elections. On the Left, current Presidents Dilma Rousseff of Brazil and Jose Mujica of Uruguay were both participants in urban guerrilla movements once condemned as 'terrorist', and current Nicaraguan President Daniel Ortega has renewed popularity despite past (and, some say, present) 'dictatorial' tendencies. And it is instructive that whereas the first forcible removal of Haitian President Jean-Bertrand Aristide in 1994 met with the uniform repudiation of the international community, his second forcible removal in 2004 drew no such response. The legislatively and judicially backed 2009 Honduran *coup d'etat* that ousted elected President Manuel Zelaya and led to the election of a pro-coup government is similarly a reminder that internal struggles remain fraught with ambiguity.

[109] Kooijmans 1964, at 247. 'A blue-print for castles in the air can never serve as a design for a habitable house.'

itself to selective invocation by powerful actors in the service of partisan projects. Consequently, the sovereign equality doctrine's constraints on the cross-border exercise of power in the name of justice, notwithstanding their modification and partial erosion, retain a significant place in the international legal order.

References

Akande D (2004) International law immunities and the International Criminal Court. Am J Int Law 98:407–433

Akehurst M (1972–1973) Jurisdiction in international law. Br Yearb Int Law 46:240–244

Bassiouni MC (1996) International crimes: *jus cogens* and *obligatio erga omnes*. Law Contemp Prob 59:63–74

Bianchi A (2008) Human rights and the magic of *jus cogens*. Eur J Int Law 19:491–508

Bodin J (1955) Six Books of the Commonwealth [1576]. Abridged and translated with an introduction by MJ Tooley. Basil Blackwell, Oxford

Brown BS (2001) The evolving concept of universal jurisdiction. New Engl Law Rev 35:383–397

Byers M (1999) Custom, power, and the power of rules. Cambridge University Press, New York

Cassese A (2003) International Criminal Law. Oxford University Press, New York

Cohen JL (2004) Whose sovereignty? Empire versus international law. Ethics Int Aff 18:1–24

Czaplinski W (2006) Jus cogens and the law of treaties. In: Tomuschat C, Thouvenin J (eds) The Fundamental Rules of the International Legal Order: *Jus Cogens* and Obligations *Erga Omnes*. Martinus Nijhoff, Leiden, pp 83–98

d'Aspremont J (2006) Legitimacy of governments in the age of democracy. NYU J Int Law Politics 38:877–917

d'Aspremont J (2010) Responsibility for coups d'etat in international law. Tulane J Int Comp Law 18:451–475

Doswald-Beck L (1986) The legal validity of military intervention by invitation of the government. Br Yearb Int Law 56:189–252

Doyle AC (1967) Silver blaze. In: Baring-Gould WS (ed) The annotated Sherlock Holmes, vol II. Clarkson N. Potter, New York, pp 261–281

Fabry M (2009) The right to democracy in international law: a classical liberal reassessment. Millenni J Int Stud 37:721–741

Ferdinandusse WN (2006) Direct application of international criminal law in national courts. T.M.C. Asser Press, The Hague

Fox GH (1992) The right to political participation in international law. Yale J Int Law 17:539–607

Fox GH, Roth BR (2001) Democracy and international law. Rev Int Stud 27:327–352

Fox H (2003) Some aspects of immunity from criminal jurisdiction of the state and its officials: the *Blaskić* case. In: Vohrah LC et al (eds) Man's inhumanity to man: Essays on international law in honour of Antonio Cassese. Kluwer Law International, The Hague, pp 293–308

Franck TM (1992) The emerging right to democratic governance. Am J Int Law 86:46–91

Freiherr von der Heydte FA (1958) Völkerrecht. Politik und Wirtschaft, Köln

Henkin L (1972) Foreign Affairs and the constitution. Foundation Press, Mineola

Hicks MH-R, Dardagan H, Guerrero Serdán G, Bagnall PM, Sloboda JA, Spagat M (2011) Violent deaths of Iraqi civilians, 2003–2008: analysis by perpetrator, weapon, time, and location. PLoS Med 8. http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.1000415. Accessed 21 Nov 2012

Higgins R (2013) Equality of states and immunity from suit: a complex relationship. Netherlands Yearbook of International Law 43:129–149

Jackson R (2000) The global covenant: human conduct in a world of states. Oxford University Press, Oxford
Jennings R, Watts A (eds) (1992) Oppenheim's international law, 9th edn. Longman Higher Education, Essex
Kalyvas S (2001) 'New' and 'old' civil wars: A valid distinction? World Politics 54:99–118
Kingsbury B (1998) Sovereignty and inequality. Eur J Int Law 9:599–625
Kooijmans PH (1964) The doctrine of the legal equality of states: An inquiry into the foundations of International Law. A.W. Sythoff, Leiden
Linderfalk U (2007) The effect of jus cogens norms: whoever opened Pandora's box, did you ever think about the consequences? Eur J Int Law 18:853–871
MacDonald RStJ (1981) International law and the conflict in Cyprus. Can Yearb Int Law 19:3–49
Mitrany D (1966) A working peace system. Quadrangle Books, Chicago
Nieto-Navia R (2003) International peremptory norms (*jus cogens*) and international humanitarian law. In: Vohrah LC et al (eds) Man's inhumanity to man: essays on international law in honour of Antonio Cassese. Kluwer Law International, The Hague, pp 595–640
Reisman WM (2000) Unilateral actions and the transformations of the world constitutive process: the special problem of humanitarian intervention. Eur J Int Law 11:3–18
Roth BR (1999) Governmental illegitimacy in international law. Clarendon Press, Oxford
Roth BR (2011) Sovereign equality and moral disagreement: premises of a pluralist international legal order. Oxford University Press, New York
Sadat LN (2006) Exile, amnesty, and international law. Notre Dame Law Rev 81:955–1036
Schmitt C (1985) Political Theology: Four chapters on the concept of sovereignty [1922] (trans: Schwab G). MIT Press, Cambridge
Schwelb E (1967) Some aspects of international jus cogens as formulated by the International Law Commission. Am J Int Law 61:946–975
Shany Y (2007) The prohibition against torture and cruel, inhuman and degrading treatment and punishment: Can the absolute be relativized under existing international law? Cathol Univ Law Rev 56:837–870
Shelton D (2006) Normative hierarchy in international law. Am J Int Law 100:291–323
Simpson G (2001) Two liberalisms. Eur J Int Law 12:537–571
Simpson G (2004) Great powers and outlaw states: Unequal Sovereigns in the International Order. Cambridge University Press, Cambridge
van Hoof GJH (1983) Rethinking the Sources of International Law. Kluwer, Deventer

Chapter 3
From Freedom and Equality to Domination and Subordination: Feminist and Anti-Colonialist Critiques of the Vattelian Heritage

Tony Carty and Xiaoshi Zhang

Abstract The chapter takes as its starting point Pieter Kooijman's critique of Vattel's thinning out of the concept of authority in international law, one which attaches to the idea of state equality the possibility for each state to insist upon its own standards to the exclusion of any objective standards in the conduct of international relations. The chapter traces Vattel's contextual background in major Enlightenment shifts which set up a pernicious triad of thinkers such as Mandeville, Smith and de Sade. These thinkers make of post-Enlightenment economic and social relations a struggle of Master and Slave, most easily and clearly depicted in feminist studies, but also finding expression in imperialist relations and in particular, the unequal relations between the West and China, with the continuing inconclusive debate about unequal treaties. The chapter uses close study of a possible 'anti-feminist' novel, and feminist critique thereof, as well as a fairly extensive critique of the place of China in the recent history of international law, to argue that the present return of China to the position of a world power able to challenge the global system, could auger ill for post-Vattelian international law. Feminist critique is used to show that the post-Enlightenment ethical-cultural resources of international law are not equal to offering a country such as China more than a 'masculine' resort to its own self-strengthening. A search for alternatives ways to constructive dialogue are imperative, but, as Kooijmans shows, after Vattel the task of the international lawyer to contribute effectively is immeasurably disadvantaged.

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3.1 Introduction

In *The Doctrine of the Legal Equality of States* Kooijmans recognises the central importance of Vattel in contributing to an interest driven, power politics, 'fatally interfering with the normative character of law.'[1] Of course he is referring to Vattel's classic 1758 text which, following the standard assessment of Nussbaum, has had great influence in the practice of inter-state relations.[2] Kooijmans begins his consideration of Vattel by citing his most celebrated formulation of the equality principle.[3] In his *Preliminaries* Vattel says that men are naturally equal and a perfect equality exists in their rights and obligations, as proceeding from nature; that nations are composed of men, so that the same applies to them, so that 'power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'[4]

This paper will agree with Kooijmans in taking Vattel's declaration as authoritative for the discipline of international law, treating him as the modern exponent of the legal expulsion of hierarchy from international relations. It is

[1] Kooijmans 1964, at 87.

[2] Ibid., at 83.

[3] Ibid., at 84.

[4] De Vattel 1999, para 18. (The numerous paragraph references used in this paper are reproduced in the text itself).

important to appreciate that Vattel was not exactly expounding what he regarded as positive law in the sense of conventional law. For him, equality was derived from nature. More particularly, it came from what he mysteriously described as 'voluntary law'. Under the rubric of *Foundation of the voluntary law of nations*, Vattel expounds that as

> nations are *free, independent and equal* – and since each possesses *the right of judging,* what conduct she is to pursue … the effect of the whole is to produce, at least externally … a perfect equality of rights between nations … in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment, *so that whatever may be done by any one nation may be done by any other; and so they ought, in human society, to be considered as possessing equal rights.*[5]

After quoting the same passage,[6] Kooijmans comments that this absolute conception of equality is an obstruction for what he calls a primary natural law, which would imply objective norms for the behaviour of states. As Kooijmans indicates, what Vattel is arguing for is each state following its own standards, giving full play to national interest.[7] In other words, the great likelihood of severe conflict and the absence of any standard above individual nations are built into Vattel's schema – as such standard, indeed, is also absent in relations of individual men for the resolution of such conflicts. Vattel continues to say that '[e]ach nation in fact maintains that she has justice on her side in every dispute that happens to arise; and it does not belong to either of the parties interested, or to other nations, to pronounce a judgment on the contested question.'[8] As Kooijmans puts it, the consequence of this doctrine is 'essentially a loss of authority and a loss of depth for international law. Led by utilitarian motives and surrender to actual practice, he finally deprives natural law … of actual validity'.[9]

It is seen how Kooijmans stresses the utility and national interest aspect of Vattel's thinking. Martti Koskenniemi provides an authoritative introduction to how these central aspects of Vattel's thought belong as an integral part of the European Enlightenment and in the development of international law thinking as an integral part of that same Enlightenment.[10] Koskenniemi appreciates the slippery nature of the concept of 'voluntary law' within which Vattel embeds his formulation of equality. It is that part of the law which takes account of the specific nature of the international system. It reflects the 'presumed consent' of states to what 'they would consent if they possessed full knowledge of their interests and their relative position at each moment vis-à-vis their rivals'. This is not an equation of 'voluntary law' with actual rules attributable to treaty or tacit custom, says Koskenniemi: 'something is not in accordance with a nation's interest merely

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[5] Ibid., 1999, para. 21 (emphasis added).

[6] Kooijmans 1964, at 84-85.

[7] Ibid., at 85.

[8] De Vattel 1999, para. 21.

[9] Kooijmans 1964, at 86.

[10] Koskenniemi 2011, at 73-75.

because a nation happens to do it'.[11] Instead, in Koskenniemi's view, '[v]oluntary law is what professional expertise tells us is needed for a nation's "bonheur et perfection"'. The voluntary law is firmly grounded, he says,

> in the 18th century reality, where progressive elements can be chosen, which look for a more harmonious existence in the future. Like Mandeville's *Fable of the Bees,* voluntary law's dual realist/idealist structure consecrates the liberal world-view under which private vices become producers of the greatest public good.[12]

Koskenniemi ends his chapter equivocally by saying that Vattel 'buys freedom from Empire and the public law of the State at the cost of capitalism and expert rule.'[13]

This paper will explore more fully the negative implications of Vattel's theory of voluntary law and equality, being embedded so fully in the 18th century Enlightenment optimism. Koskenniemi has made clear that voluntary law corresponds not to what states happen to do, but rather to what, happily, conforms to a harmonization of their interests. It is in this sense, that voluntary law expresses an equilibrium of desire, something corresponding also to Adam Smith's doctrine of the hidden law of the market. While the market is an impersonal force and the voluntary law is a normative system of presumed consent, nonetheless the former also presumes that individuals pursue their interests, while the latter presumes the same, with the added proviso that they do so with a maximum knowledge and intelligence as to what their interests are. The paper builds upon insights provided by D-R Dufour, that the equilibrium of desire, about which Mandeville was so optimistic, quickly developed into the 'delights' of domination and subordination. This development received the fullest philosophical exposition by the Marquis de Sade at the end of the 18th century, before becoming 'codified' in Hegel's dialectic of 'Master and Slave' in his *Phenomenology of the Spirit.* While it is possible for 'desires' to be exchanged, there is nothing in the logic of the pursuit of interest, whether by individual men or by nations, which says that where 'desires' clash, each should not insist on the triumph of their own 'desires'. Indeed, the most exquisite 'desire' is precisely where one's own 'desire' absorbs, quashes or eliminates the 'desires' of the other, while still leaving a certain place for the exchange of 'desires'.[14] Kooijmans himself fully appreciates this radical character of Vattel's destructiveness when he also comments on the effect of his doctrine of equality. Vattel himself retained an ideal of an ethical 'droit nécessaire'. A later generation dispensed with this already purely ethical dimension of Vattel's thinking 'thereby sublimating a system of power-politics to a system of valid law and fatally interfering with the normative character of law.'[15]

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[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Dufour 2009.

[15] Kooijmans 1964, at 87.

This paper will open up and explore for international law and legal theory generally the issues of intellectual history raised by Dufour. The central feature of the Enlightenment concept of legal relationship is the contract or treaty, whether in private or international law. Ostensibly, all relationships are consensual. Vattel characterizes precisely these relationships as the source of 'perfect legal rights', which can be enforced. However, a continued close reading of his text reveals that he recognizes the conflict of interpretations of treaties as inevitable. Here, the absence of any objective standard means that disagreements can only be resolved through the threat or use of force, followed, through war, with a peace treaty which is, by its nature, coerced. The remarkable conclusion of this analysis is that, far from having no theory of relationship implicit in his radical individualism, where each is completely free to set and follow his own standards, Vattel's theory goes directly to the heart of Hegel's 'Master-Slave' relationship. It is the nation most able to impose the certainty of physical death and extinction on the other whose legal perspective, outlook or viewpoint always prevails.

Having explained the dynamics of the place of treaty in Vattel's system of international law, we will look to Dufour to explain the dynamic of how the apparent freedom of contract leads to the amoral anti-freedom of the master-slave relationship. The context of his writing is his argument that Euro-American, Western civilization has been led into a crisis of all normativity by the interest-based logic of capitalism, an argument which precisely parallels the impact which Kooijmans could see that Vattel was having on the tradition of normativity in international law. The pathway away from the Christian ethos of Augustine and Pascal (the equivalent being for Kooijmans, Vitoria, Suarez and Gentili),[16] through the supposedly enlightened hedonism of Mandeville to Adam Smith, leads ineluctably to the Sadean logic of 'Master-Slave' Relations. This pathway has brought the West to the brink of disaster not only in economic relations but also in all aspects of public and private life.

Next we will explore historically how far some strands of feminist critique (beginning with G. Lloyd)[17] can unravel the responsibility of phallocentric logic for the aggressiveness of the Enlightenment legal theory of capitalism and of international law which so easily turns the apparently consensual contract into a master-slave relationship It will focus acutely on the aspect of the 'Master-Slave' relationship, which is 'the representation of the other', forcing the other to accept one's own representation of it. This aspect is developed by Sartre and by de Beauvoir and leads to an exploration of the place of pornography in human relationships. Pornography is the key concept that comes out of Dufour's analysis to explain the public space at the present time.

The essential break which Dufour sees de Sade as making with Mandeville and Adam Smith is that, while it may often be convenient simply to exchange desires,

[16] Ibid., at 89.

[17] Lloyd 1984.

exchange is not necessary. The logic of expanding individual desire does not require it. This insight leads to the exploration of the possibility that the concepts of contract/treaty are really rhetorical flourishes of phallocentric legal logic, the framework within which coercion takes place. Formal consent appears to be on offer, but in practice pressure leads to a blurred acquiescence, in which the 'slave' acquiesces in the fulfilment of the desires of the 'master', while setting in train a very ambivalent exchange with the 'master' as to whether there has been consent. The development of this process is illustrated with an exposition of the hyper-successful recent novel of E. James, *Fifty Shades of Grey*.[18] The focus of our attention in this novel is on the negotiation of the dominant-subordinate contract, various draft terms of the contract and whether it ever comes to signature.

We go on to argue that the coerced gender relation in the novel is parallel to the relation between the west and late Qing China. In this way, we bring the discussion back to more familiar grounds of international law by choosing to explore the long history of the coerced treaty, the unequal treaty in its most celebrated context, Western relations with China. The topic is appropriate because, as we will show, Western international law doctrine is unrepentant as to the legality of the treaties imposed on China. Anchee Min has written a recent novelistic interpretation of this history in *The Last Empress*. She also uses the same sexual metaphor of domination to describe the negotiation with foreign powers following the Boxer Rebellion. Li Hongzhang's (Chinese negotiator) first response after being presented with the drafts of the treaties drawn up by the foreign powers was 'My country is being raped.'[19] In Sect. 3.7 of this paper, Vattel will be once again introduced through the form of his follower and adapter in the Chinese context, Henry Wheaton. Our discussion of Chinese international legal experience stresses the pornographic gaze, as the most basic element of the exercise of European power over China. This reduced China to a picture of opium infested, sodomite ridden, and concubine dominated, effeminates, who were asking to be disciplined and punished into becoming suitable partners in the Western system of exchanges. The paper stresses the exasperation of the West with the indifference of the Chinese who, in turn, appeared to experience no desire for them and who had to be compelled into relationship with the West. In this exercise, the rhetorical role of treaty and consent is pivotal. China had to be made to sign treaties. The nature of its consent is as controverted as the consent of Anastasia in *Fifty Shades of Grey*. Even today the most orthodox Western commentators insist that China can only have signed and been legally bound. Any other conclusion contradicts the logic of treaties as known to the liberal West. We explore the evidence that the Qing Empire was 'delighted' to submit to and to 'pleasure' the West in whatever way it

[18] James 2012.

[19] Min 2007, at 390.

pleased,[20] but that, subsequently, China has tortured its own consciousness with the idea that, to borrow the phrase of Ruskola, it is a state which has been raped.[21]

3.2 Vattel, from Conscience to Commitment to Coercion[22]

Vattel moves imperceptibly from a belief in the freedom of conscience of each nation, to a belief that their rights can be protected as a matter of external law, through agreement; to a belief that each nation has the freedom to determine whether and what is the extent of agreement; to a belief that differences are to be resolved, if necessary, through force. All of these beliefs are accompanied by an anxiety that nations are always changing in the weight of power they enjoy in relation to one another, and where a consortium of states imagine, as a matter of conscience of course, that an individual nation is a real threat to them, they may resort to coercion to reduce its power. This anxiety is in effect to place the whole law of treaties, contract and consent within a context of endless change of power balance and, while not abolishing the very idea of treaty, it makes it entirely dependent upon whatever the necessities of power struggles among nations should dictate. Nations may still resort to treaties/contracts where the struggles of power have not reached beyond a certain point, a matter for their absolute discretion, but, it is more likely that the same nations will use the rhetoric of the sanctity of obligations to render culpable the nation forced into the role of victim.

So Vattel recognises a central role for treaties in creating enforceable rights. This concerns the duty to observe promises.

> There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises. This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society.[23]

While Vattel in this chapter appears to expound a liberal, commercial view of treaties as transactions – the parties cannot claim these turn out to be more burdensome than expected –,[24] he goes much further in Ch. 15, to argue that the keeping of promises is a sacred obligation, breach of which is of concern to all

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[20] http://www.china.com.cn/aboutchina/txt/2008-11/14/content_16768240.htm Accessed 27 July 2012. The Empress herself said her desire was to do whatever would please the West. Its support secured her throne against internal unrest.

[21] Ruskola 2010.

[22] The first part of this section, until the consideration of Koskenniemi's article, has already been published in almost the same form in Carty's contribution to the collective volume on De Vattel 1999. See Carty 2011a.

[23] De Vattel 1999, para. 163.

[24] Ibid., paras. 157-158.

nations and not just the one to which the promise is made.[25] The *ethos* at work is quite clear. Vattel says that

> [b]etween bodies politic, – between sovereigns who acknowledge no superior on earth, – treaties are the only means of adjusting their various pretensions, – of establishing fixed rules of conduct, – of ascertaining what they are entitled to expect, and what they have to depend on. But treaties are no better than empty words, if nations do not consider them as respectable engagements, – as rules which are to be inviolably observed by sovereigns, and held sacred throughout the whole earth.[26]

At the same time, he does not wish to forget his liberal credentials and thinks one must be able to make a distinction between reasonable doubt about the extent of obligations and manifest bad faith. So, according to Vattel

> we should be careful not to extend this maxim[27] to the prejudice of that liberty and independence to which every nation has a claim. When a sovereign breaks his treaties, or refuses to fulfil them, this does not immediately imply that he considers them as empty names, and that he disregards the faith of treaties: he may have good reasons for thinking himself liberated from his engagements; and other sovereigns have not a right to judge him. It is the sovereign who violates his engagements on pretences that are evidently frivolous, or who does not even think it worth his while to allege any pretence whatever, to give a colourable gloss to his conduct, and cast a veil over his want of faith, – it is such a sovereign who deserves to be treated as an enemy to the human race.[28]

While it may appear from the above text that Vattel thought one could distinguish between reasonable and unreasonable behaviour with respect to treaty rights, however, it is when we come to consider Vattel's thought systematically, we can see how his doctrine on the settlement of disputes makes his treaty law, as every other aspect of his so-called 'Perfect law', giving rise to enforceable rights, a play of power just as Kooijmans says it must. In Ch. 18 on methods of resolving disputes, Vattel says that

> [i]n *doubtful causes* which do not involve essential points, if one of the parties will not accede either to a conference, an accommodation, a compromise, or an arbitration, the other has only the last resource for the defence of himself and his rights, – an appeal to the sword; and he has justice on his side in taking up arms against so intractable an adversary.[29]

It appears to us he is saying that from each perspective, the other is intractable, where that 'other' will not accede to a peaceful means of resolving disputes, e.g. arbitration. Yet, subjectivity so prevails that it might appear a nation can resort to force even where the other side has not formally refused e.g. arbitration. The first nation may still have such necessary and prudent regard to its own security as to

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[25] Ibid., para. 218 and further.

[26] Ibid., para. 19.

[27] That is, the faith of treaties, the duty to observe them.

[28] De Vattel 1999, para. 222.

[29] Ibid., para. 333.

have recourse to arms without every conciliatory measure being already expressly rejected.[30]

> it is sufficient that she have every reason to believe that the enemy would not enter into those measures with *sincerity*, – that they could not be brought to terminate in a happy result, – and that the intervening delay would only expose her to a greater danger of being overpowered.[31]

The only qualification appears to be that the attacker must provide grounds for this distrust of the other by being able to justify his conduct *in the eyes of all mankind*.[32] Therefore, despite the legal character of a treaty where differences of its interpretation develop into serious conflict, the new situation will give each state all the more freedom to decide that the potential enemy is not sincere in trying to reach an understanding.

The so-called voluntary law is no more precise and secure from subjective interpretation than the natural law from which it has its origin. All normativity is dissolved into opinion, which is not salvaged by the fact that it should appear, from time to time, that one nation should become so threatening that most others come together to protect themselves. That same nation could just as well be the scapegoat, which holds the rest of the community together by becoming its sacrificial victim, as described by René Girard in his numerous writings.[33]

All of this appears clear to us in the vital paragraph 335 whereby Vattel uses his disquisition on peaceful settlement of disputes to dissolve the whole of *The Law of Nations.* Despite the liberality of spirit that is attributed to Vattel, he begins this paragraph by assuming that morality is only the refuge of the weak and will last among the strong only so long as hypocrisy pleases. It will be the same with nations. In this way the natural conscience of nations eats into their perfect rights and their voluntary law.

> When, therefore, a nation pretends that it would be dangerous for her to attempt pacific measures, she can find abundance of pretexts to give a colour of justice to her precipitation in having recourse to arms. And as, in virtue of the natural liberty of nations, each one is free to judge in her own conscience how she ought to act, and has a right to make her own judgment the sole guide of her conduct with respect to her duties in every thing that is not determined by the perfect rights of another (Prelim. § 20), it belongs to each nation to judge whether her situation will admit of pacific measures, before she has recourse to arms. Now, as the voluntary law of nations ordains, that, for these reasons, we should esteem lawful whatever a nation thinks proper to do in virtue of her natural liberty (Prelim. § 21), by that same voluntary law, nations are bound to consider as lawful the conduct of that power who suddenly takes up arms in a doubtful cause, and attempts to force his enemy to come to terms, without having previously tried pacific measures. Louis XIV, was

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[30] Ibid., para 334.

[31] Ibid.

[32] Ibid. (emphasis in original).

[33] For instance, Girard 2005, or Girard et al. 1987. So the distinction between 'reasonable' and 'unreasonable' disengagement from treaty obligations drawn by De Vattel 1999, at para. 222, could be drawn to serve as scapegoating of the 'unreasonable' state.

> in the heart of the Netherlands before it was known in Spain that he laid claim to the sovereignty of a part of those rich provinces in right of the queen his wife. The king of Prussia, in 1741, published his manifesto in Silesia, at the head of sixty thousand men. Those princes might have wise and just reasons for acting thus: and this is sufficient at the tribunal of the voluntary law of nations. But a thing which that law tolerates through necessity, may be found very unjust in itself: and a prince who puts it in practice may render himself very guilty in the sight of his own conscience, and very unjust towards him whom he attacks, though he is not accountable for it to other nations, as he cannot be accused of violating the general rules which they are bound to observe towards each other. But if he abuses this liberty, he gives all nations cause to hate and suspect him; he authorizes them to confederate against him; and thus, while he thinks he is promoting his interests, he sometimes irretrievably ruins them.[34]

What Vattel portrays systematically is the inevitability of differing world views, perspectives, imaginings, which will inevitably clash and lead to trials of strength. He resorts to extremely well known episodes of recent diplomatic history, widely regarded as the most notorious examples of Machiavellian power struggles – the machinations of Louis XIV and Frederick II – to show that central to the dynamic of treaty law interpretation is a struggle to the death among nations.

This conflict of interpretations leads to war to resolve the conflict. As the outcome of the conflict rests upon strength, this is why we equate Vattel's theory of 'dispute resolution' with the usual interpretations of Hegel's 'master-slave' relationship. To decide who is 'master' and who is 'slave' is, in this sense an integral part of Vattel's doctrine of the freedom, independence and equality of states. Conflicts of treaty interpretation lead to war. War is obviously a fight to the death, so it is the victor in war who succeeds to impose his interpretation on the vanquished. In Book 3, which is devoted to the concept of War, paragraph 26 of Chapter 3 requires a definite injury to a perfect right as a precondition of a right of employing force or making war. Once again, where nations start wars on mere pretexts they will become enemies of the human race and all nations will have a right to join in a confederacy to punish them.[35] If the case is doubtful there is the usual duty to take conciliatory measures, and equally the right to use force against the one who is not conciliatory.[36]

Nonetheless, the dynamic of forceful resolution of differences of perspectives appears again, in a form related to the very foundations of Vattel's 'voluntary law'. It is Vattel's fundamental principle of respect for difference of opinion.

> It may however happen that both the contending parties are candid and sincere in their intentions; and, in a doubtful cause, it is still uncertain which side is in the right. Wherefore, since nations are equal and independent (Book II. § 36, and Prelim. §§ 18, 19), and cannot claim a right of judgment over each other, it follows, that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and until the decision of the cause. But neither does that circumstance deprive other nations of the liberty of forming their own judgment on the

[34] De Vattel 1999, para. 335.

[35] Ibid., para. 34.

[36] Ibid., para. 38.

> case, in order to determine how they are to act, and to assist that party who shall appear to have right on his side; nor does that effect of the independence of nations operate in exculpation of the author of an unjust war, who certainly incurs a high degree of guilt. But if he acts in consequence of invincible ignorance or error, the injustice of his arms is not imputable to him.[37]

It is James Brierly who has long ago remarked, along with Kooijmans, that the system of Vattel represents the breaking of all social bonds in favour of individual freedom. Brierly also identifies the problem as centrally resting in the freedom, independence and equality of states, expressed in Vattel's 'voluntary law'. Vattel makes each state the sole judge of its own actions, accountable for its observance of natural law only to its own conscience.[38] This accountability reduces natural law to 'little more than an aspiration after better relations between states'.[39] Or to borrow Kooijmans' words again, Vattel's legal regime sublimates a system of power-politics to a system of valid law.[40]

3.3 The Law of Nations of the Enlightenment as a Frame for the Free Markets of Nations

As has been seen earlier, Koskenniemi explains how historically the Voluntary Law of Nations of Vattel is on par with the liberal world view under which private vices produce the greatest public good.[41] Continuing his history of the place of international law in the Enlightenment Koskenniemi explains how the efficacy of the 'Law of Treaties' can only be understood in the context of the economic and other material relations of states. This is a bold judgment that the primary intellectual and cultural vigour of the Enlightenment rests not with law but with economics. While it does not necessarily presage gratuitously vicious behaviour by states towards one another, these will, nonetheless only act for their own advantage. Koskenniemi comments on David Hume's views about treaties, that '[i]t is only with arguments about the "advantages of treaties" that a stable and realistic sphere of the international seems to emerge. This is not a sphere of law, however, but of economics.'[42] Koskenniemi explains the context of the new natural law approach, which sought to make 'self-interest appear consistent with life in society'. He quotes the same famous remark from Adam Smith, as does Dufour, that our dinner comes not from the kindness of the butcher and brewer or the

[37] Ibid., para. 40.

[38] Brierly 1963, at 38.

[39] Ibid.

[40] Kooijmans 1964, at 87.

[41] Ibid., at 86; Koskenniemi 2011, at 73-75.

[42] Koskenniemi 2008, at 30.

baker, but from their own interest.[43] So, says Smith, we should address not their humanity but their self-love.[44] The question was still whether an impartial spectator could encourage a secondary sociability in a society of self-centred individuals.[45] What appeared to be useful for long-term happiness had to be an argument that reflected the possibilities of long-term interest. As Smith could see, the weakness of international law was that there was no legislature or judicial system to resolve disputes.[46] Therefore, as the Physiocrats and others such as Frederick II also realized increasingly in the 18th century, 'the proper language for modern *salus populi* would have to be that of political economy'.[47] Neither international law nor its treaty law maxim *pacta sunt servanda* could expect to hold out against the egotistical interest of individual states, and, anyway, these states were armed with the unlimited discretion to judge what their treaty obligations might be, which Vattel had accorded them.

Koskenniemi further explains that the first resort of *raison d'état* appeared to be mercantilism, a zero sum game of states in their struggles with one another. However, liberalism soon came up with an invisible law of economics which will reconcile conflicting interests. The abolition of import restrictions and free trade encourages the individual, as the nation, to pursue his own advantage, which, at the same time, works to the advantage of society and the world.[48] The study of one's own advantage automatically works to that of the society. Here Smith makes an important move. The political is concerned with irrational, negative passions, while the economic realm turns our passions into beneficial and calculable interests. These interests can be subjected to a universal system of rational exchanges.[49]

Where people are concerned only to fulfil their needs, with free economic activity given full reign, welfare and happiness will be produced.[50] Koskenniemi sees that the Enlightenment confidence in the peaceful global effects of free market economics has carried over into the mentality of 21st century international lawyers. This harmony, as is said 'by a very large part of professional international lawyers in the past half century, emerges from viewing the international world in terms not of politics but of economics'. This is international law as a universal commercial society. As heads of state proliferate at the UN representing increasingly insignificant political communities in the General Assembly, 'the crowd retreats to drinks in the adjoining lounge'.[51]

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[43] Ibid., at 64.
[44] Ibid.
[45] Ibid.
[46] Ibid., at 65.
[47] Ibid.
[48] Ibid., at 66.
[49] Ibid., at 67.
[50] Ibid.
[51] Ibid.

3.4 From Mandeville, Through Smith, to de Sade: The Way to the Perverse City

The single most radical element of Dufour's apparently outrageous intellectual history is to trace the link, as a matter of intellectual history, from Mandeville to Smith and then to Sade. Indeed, the starting point is a fateful remark by Pascal in his *Thoughts,* fragment 106, '[t]he grandeur of man is to have drawn from concupiscence such a beautiful order'.[52] Classical Greek and especially Christian thought was built on the pillar of reining in the passions and ensuring their permanent subordination to reason. Love of the other, ultimately of God, had to be the exclusive alternative to love of the self. For the classical La Rochefoucauld, self-love makes men idolaters of themselves and tyrants of others if fortune gives them the means.[53] Mandeville's *Fable of the Bees,* in contrast, is about the liberation of passions as the way to opulence, their control leading to misery.[54] Mandeville preaches in the *Fable:* 'Be as greedy, egoist, as wasteful for your pleasure as you can be, for, this way you will do the most for the prosperity of your nation and the happiness of your fellow citizens.'[55] It is this idea which is white-washed without acknowledgement by Adam Smith,[56] the word 'vice' replaced by 'self-love'.[57]

Dufour, explains that *homo aequalis,* the victor over *homo hierarchicus* is the product of the economic ideology from the 18th century. We leave a holistic world, transcendent, dominated in Europe by a totality represented by a divine thought[58] to which one must submit, to enter instead to a world dominated, in Smith's cosmic structure, by a play of forces resting upon a principle of attraction. The human world is organised, although humans do not know it, by a play of forces resting upon personal interest, which plays the role of attraction, comparable to Newton's law of gravity for physical beings, an organising principle as an invisible hand, a modernised divine design.[59] There is a place for discipline, but it is, in Smith's world, a discipline for the poor, the sick and the victims of whatever calamity, who should realize what the order and the perfection of the universe requires that they accept.[60] The ravages in the 'third world', especially in the Americas, still served the purpose, in Smith's eyes, of bringing the survivors the

[52] Dufour 2009.
[53] Ibid., at 112.
[54] Ibid., at 30.
[55] Ibid., at 133.
[56] Ibid., especially at 150.
[57] Ibid., at 133.
[58] Ibid., at 139.
[59] Ibid., at 143.
[60] Ibid., at 158.

fruits of European progress, industry and the arts, without which these empires could never have become civilised or cultivated.[61]

It was Augustine who realized that love of the self subordinates the common good, through an arrogant domination; that the self-love is a rival of God, requiring everything for itself and wishing to make the other submit to its interest.[62] It is precisely this realization de Sade follows in *The New Justine ch. 12.* Egoism is the first law of nature and of reason. 'We ought only to hold sacred what delights us'.[63] In *The Philosophy of the Boudoir* de Sade repeats a principle taken from Mandeville: Men are made honest through their own egotism, when they realize their happiness depends on their virtue and this is the most sure of laws among men.[64] For de Sade, relationship with the other is simply not necessary. The other is nothing but the object of my enjoyment.[65] Of course the desire of the other may resist one's own desires. So, for myself to enjoy, it is necessary that the other does not. Hence, it comes to the fact that the exaltation of my ego requires me to be a tyrant. De Sade writes: 'il n'est point d'homme qui ne veuille être despote quand il bande';[66] 'l'idée de voir un autre jouir comme lui le ramène à une sorte d'égalité quit nuit aux attraits indicibles que fait éprouver le despotisme alors'.[67] Dufour concludes from this analysis that 'laissez faire' is to allow the construction of a demonic enterprise, essentially pornographic.[68]

Contrasting two texts of Smith and de Sade, Dufour italicizes the phrases of Smith – give me that of which I have need and you will have of me what you need –, and de Sade – loan to me for a moment the part of your body which can satisfy me and enjoy yourself that part of me which is agreeable to you, if you please.[69] But how free will the exchange really be? Dufour notes how de Sade helps us to question the ambivalence of the dimension of consent in exchange. Might there not be a secret clause in the maxim of exchange? The true world of self-love, in perversion, takes what it wants. In de Sade's words '[j]e ne te demande rien…je prends et je ne vois pas que de ce que j'use d'un droit sur toi, il doive résulter qu'il me faille abstenir d'en exiger un second'.[70] Dufour concludes by explaining that the essence of this coercion is that one aims to undo the other, to twist her body into parts, by dissecting and singling out her particular sexually potent organs, to disorganize her.[71] The depersonalizing focus on particular aspects of the sexual anatomy of the other

[61] Ibid., at 152.
[62] Ibid., at 60, 165.
[63] Ibid., at 169.
[64] Ibid., at 170.
[65] Ibid., at 172.
[66] Ibid., at 173.
[67] Ibid., at 174.
[68] Ibid.
[69] Ibid., at 178.
[70] Ibid., at 179.
[71] Ibid., at 185.

such as penis, anus, mouth, vagina, or whatever means which relates only with the individual organs rather than the body, and thereby denies the body any possibility of personality or subjectivity.[72]

3.5 An Illustration of a Sadean Contract from a Hyper-Best Selling Woman's Novel

Literatures represent a vision of the world. A well-received novel indicates recognition of the author's vision of the world. Every individual has an experience, which has little relevance with regard to what the state authorities declare openly. This experience is the way to relate oneself to the materials of a culture, 'something passed over in silence'.[73] Literature is a good way to understand how law is accepted by a flesh and blood person. If a popular work does not represent the *status quo*, then it may successfully transform the mind and imagination of the reader. In both cases, *Fifty Shades of Grey* is worth examining.[74]

In Hegel's well known 'Master-Slave' Paradigm,[75] the process to obtain the certainty of self is achieved in two stages. Self-consciousness can achieve its satisfaction only in another self-consciousness. As Lloyd explains, self- consciousness is certain of itself only by overcoming the other's self-consciousness, cancelling its otherness.[76] He has to be certain in his own self-consciousness and then enter into the struggle to cancel self-consciousness of the other in order to satisfy himself that his consciousness is the objective truth. In the novel, Grey is sure of himself which he hides from the public and even family, thereby blocking any relationship of mutual dependence. He further assures himself by drawing Anastasia gradually into an ever darker sexual situation, culminating in her humiliation, a several times repeated spanking as 'punishment' for her 'defiance'. Anastasia tries to resist Grey's 'biased, kinky as hell, distorted worldview regarding sex'.[77]

What makes the novel so typical from the perspective of capitalist, liberal society is that the whole novel hovers around Grey's offer of a contract and the invitation of Anastasia to accept it. There is even an ancillary non-disclosure agreement as a pre-condition to the beginning of relations. To make their struggle more interesting from a legal perspective is the involvement of a contract with clear descriptions of what shall be done by the dominant and submissive. Contract as a consensual agreement seems to be incompatible with the whole idea of master

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[72] Ibid.

[73] Carty 2000, at 168.

[74] James 2012.

[75] See, for instance, the famously intelligible Pinkard. Pinkard 1996, at 53-63.

[76] Lloyd 1984, at 89.

[77] James 2012, at 132.

and slave relation. Two parties in a contractual relationship are supposed to be equal and an agreement is not valid unless both parties put their signature on it.

However, the underlying phallogocentric logic of the draft contract determines that Anastasia has to respond to all the definitions provided by Grey in what is for him a standard contract. Anastasia is his sixteenth submissive. The definitions have to do with what Dufour recognizes as a pattern of 'disorganizing' Anastasia's personality: oral sex, anal sex, vaginal and anal fisting, paddling, spanking and especially gagging and blind folding.[78] The seemingly equal idea of a contract is always a matter of what Grey will do to Anastasia. There are no clauses about what Anastasia may do to Grey. This is an archetypal 'unequal treaty'. One can only wonder how such terms could be acceptable in a contract where there is no measure of duress or undue influence. In any case it is a seemingly equal contract where coercion takes place.

Anastasia adores the typical modern successful male, a top business executive with unlimited financial, intellectual and physical power. She wants a normal relationship with a man like Christian Grey so much that she is unable to decline the twisted offer. She is trapped in the dilemma that she has to cancel herself to fit into the lifestyle and sexual habits of Grey. Otherwise she will lose her knight in shining armour. She is presented with a choice to consent or not to the contract with basic rules set out by Grey when on her side she wants hearts and flowers. She wants love and intimacy, in the words of Drucilla Cornell.[79] Is there any possibility of absolute insistence of interpretation of contract on Anastasia's side? It seems not. The magical attractiveness of Grey and his weapon of sex[80] have pushed her to the corner with no real choice. At one point, Anastasia's roommate Kate asks her, 'What's wrong? What did that creepy good-looking bastard do?' She replies 'Oh, Kate, nothing I didn't want him to.' Anastasia has not realized that she is gradually on the way to objectification by Grey.

Yet, from the very beginning, at the time of discussion of the non-disclosure contract she is already lost to him. She says 'Christian, what you fail to understand is that I wouldn't talk about us to anyone anyway. So it is immaterial whether I sign an agreement'.[81] On the contrary, she believes the subjugation is her own choice and not the coercion from powerful, attractive, domineering Grey. At one point, during a mealtime conversation where she agrees with him that she wants him, she thinks to herself, 'How can he seduce me – solely with his voice? I am panting already – my heated blood running through my veins, my nerves tingling.'[82] Step by step, Grey acquires her acquiescence to fulfill his own desires, at the same time, making Anastasia believe that pleasure is intended to be mutual. When she asks '"What do I get out of this?" He shrugs… "Me" he says simply.

[78] Ibid., at 164-175.

[79] Cornell 1993, at 102.

[80] James 2012, at 201 and 224.

[81] Ibid., at 96.

[82] Ibid., at 224.

"Oh my", she thinks to herself'.[83] Therefore, Anastasia blindly accepts that the contract is mutual without noticing that she has no say to the contents.

To be fair to Grey, and in the sense of wanting each other, Grey and Anastasia are in a mutual relationship. The clash of desires is made obvious by Grey's insistence on the details of the contract and Anastasia's inclination for a normal date. In other words, their desires for each other are on differing terms. And different interpretation is a constant source of instability in the relationship, with Anastasia frequently running away from Grey.[84] She knows she can always escape. Anastasia is aware that the contract of dominant/submissive is legally unenforceable. Grey's explanation is that the written contract represents a consensual arrangement. In any case, he will not go to court for such a contract. The purpose is to show that he will not coerce anything on Anastasia if she does not consent. This explanation is in accordance with what Vattel would have agreed on in his law of treaties that two parties voluntarily enter into a contractual relationship.

Anastasia is in such an unsecured and dangerous situation that she has no strength to bargain as an equal party to the contract, she is doomed to lose whatever she decides. She finally acquiesces to Grey's proposal. Her subconscious immediately screams at her: 'holy shit, I've just agreed to be his sub'.[85] She is not a natural submissive, yet she acquiesces to what Grey desires from her and consequently becomes what she does not wish to be.

At one point, Anastasia protests at the punishment and argues that she has not signed the contract yet. Grey's response is that Anastasia has no choice and he will hold her against her will if necessary. He does not hide his reason for his behaviour, 'I want you to behave in a particular way, and if you don't, I shall punish you, and you will learn to behave the way I desire.'[86]

Clearly, the above declaration is the essence that lies behind the contract. Far from being consensual, the powerful and advantageous party's viewpoint prevails with the extinction on the other. When Anastasia tries to return the first edition of *Tess of d'Urbervilles*, she argues that she was not a submissive yet when Grey bought the present.[87] However, to Grey, there is no room for different interpretations to the contract. Anastasia has agreed now and that is the end of discussion.

Anastasia is unsatisfied with the unequal relationship they have. She is punished for rolling her eyes, so when she sees Grey roll his eyes twice at the family dinner, she could not help but wonder, 'Why can he do that when I can't? I want to roll my eyes back at him, but I do not dare, not after his threat in the boathouse.' Here is the plain and cruel reality. The supposed equal parties are not equal in face of power struggles. Anastasia is trapped. She does not want to lose him but she also

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[83] Ibid., at 101.

[84] Ibid., at 229.

[85] Ibid., at 245.

[86] Ibid., at 287.

[87] Ibid., at 251.

would just like more, more affection, more playful Christian, more … love.[88] Unfortunately, she does not have the right to interpret their contract implied by her acquiescence.

At the end of the book, Anastasia finally realizes that Grey will never accept her interpretation of their relationship. She has glimpsed the extent of his depravity and he is not capable of love – of giving or receiving love. 'My worst fears have been realized. And strangely, it's liberating.'[89] The worst fears have been of losing Grey. However, losing Grey means getting out of the repressive contractual relationship. Therefore, Anastasia feels a strange liberation from her worst fears. She returns all the material compensations Grey has given her, and admits that she only accepts them under sufferance and she does not want them anymore.

At the end, the quotations from *Tess of the d'Urbervilles* become true. Rules and standards are set down by the dominant, and the submissive is only the victim. Contractual terms and conditions cannot guarantee an equal status. Anastasia compares herself with Tess and feels similar pain for the relation to the man she submits to. 'Why didn't you tell me there was danger? Why didn't you warn me? Ladies know what to guard against, because they read novels that tell them of these tricks…' (Tess says to her mother after Alec d'Urberville has had his wicked way with her.)[90] 'I agree to the conditions, Angel; because you know best what my punishment ought to be; only-only-don't make it more than I can bear.'[91]

3.6 Feminist Approach to the Master-Slave Relation, Also in the Light of *Fifty Shades of Grey*

Drucilla Cornell argues that writings about woman have significance for the development for the way we think about 'heterosexual' love. She believes the writing of Nietzsche reveals that Woman stands in his play as the very figure of death and sensuality.[92] Nietzsche's metaphor of Woman as the figure of death does not ultimately celebrate her difference; rather, it risks her obliteration.[93] By discussing the work of male philosophers in the last century and the female character in their work, Cornell tries to argue that these works unfold the masculine desire to dominate in a relationship. The magnificent heroine is abandoned in Nietzsche's work because her self-consciousness is unable to be cancelled. She represents a threat to the certainty of the male subject.[94] Cornell is criticizing the male fantasy

[88] Ibid., at 255.
[89] Ibid., at 510.
[90] Ibid., at 54.
[91] Ibid., at 249.
[92] Cornell 1993, at 45.
[93] Ibid., at 50.
[94] Ibid., at 52.

for contributing to the suppression of woman and bringing Woman's consciousness to extinction. Feminists have been fighting for the independence of woman for ages. And women are doing extremely well in every aspect around the world. However, this recent successful fiction indicates a retreat of woman, being a return to subjugation again and an avoidance of responsibility. Women are going back to the time of suppression under the disguise of equal bargain. It is not surprising that the success of this erotic fiction attracts many criticisms from independent women. According to psychotherapist Estela Welldon, author of the books *Mother, Madonna, Whore, the Idealization and Denigration of Motherhood*, and *Sadomasochism*, '[i]t is as if women are now trying to apologize for the success they have had in a man's world.'[95]

The metaphor of Woman in this fiction goes back to the idea of Woman that Simone de Beauvoir identified in her time. 'Woman represents only the negative, defined by limiting criteria, without reciprocity.' The only absolute human type is the masculine.[96] De Beauvoir follows Hegel in holding that one consciousness will find a fundamental hostility towards another consciousness. Usually the two will struggle for dominance. The subject sets him up as the essential as opposed to the other, the inessential. Thus, the essential becomes the subject and the inessential becomes the object. An historical event may result in the subjugation of the weaker by the stronger. But 'the dependency of women towards men was not the result of a historical event or a social change – it was not something that *occurred*.'[97] The anatomy and physiology of woman which caused women's subjugation is not a historical event like the appearance of the proletariat. De Beauvoir believes that women themselves are to blame for failing to bring any change to the rigid system. 'They have gained only what men have been willing to grant; they have taken nothing, they have only received.'[98]

Anastasia in *Fifty Shades of Grey* is identical with what de Beauvoir describes above. She seems to make many progresses out of the contract and Grey enjoys several first-time experiences with her, for example, bringing her on his helicopter, Charlie Tango. But none of the experiences is what he objects to. In contrast, Anastasia accepts things she does not want and becomes more and more confused and lost. Grey-the-sovereign provides Anastasia-the-liege with material protection and undertakes the moral justification of her existence as his sub. Anastasia tries hard to resist the objectification as a girl living in the twenty first century. However, gradually she gets used to the benefit and the protection Grey provides. Contrary to the improvement brought about by many feminist advocates, Anastasia kneels down and becomes the inessential without a meaningful struggle. The book's success rings an alarm to feminist activity that women may deny a claim to

[95] http://www.guardian.co.uk/books/2012/jun/30/fifty-shades-grey-women-sadomasochism. Accessed 26 July 2012.

[96] De Beauvoir 1953, at xliv.

[97] Ibid., at xlvii.

[98] Ibid., at xlviii.

acquire the status of subject. In the words of de Beauvoir, that women are again very well pleased with their role as the Other.[99]

De Beauvoir is strict and categorical with conditions imposed on a subject. She considers it to be a moral fault if an independent subject gives her consent to conditions on her activity given by another subject. A woman without absolute transcendence will always be objectified and lose her battle against the male subject who tries to stabilize her in the form of immanence. In other words, the only way for woman to get rid of oppression and frustration is to be the essential and sovereign. She says, '[t]his means that I am interested in the fortunes of the individual as defined not in terms of happiness but in terms of liberty.'[100] Even in love, de Beauvoir argues, a woman can only love in liberty as man does if she believes in her equality and adopts the same decisiveness.[101] However, as a result, the woman who adopts the same decisiveness and chooses to reason in accordance with masculine techniques will inevitably repudiate what she has as 'different'.[102] De Beauvoir argues that equality between genders has to be absolute in accordance with the masculine value of freedom. Equal with difference is another form of condition of inequality which de Beauvoir would not accept. Therefore, for women to be really equal with men there has to be a resolute all-around cut-off from the subjugated women of the past and an absolute acceptance of the masculine values by women. In Anastasia's case, she is not to escape at last. She has to adopt similar sovereign attitudes in the relationship and fight for her equality.

As Lloyd puts it, de Beauvoir's theory of woman objectified as other is drawn from the Sartrean articulation of the struggle for dominance between lookers and looked-at.[103] This struggle for the status of looker is uncompromising. It is a fierce combat with a demand for freedom. As Cornell quotes Mackinnon, 'I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest.'[104] Mackinnon's position is that women must give up the distorted desire to be the inessential part of a male–female relationship. However, for Cornell, if in this endless struggle between genders, one is either a master or a slave, the conflict and hierarchy will not disappear even with a reversal of power putting women in the master position. Women's victory will not put an end to the fierce combat. Cornell notes the remarks by Bell Hooks that 'the very rhetoric of freedom has all too often reflected the desire to achieve the imagined position of phallic power.'[105] With the unquestionable masculine value of freedom,

[99] Ibid., at l.
[100] Ibid., at lix.
[101] Ibid., at 731.
[102] Ibid., at 743.
[103] Lloyd 1984, at 96.
[104] Cornell 1993, at 102.
[105] Ibid., at 101.

we are left with 'politics of revenge and lives of desolation, which make a mockery of the very concept of freedom.'[106]

3.7 China and Britain in the 19th Century: The Continuing Ghosts of Unequal Treaties

The West's obsessive treaty making with Qing China (running to hundreds), shows both its recognition of China as a state and its desire to colonise it at the same time. This ambiguity with the relationship was never resolved as Ruskola shows in his article *Raping Like a State*. Of the many possible interpretations of these events his is the one which corresponds most closely to the analysis of Vattel which we have based on Dufour.[107] The danger of reading social and political relationships in terms of equality could not be clearer than in Henry Wheaton's development of Vattel in the 1840s. The key international law figure in play in European and American expansion in China was Henry Wheaton, the third edition of whose *Elements of International Law,* appeared shortly after the First Opium War in 1845, three years before he died. This work was the most important Anglo-Saxon, not merely American, textbook on international law in the 19th century and it drew directly on Vattel.[108] Wheaton showed just how malleable Vattel could be when he, Wheaton, commented on the 'recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America' in the following terms. '[T]he former has been compelled to abandon its inveterate anti commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.'[109] The Chinese had to be taught equality, and as Ruskola shows, the West never seemed to feel that China had been taught enough.

Ruskola's argument is that the very idea of trade was described by merchants and politicians at the time as intercourse. The leading US figure W.A.P. Martin, the translator of Wheaton's *Elements of International Law,* said he wanted to 'throw open the portals for unrestricted intercourse' so as to 'unlock the treasures of the interior'.[110] Ruskola refers frequently to the Western view of China as having an effete political character, giving, in his view, more than a hint of a metaphor of sexual violence to the frequent Western use of language that 'commercial intercourse' was 'forced' on China.[111] As a consequence, given the nature

[106] Ibid., at 132.

[107] Ruskola 2010.

[108] Carty 1986, at 92 and references at 105.

[109] Wheaton 1866, at 22. An additional footnote by the editor Dana points to how the book was already translated into Chinese by a commission from the Chinese Minister of Foreign Affairs.

[110] Ruskola 2010, at 1511-1512.

[111] Ibid.

of this intercourse, China gradually became, to use Dufour's expression, de-organized. As Ruskola puts it: 'In short the problem of exchange was ultimately solved only by producing desire with drugs.'[112] As Marx remarked, opium so harmed China's economic sovereignty that it obtained 'sovereignty over the Chinese'.[113]

In additional support of Marx's language there is a passage in the novel by Ishiguro, *When We Were Orphans.* The novel concerns the strange disappearance of the parents of the chief character in the novel. The father had worked for a British merchant company in China in the 1920s heavily engaged in the opium trade. The mother had tried to oppose the trade of her husband, who abandoned the family and died shortly afterwards. The mother's resistance to the Opium trading of her husband's company led her to fall foul of a Chinese warlord who turned her into a sex slave and drove her insane. A confident of the family, implicated in her kidnapping, tried to explain the impossibility of having any constructive, reformist impact on British commercial policies at the time, in these terms:

> For a long time our strategy was rather naïve. We thought we could shame these companies into giving up their opium profits. We wrote letters, presented them with evidence showing the damage opium was causing to the Chinese people. Yes you may laugh, but we thought we were dealing with fellow-Christians. Well eventually we saw that we were getting nowhere. We discovered that these people, they not only liked the profits very much, they actually *wanted* the Chinese to be useless. They liked them to be in chaos, drug-addicted, unable to govern themselves properly. That way the country could be run virtually like a colony, but with none of the usual obligations …[114]

In addition, Ruskola argues that the British and other Europeans saw the issue of 'lack of respect' or exchange of insults, with charged erotic overtones of domination and subordination. The kowtow in particular was regarded as a 'violation' of the dignity of Western envoys.[115] Ruskola points to a long history of Western association of the Chinese mandarin class' purely scholarly non-military character as a mark of effeminacy, shading into a proclivity for sodomy. The Western horror of being subjected to the kowtow was associated with anxiety about supposedly widespread sodomy among Chinese. The ritual kowtow was 'a physical act at the core of imperial sovereignty that came to be regarded as simply beyond the pale of European norms of dignity… as the symbol of "total submission" as performed by a subject "on all fours like an animal"'.[116] Ruskola compares the Western reaction to this ritual as an hysteria reproducing the logic of homosexual panic: 'The proper position for honorable men was to face each other

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[112] Ibid.

[113] Ibid. See Ruskola's references at his note 145.

[114] Ishiguro 2000, at 288.

[115] Ruskola 2010, at 1501.

[116] Ibid., at 1517-1518. Ruskola's quotations are from Wittfogel 1957, at 152.

standing erect, with swords on their sides, not laying prostrate on the ground waiting to be sodomized politically.'[117]

But Ruskola argues further that in the end China's unstable status was resembling the queer status of the coolie-indentured male laborer 'neither sovereign nor colonized, neither civilized nor savage'.[118] While trade was by its nature consensual intercourse, the problem was that of the Chinese desire. In Ruskola's words,[119] '[w]hile the West's appetite was insatiable when it came to Chinese tea, porcelain and silk, the Chinese had little interest in the manufactured goods that Western merchants offered to them.'[120] The response of a British diplomat, Horatio Lay is that China must 'however much against her will … comply with the usages of Western nations, intercourse with whom she is manifestly too weak, physically, to decline.'[121] China had to be 'opened'. True economic liberalism, notes Ruskola, 'requires consent that is given voluntarily. Once obtained, consent in turn justifies anything, or as Hobbes put it, 'Nothing done to a man by his own consent can be injury'.[122] Yet, there remained for the West a tantalizing ambiguity about what it had achieved in relation to China. Ruskola says that 'the problem with the treaties that China had signed after the Opium Wars was that they included "nothing to demonstrate to the empire that it must come to its knees".'[123]

3.8 Conclusion: Contemporary Western Reflections on Unequal Treaties: And Speculations About the Public Mood in China

It has been the aim of this chapter to show just how destructive for any concept of communal global legal life the over-celebrated Enlightenment has been, with its dubious marriage of legal and economic *laissez faire.* We agree with Kooijmans' appeal to the Christian ontology of creation as it applies to international community. There is an objective order of justice whereby all God's creatures, nations and individuals have their appropriate space which must be respected in accordance with what he calls material directives or general principles of law. Individual states and the world community all have their spheres and while they depend on one another, it is never appropriate for any to absorb or, to be more

[117] Ibid., at 1518.
[118] Ibid., at 1504.
[119] Ibid., at 1505.
[120] Ibid., at 1505-1506.
[121] Ibid., at 1507.
[122] Ibid., at 1509. Ruskola quotes Hobbes 1651, at 112.
[123] Ruskola 2010, at 1519. See Morse and MacNair 1931, at 132-133.

precise, consume or eat up the other. It is clear how this created order restrains unbridled desire and unrestrained pursuit of interests at the expense of others.[124]

However, it is not surprising, as has already been shown elsewhere,[125] that Western international lawyers, still attached to the Vattelian principles of the Enlightenment, are still 'confused' or 'ambivalent' about how to describe the notion of unequal treaty. In an exhaustive consideration of the question, Mathew Craven quotes French (Reuter) and Swiss (Calfisch) authors to say, precisely now, that the doctrine of unequal treaties serves only as a 'political' argument possessing no legal status at all. De Lisle says, with respect to China, that the doctrine of unequal treaties was a self-interested position for a regime, which was a newcomer to the international legal order, dissatisfied with its content but too weak to change its rules. The concept, concludes Craven, 'seems to have been consigned to the dustbin of "redundant ideas".'[126]

In such a context of apparently obsessively forgotten ideas Craven sets himself the task of offering a speculative narrative that seeks to interrogate why the concept (or if one prefers, the phenomenon) has been so completely denied a place in what Craven calls our current imaginings of international law.[127]

One legal conclusion Craven reaches is that the Chinese inability to recognize or understand the notion of diplomatic or juridical equality made the introduction of unequal treaties necessary, from the British perspective.[128] Still, the European powers insistence upon formal equality was, Craven himself readily accepts, comprehensively undermined, presumably in moral terms, by the presence of military forces that gave the lie to the non-hierarchical relations they espoused.[129] Craven identifies that, in conceptual terms, treaties do have a bilateral character depending on the autonomy of will of the parties.[130] This is fundamental to Western, liberal, post Vattelian legal logic. Craven separates the question of coercion from the law of treaties as such and place it in a separate category, the law on the use of force. One then has to identify the question of unequal treaties as tied to the prior question whether use of coercion is regarded as unlawful.[131] Craven notes immediately the fundamental problem of the thinning of any idea of authority for which Kooijmans rightly holds Vattel responsible. Says, Craven, there is a dependence here upon the self-evidence nature of the legal assessment by the conflicting parties, i.e. the possibility of a conflict of interpretation of the events. For instance, the Treaty of Nanking might be regarded as coerced and unequal by the Chinese, but it would still be expected that the British would speak

[124] Kooijmans 1964, at 196-210.

[125] The argument has already been made in Carty 2011b, at 146-149.

[126] Craven 2005, at 337.

[127] Ibid. See also Carty 2011b, at 146.

[128] Ibid., at 355.

[129] Ibid., at 356.

[130] Ibid., at 366-367.

[131] Ibid., at 373.

about their recourse to arms as having been in self-defence.[132] To the extent that any use of coercion is likely to be accompanied by some justificatory discourse those disputing the validity of an agreement would be constantly fighting a rear-guard action.[133]

Craven is returning to the structural foundations of Vattel's *voluntary law*, the absolute autonomy of interpretation of states, including the prerogative of Britain to treat the Opium Wars as wars of self-defence if it pleases. There is no impartial third party to adjudicate claims. Craven argues, with Sir Ian Sinclair, that the threat or use of force does not strictly speaking vitiate consent to a treaty. It is a commission of a delict, if it is unlawful. Therefore Sinclair argues that consent needs to be stripped off its association with a factual absence of coercion. In the summary of Craven, consent is then less an expression of 'autonomous will' and more the formal mode of acceptance of an instrument – signified by signature, ratification or accession 'in which any psycho-sociology of "agreement" was beyond the domain of law and in which the presence or absence of duress was largely irrelevant.'[134]

International law, in this liberal tradition, which has its starting point with Vattel's *voluntary law,* remains fundamentally confused about the nature of consent and the role of autonomy in the face of conflicting desires and wills. Do notions of autonomy or absence of autonomy, duress or its absence have any common or distinctive referents? Craven's own conclusion appears primarily to wish to allow lawyers a way to escape these difficulties created for them by market liberalism.

> Lawyers could rely upon a presumption of validity as a way of insulating themselves against the possibility that consent might all too often be found defective; it was for the politicians to devise ways of ensuring that untoward influence is not exercised at the moment of negotiation.[135]

In other words, post-Vattel, the very idea of consent, in whatever formal or logical sense, disappears among the conflicting desires and consequently clashing perspectives of persons wishing to expand their own spheres of being while constantly pressurizing others to absorb them. The micro-study of gender relations, at present possibly the most sensitive area of equality studies, in *Fifty Shades of Grey,* has illustrated the acute difficulty of locating any transcendental concept of will or consent in the entangled relations of Christian and Anastasia. It is therefore hardly surprising that for Craven the very idea of consent as a separate element of 'autonomous will' in the psycho sociology of agreement has disappeared. Christian possesses Anastasia without a formal contract, while remaining outside legal definitions of rape.

One might try to continue these reflections with some speculation upon how China may be expected to react in the future to its historical experiences of

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[132] Ibid., at 373.

[133] Ibid., at 373.

[134] Ibid., at 374.

[135] Ibid., at 375.

unequal contracts/treaties. Here the analysis of *Treaties, Unequal*, which Anne Peters has done, is also very helpful.[136] She accepts the same conceptual framework as Craven, beginning with the remarks that 'the prejoritative term "unequal treaty" (or more polemical ones such as "coercive", "predatory" or "enslaving" treaties) refers …to the treaties between European powers, the United States of America…and…mainly Asian States'.[137] She comments that '[c]urrent international law as it stands does not accept a special legal category of unequal treaties with special legal effects.'[138] Peters' very thorough study shows the predominant experience of China in the debate. The modern notion of unequal treaties was developed by the Chinese in the 1920s and overwhelmingly scholarship has been concerned with the Chinese experience.[139]

Peters recognizes that the issue of unequal treaties has actually become part of Chinese identity. The issue

> became a focal point for nascent nationalism and was a driving force for institutional and legal reform. Notably in China, the unequal treaties also functioned as a scapegoat for interior problems and backwardness. On the other hand their abrogation became one of the aims of the Chinese revolution of 1911 and was one of the three "people's principles" besides democracy and socialism. The treaty rhetoric has been integrated into the common heritage of the Chinese.[140]

Peters traces the changing Chinese consciousness through the 19th century. To begin with Asian countries were not concerned with extra-territoriality or customs regimes, merely wishing to retain control over certain cities and prevent foreign intrusion. This was because they lacked the conceptual understanding of legal identity necessary to object. 'Only later, the standard reproach of the non-Western parties emerged that the special privileges granted by the treaties significantly aggravated war-lordism and contributed to, if not caused, instability and governance problems in the host States.'[141] Nonetheless, Peters claims that these 'changes in attitudes and subjective assessments' did not warrant any changes in legal obligations, for instance as constituting a supposed element of changed circumstances.[142]

Her characterization of the general system of international law of treaties is remarkable in its brutality and confirms very much the contempt which Dufour heaps on the whole of Western social culture attributable to the triad of Mandeville, Adam Smith and the Marquis de Sade.[143] She begins her analysis of contemporary

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[136] Peters 2007.

[137] Ibid, para. 1.

[138] Ibid, para. 2.

[139] Ibid., paras. 4 and 7.

[140] Ibid., para. 66.

[141] Ibid., para. 25.

[142] Ibid., para. 57.

[143] The word 'triad' signifies not simply triangularity but also to the underground criminal gangs that operate in Chinese communities in Hong Kong and other parts of South East Asia.

unequal treaties, with question mark, with the words: '[r]esort to economic and political pressure exploiting the extreme power disparities is a pervasive feature of inter-State relations. The result is treaties which are in procedural or substantive terms unbalanced'.[144] Peters gives a very comprehensive picture of unequal treaties usually connected with the United States, concerning its military bases and its opposition to the International Criminal Court, as well. Peters correctly identifies the legal situation as one going to the foundational structure of international law. So she says, in language which would make Christian Grey smile, 'the freedom of the will of States is as yet no requirement of the validity of international treaties, mostly because an international institution which could effectively secure the genuine voluntariness of consent is lacking'.[145]

Peters appears to argue that this is an anomaly of international society which lacks the sense of community of national society, with its more developed domestic contract law.[146] However, her conceptual confusion really goes to the very absence of any conceptual logic or coherence in the post-Enlightenment concept of autonomous will, as also with Craven's vanishing of this element from what he calls the 'psycho-sociology of agreement'. So Peters says: 'The concept of a treaty is premised on the concept of contractual freedom (or in the inter-State context: sovereignty). By upholding unequal or otherwise unfair treaties, international law accepts the imbalances in social and political power that are reflected in international treaties.'[147] How can Peters continue to use the word 'treaties' at the end of the last sentence? The reason is that the whole idea of 'unequal' is itself unconvincing to her. So she continues: 'The concept of unequal treaties is extremely vague. Both the prerequisites and the legal consequences of the inequality of a treaty are unclear. Which types of power or influence are relevant? How would they be measured? At what point would the inequalities in bargaining power and in the contents of the treaty be so intolerable as to flaw a treaty?'[148] One can imagine Mandeville, Smith, de Sade laughing at the very idea of an international law of treaties. If one is to call for a global, compulsory system of adjudication, as Peters does – an impossible demand – one might as well simply accept, as Dufour insists, that we are now in a jungle which it is only obfuscating to characterize as legal.

The feminist theoretical reflections on the novel, *Fifty Shades of Grey* point to a morally desolate adoption of 'masculine'; standards to cope with contemporary society. This is merely a signal for reliance on one's own strength, without pathetic appeals to equity, fairness, compassion or any other emotion that might indicate mutual respect or empathy. The feminism of de Beauvoir and MacKinnon is one of combativeness, of grinding down the cult of Christian Grey, wherever its shows its brutish face. There is a parallel in Chinese debates about how to confront Western

144 Peters 2007, para. 60.
145 Ibid., para. 71.
146 Ibid, paras.71-73.
147 Ibid, para. 73.
148 Ibid, para. 75.

international law since the late 19th century. It is a reference to the so-called self-strengthening movement. This was premised on the idea that there is no ethical content whatsoever to Western international law or civilization and the only hope for China was a simple increase in its material strength.[149] It is arguable that this ethos of self-strengthening is the fundamental driving force of contemporary China.

In an important recent survey of contemporary Chinese thought about China's place in world society, Zhu Liqun offers a sophisticated account of China's peaceful rise, in terms of a Confucian style civilization.[150] Zhu is aware of the tradition of nationalist historiography which would call for a settling of scores. She addresses this question directly:

> Before China's adoption of the reform and opening up policy, it had a revolutionary relationship to the international system. Its policy was aimed at overthrowing the old world order and constructing a new one. By integrating itself into the international marketplace and international society through its reform and opening up policy, it has gradually changed into an insider of the international system, become a *status quo* state and thus no longer seeks to overthrow the current international system.[151]

While this vision may be taken at face value as sincerely held, both by Chinese intellectuals and by the government, the analysis of this chapter would point in almost the opposite direction. Without having to look backwards, China will inevitably become, to employ the language of Simone de Beauvoir and Catherine Mackinnon, the 'Master' and the West, Europe and America, 'the Slave'. This is precisely the implication of China becoming the insider in the international market, which can only function with domination and subjugation, with winners and losers. China's export drive to Europe and America is fuelled by Chinese credit to these markets and by outposting of US and European businesses to China. Of course there is a dynamic in this relationship which makes the 'Master' also dependent on the 'Slave'. This is only to highlight the profoundly destructive character of post-Enlightenment human relations, following the triad highlighted by Dufour, and only humbly imitated by Vattel. The point is that the absence of any inbuilt ethical restraints to this now global civilization can only intensify its inherent instability.

That is one context in which to be troubled by the constant Western carping at lack of good governance in China, not to mention the China threat, supposedly attributable to the scape-goating domestic policies of the Chinese regime, of which the rhetoric of unequal treaties and one hundred years of humiliation are a part. Indeed, the recent notorious collective volume of Chinese opinion, under the title *China Is Unhappy,* gives expression to precisely the same spirit of revenge as can

[149] On the debates around social Darwinism among turn of the century Chinese intellectuals see in particular Svarerud 2007, especially at 190–230.

[150] Zhu 2010.

[151] Ibid., at 39.

be found in the feminism, which takes on the imitation of the masculine. One of the authors, Wang Xiaodong, responded to the interruption of the Olympic Torch procession through France with the following menace:

> Now that the balance of power between China and the West has changed, the time when we have to please you unilaterally is gone. In the future, when our strength further grows, if you do not please us, we will beat you.[152]

References

Brierly JL (1963) The Law of Nations, 6th edn. Sir Humphrey Waldock. Clarendon Press, Oxford
Carty A (1986) The Decay of International Law. Manchester University Press, Manchester
Carty A (2000) The law and literature debate in Britain and the United States. Slavia Occidentalis 57:167–175
Carty A (2011a) Vattel's natural liberty of conscience of nations in a new age of belief and faith. In: Chetail D, Haggenmacher P (eds) Vattel's International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe siècle, Brill, Martinus Nijhoff Publishers, Leiden; Boston, pp 189–210
Carty A (2011b) International law and the spirit of anti-colonialism: Europe fights back, Review article of Mathew Craven, The decolonization of international law, 2009. Mod Law Rev 74:135–149
Cornell D (1993) Transformation: recollective imagination and sexual difference. Routledge, London
Craven M (2005) What happened to unequal ureaties? The continuities of empire. Nordic J Int Law 74:335–382
de Beauvoir S (1953) The second sex (trans: Parshley HM (ed)). Alfred A. Knopf, New York
de Vattel E (1999) The Law of Nations. New edition by Chitty J, with additional notes and references by Ingraham ED. T & JW Johnston & Co. Law Publishers, Philadelphia. http://www.constitution.org/vattel/vattel.htm. Accessed 19 November 2012
Dufour D-R (2009) La cité perverse. Denoël, Paris
James EL (2012) Fifty shades of grey. Arrow Books, London
Girard R (2005) Violence and the sacred. Continuum International Publishing Group, New York/London
Girard R, Bann S, Metteer M (1987) Things which have been hidden since the beginning of the world. Stanford University Press, Stanford
Hobbes T (1651) The Leviathan. In: Martinich AP (ed) Broadview Editions Series 2005. Broadview Press, Toronto
Ishiguro K (2000) When we were orphans. Faber and Faber, London
Kooijmans PH (1964) The doctrine of the Legal Equality of States. A.W. Sijthoff, Leiden
Koskenniemi M (2008) The advantage of treaties: international law in the enlightenment. Edinb Law Rev 13:27–56
Koskenniemi M (2011) 'International community' From Dante to Vattel. In: Chetail D, Haggenmacher P (eds) Vattel's international law in a XXIst Century Persepective, Le droit international de Vattel vu du XXIe siècle, Brill. Martinus Nijhoff Publishers, Leiden, pp 51–76
Lloyd G (1984) The man of reason, "male" and "female" in western philosophy. Methuen, London
Min A (2007) The last empress. Bloomsbury Publishing, London

[152] Song et al. 2009, at 41. (our translation)

Morse HB, MacNair HF (1931) Far eastern international relations. Houghton Mifflin, Boston
Peters A (2007) Treaties, unequal. Max Planck Encyclopdia of Public International Law. http://www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e1494.pdf?stylesheet=EPIL-display-full.xsl. Accessed 16 January 2013
Pinkard T (1996) Hegel's phenomenology. The sociality of reason. Cambridge University Press, Cambridge
Ruskola T (2010) Raping like a state. UCLA Law Rev 57:1477–1536
Song X, Wang X, Huang J, Song Q, Liu Y (2009) Zhong Guo Bu Gao Xing (China is unhappy). Zhong Hua Shu Ju, Hong Kong
Svarerud R (2007) International law as world order in late imperial China, Translation, Reception and Discourse, 1847–1911. Brill, Leiden
Wheaton H (1866) Elements of international law, 8th edn (edited with notes by Dana RH). Sampson Low and Son, London
Wittfogel KA (1957) Oriental Despotism. A comparative study of total power. Yale University Press, New Haven
Zhu L (2010) China's foreign policy debates. Chaillot Papers. European Union, Institute for Security Studies, Paris

Chapter 4
Great Powers and Outlaw States *Redux*

Gerry Simpson

Abstract In this brief paper, provoked in part by Pieter Kooijmans' *The Doctrine of the Legal Equality of States*, the author returns to his 2004 book, *Great Powers and Outlaw States* and reads it in light of criticisms by two sympathetic interlocutors, and in the shadow of the 2003 Iraq War and more recent efforts to conceptualise the possibilities of constraining hegemony (when it threatens the 'rule of law') and promoting it (when it might secure some superseding political ends).

Keywords Sovereignty · Equality · Hegemony

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4.1 Sovereign Equalities

I wrote most of *Great Powers and Outlaw States*, my book on sovereign equality, at the end of the millennium in the winter of 1999 in an apartment overlooking the Charles River in Cambridge, Massachusetts (as, Rosa, the younger of my daughters lay asleep for the first four hours of each morning).[1] At that time, Pieter Kooijmans may well have been preparing his thoughts on the *Difference relating to Immunity from Legal Process* advisory opinion. His book on *The Doctrine of the Legal Equality of States* was in the basement of Harvard's Widener Library alongside a surprisingly large number of monographs on the equality of states (Bengt Broms, Edwin Dickinson and so on).[2] I borrowed them all, of course, and these formed the basis of my thinking in at least one or two of the chapters in my own book.

Professor Kooijmans' book, of course, recognises from the outset the challenge to equality posed by the diversity of sovereigns, the structure of international society and recent developments in international organisations. We can think of these challenges as operating across three dimensions. First, he refers to the actually existing inequalities among states. These include inequalities of character, inequalities of material power and inequalities of intellectual resources. *The Doctrine of Legal Equality* is in some respects a book-length response to jurists (Lorimer, Westlake, Lawrence) who would fold these inequalities into a juridical order that merely reflected them. Second, Kooijmans recognises the problems associated with institution-building in international law and the apparent requirement that executive action by states with special responsibilities be a feature of these organisations. Third, there is the ambiguous relationship between decolonisation and sovereign equality. On one hand, the newly-independent states want to claim a strong form of equality that might have the effect of buttressing the legal regime. On the other hand, according to Kooijmans' these same states might argue that this strong form of equality has the effect of permitting them to disavow legal rules in existence prior to their independence.[3]

My own book took up some of these matters from a *fin de siècle* perspective but, in this essay, I want to focus on the way in which arguments about legalised hegemony (briefly the idea that the prerogatives of the Great Powers, since 1815, have been both legitimised and circumscribed through law) found in that book might have been confirmed or challenged by developments since then. The Iraq

[1] See Simpson 2004. I thank the editors of the *Netherlands Yearbook of International Law* for their patience, and for asking me to write again on the subject of sovereign equality. The Editorial Board and an assiduous referee prompted me to go further with the argument; I thank them for this. For example, one obvious direction to go in would involve considering, say, the, not at all widely accepted, doctrine of pre-emptive self-defence (in its strongly preventative or precautionary form) as an attempt to extend legalised hegemony.

[2] Kooijmans 1964; Broms 1959; Dickinson 1920.

[3] Kooijmans 1964, at 3-5.

War is the key case, of course, but its relationship to my argument is, perhaps, ambiguous. I begin though (in Sect. 4.1) by re-describing the central argument in *Great Powers* and then by noting and attempting a response to (in Sect. 4.2) some criticisms and demurrals published shortly after it was published. Section 4.3 discusses some recent ideas about how hegemony might be constrained, and in Sect. 4.4, I briefly advert to some recent arguments about the need to *promote* hegemony through law.

Many of these writers I read in Cambridge took seriously the idea of an international society founded on some sort of rough egalitarianism among states. There seemed to be a general belief that the idea of sovereign equality was worth preserving in the face of both the obvious material and strategic disparities existing between states *and* the pressure to construct a legal order that was responsive to these disparities (i.e. one that formalised political hierarchies). *Great Powers*, then, tried to show how international society (and here I was greatly influenced at the time by the English School of political theorists, in particular Martin Wight) was constructed around a negotiation or bargain between sovereign equality and, what I called, 'legalised hierarchies' and 'anti-pluralism'.[4] This bargain produced juridical sovereignty – an organising principle that contained elements of each. In retrospect, Kooijmans provided me with the clue to think afresh about what he might have called 'justifiable hierarchies' and James Lorimer, the Scottish 19th century international lawyer, was the prompt for the consideration of anti-pluralism.[5]

Sovereign equality, of course, was already a familiar idea. As Lassa Oppenheim put it

> The equality before International Law of all member States of the Family of Nations is an invariable equality derived from their international personality. Whatever inequality may exist between states as regards their size, power, degree of civilisation, wealth and other qualities, they are nevertheless equals as international persons.[6]

But what did this mean and what were its consequences? I teased out three types of sovereign quality. The first was a strict and minimalist *formal equality*. Describing this as 'perfect equality', Judge Shahabuddeen in *Nauru*, isolated it in the following terms: 'It seems to me that, whatever the debates relating to its precise content in other respects, the concept of equality of States has always

[4] Wight 1966.

[5] Throughout *The Doctrine of Equality,* there is an - often explicit - acceptance that some inequalities must be given a juridical imprimatur because they are necessary to the success of the legal order. This is the point at which the political inequality that Kooijmans discusses throughout the book (e.g. at 100-101) adopt legal forms (e.g. the Security Council). See, too, Lorimer 1883.

[6] Oppenheim 1920, para 115. See, too, from different eras: The American Institute of International Law: Its Declaration of the Rights and Duties of Nations (1916): 'Every nation is in law the equal of every other nation'; Wilson 1910, at 74; Wheaton 1855, at 58, 118.

applied as a fundamental principle to the position of states before the Court'.[7] Article 35(2) of the ICJ Statute puts it like this:

> The conditions under which the Court shall be open to other states shall…be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the court.[8]

This formal equality was, in the end, a right to vindicate the rights the state already possessed (because these could differ this was not a doctrine of equal rights, as such; states do not possess equal rights, in the strong sense). This was the weak equality favoured by writers such as the Scottish international lawyer, James Lorimer who disparaged stronger more substantive forms of equality:

> No principles have been repeated more frequently or authoritatively than the equality of states and their absolute independence…and all of them may now, I think, be safely repudiated by history, as they always were by reason.[9]

The second form of equality identified was *legislative equality*. A weaker version of this held that states could be bound only by those norms to which they had consented. The stronger conception – and one that has only been realised in practice – argued for equality in the creation of international organisations and treaties and in the formation of customary international law.[10] This weaker version, I argued, had been threatened by the idea of objective treaty norms and universal law. The stronger conception, meanwhile, is compromised by voting procedures in international organisation and by a tendency to expand the 'specially-affected states' doctrine.

Finally, the book adverted to something called *existential equality*. Philip Jessup once noted that 'States have "feelings"'.[11] The dignity of states, then, is central to this conception. States have a right to exist (free from (forceful) intervention by other states) and have right to organise themselves internally (within the parameters established by international criminal law and international human rights law). So, existential equality is a combination of territorial sovereignty (at the national level) and commitment to ideological pluralism (at the international level). All of this is reminiscent of *Nicaragua*, of course:

> adherence by any state to any particular doctrine does not constitute a violation of international law…[interventions to promote particular forms of government infringe]…a fundamental principle of international law, state sovereignty and violate the freedom of choice of the political, economic, social and cultural system of states.[12]

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[7] *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment of 26 June 1992, para. 270-271.

[8] Court Statement of March 1st, 1946 (quoted in Wellens 1990, at 622).

[9] Lorimer 1883, at 44; see too discussion in Kooijmans 1964, at 116-121.

[10] See Kooijmans 1964, at 100.

[11] Jessup 1948, at 28.

[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* ICJ, Jurisdiction and Admissibility, Judgment of 26 November 1984, para. 263. See, too, Letter of

The rest of the book was an effort to think through the consequences of legalised hegemony (the special and 'constitutionally' validated prerogatives of the Great Powers) and anti-pluralism (the existence of legal regimes that sought to distinguish states in good standing from unequal sovereigns or outlaws).[13]

As a way of prefacing some thoughts about the way in which sovereign equality has developed since 2004, let me make a few comments about the reception of the book itself.

4.2 Hegemony

W. H. Auden's (partial) disavowal of his famous poem, 'Spain 1937' (on the grounds that it was advocacy not poetry) provokes the thought that one could rewrite one's intellectual biography. In an essay later published as *International Law and the War in Iraq*, but originally delivered as a Ninian Stephen Lecture at the University of Melbourne, my delight at the success of a speech I gave, in which I declared the war illegal, was offset by Tony Carty's penetrating dissection, in the *Modern Law Review*, of that speech and, in particular, its relationship to *Great Powers and Outlaw States*.[14] He had several criticisms of the book (it was too wedded to international relations thinking, it lacked a clear Triepelian view of hegemony,[15] it didn't do justice to the fine grain of diplomatic history). These criticisms seemed and still seem quite persuasive to me. In particular, the idea that authority is somehow earned rather than announced juridically has a promising ring to it.[16] The matter is taken up a little in some recent work by others.[17] And, indeed, it is a key argument threading through *The Doctrine of Equality* where Professor Kooijmans repeatedly makes the point that the Great Powers (whether in the Security Council or elsewhere) exercise special powers by dint of their special

(Footnote 12 continued)
20 November 1991 (issued as United Nations document A/46/844 and S/23416) where Libya emphasized that the Charter 'guarantees the equality of peoples and their right to make their own political and social choices, a right that is enshrined in religious laws and is guaranteed by international law' (quoted in *Case concerning questions of interpretation and application of the Montreal Convention arising from the aerial incident at Lockerbie United Arab Jamahiriya v. The United Kingdom*, ICJ, Preliminary Phase, Judgment of 27 February 1988, Dissenting Opinion, Judge Oda at para. 30).

[13] I defined legalised hegemony as 'the existence within an international society of a powerful elite of states whose superior status is recognised by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality.' Simpson 2004, at 68.

[14] Carty 2006; Sellers 2005.

[15] For Triepel hegemony occurs where, 'the feeling of oppression has been changed into a feeling of joyful subordination'. Triepel 1938, S. 44 (quoted in Kooijmans 1964, at 96).

[16] Carty 2006, at 660.

[17] Bukovansky et al. 2012.

responsibilities and by the constitutionally-constrained exercise of these responsibilities and not simply because they *are* Great Powers.[18]

But more chastening was his implication that, in the interest of taking an instrumental stand against the Iraq War in the lecture, I chosen advocacy over critique (I'm putting this very bluntly).[19] The problem seemed to be that in describing an international society constituted by the relationship between hegemons and pariahs (and their relationship to an attenuated doctrine of equality), the book conceded the legality of Great Power action against outlaws. Confirming Carty's point was a review by Tim Sellers suggesting that I had produced a book-length justification for the 2003 US-UK war in Iraq. I was inclined to dismiss Sellers' review as a misreading of my argument but the more I thought about this the more likely it seemed that my critical project (showing how international law had long accommodated forms of empire (outlaw states) and hegemony (Great Powers) while advertising a commitment to the equal sovereignty of states) could be re-read either as a descriptive project (this relationship between hierarchy and equality was a feature of the international system and no-one could be surprised to see it play out in contemporary crises like the one in Iraq) or even a normative project (if, in international relations, there was a body of historical practice permitting Great Powers to intervene in the territory of outlaw states or depriving these outlaws of the usual protections and immunities of regular states then perhaps wars such as the one in Iraq in 2003 *were* lawful).

One defence to the sort of criticism the book received, then, would involve insisting on or, in my case, retreating to, some sort of distinction between descriptions of political behaviour and elaborations of legal norms. Generations of international lawyers had done just this. Legalised hegemony, Oppenheim said, was a nonsense: 'however important the position and influence of the Great Powers may be, they are by no means derived from a legal basis or rule'. Any doctrine that made the mistake of abolishing sovereign equality or recognised legalised hegemony, he went on to argue, 'confounds political with legal inequality'.[20] Professor Kooijmans makes an argument along similar lines in *Doctrine of Equality*[21] where he warns against simply transposing political inequality into legal inequality. Indeed, in one provocative phrase he argues for a legal recognition of power but only where 'power is of service to the law'.[22]

But, surely, I thought, this wouldn't do as a response. The point of my book, after all, was to show that this distinction provided too much comfort to lawyers

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[18] E.g. Kooijmans 1964 at 243-246.

[19] His essay foreshadowed a lengthy exchange among scholars about the relationship of scholarship (sometimes self-consciously political, sometimes detached) to activism (sometimes politically passive, sometimes energetically engaged). On each side, there was preciousness and angst amidst a sense of choosing among unattractive alternatives. For a partial reflection see Craven et al. 2004.

[20] Oppenheim 1920, at 162-164.

[21] Kooijmans 1964, at 107-116.

[22] Kooijmans 1964, at 112.

who would point to the awfulness of international diplomacy and the rectitude of international norms (*their* embrace of hegemony juxtaposed against *our* defence of equality). There was, after all, no shortage of books (from the political science side) showing that international relations was the realm of war or hierarchy, and treatises (from the international law side) arguing for the integrity and applicability of the sovereign equality doctrine. My book tried to show that equality was a *political* norm operable *among* the Great Powers (at Vienna or in San Francisco it constructs an equality between the Great Powers that entirely failed to reflect the material conditions on the ground) and that the legal order was infused with *constitutional* hierarchies that permitted all sorts of activity by Great Powers that would be impermissible if carried out by middle or weaker powers.

As for the Iraq War, it could, indeed, be understood as the latest episode in a sequence of events in which small breakaway coalitions of great and middle powers try to extend legalised hegemony into novel situations or more expansively interventionist doctrines, or it may indicate a continuing preference for looser security regimes over institutional oversight. Each of these styles of ruleship has historical roots. The first is found in 1815 with the establishment of the Holy Alliance following the Congress of Vienna. Meanwhile, the relationship between institution and regime is clarified by the debate between Roosevelt and Churchill off the coast of Newfoundland in 1941. I now turn to each of these cases.

The classic contemporary instance of breakaway hegemony was the Kosovo War which, as I argued in 2004, resembled the situation in the post-Congress Europe of the early 19th Century when the Eastern Powers (Austria, Prussia and Russia) engaged in a regional security effort, disparaged by the other Great Powers of the time, to promote a particular conception of international order. These conservative powers proposed to put into effect a theory of intervention whereby constitutional reform and revolution in other states would be met with military reaction and reactionary militancy by the Eastern Powers (and, in certain circumstances, France). The idea was to insert 'a salutary fear into the revolutionists of all lands'. This project was to be extended to the Western hemisphere, too, where a revolt against Europe had already resulted in the appearance of several new nations.[23] The Americans responded to this manoeuvring with the Monroe Doctrine: 'It is impossible that the Allied Powers should extend their political system, to any portion of our continent, without endangering our peace and happiness'. In the end, the Holy Alliance was short-lived. The constitutionalists of South America and Spain could not be pacified and, ultimately, the conservative regimes of Europe were, themselves, overthrown by the revolutions of mid-19th Century Europe.

Perhaps, then, and likewise, the Coalition war in Iraq and the NATO action in Kosovo can be viewed as tentative and – in the end - contentious efforts to extend

[23] Simpson 2004, at 200.

legalised hegemony beyond Chapter VII of the UN Charter. In the 19th Century, the Eastern Powers had argued that the Holy Alliance was a natural consequence of the adherence of European powers to the Second Treaty of Paris. The pact formed against Napoleon was aimed at destroying the influence of revolutionary politics on international relations. The powers of the Holy Alliance believed that the logical consequence of this war aim was the future suppression of revolutionary practices within domestic contexts. Why fight a future Napoleon on the battlefields of Europe when he could be destroyed *prior* to taking power in one of the states of Europe? Thus, the rhetoric arising out of the Holy Alliance was designed to mollify the other powers and demonstrate the link between the system brought into existence at Vienna and the specific aims of the Alliance itself.[24]

All of this, of course, resembles the sorts of arguments made in defence of the Kosovo and Iraq interventions (that these interventions were implicitly authorised or that the interventions merely 'enforced' existing Security Council resolutions or that the interventions supported and consolidated the fundamental norms of the system or, more usually, loose combinations of all three).

And, as I have indicated this struggle between two sorts of legalised hegemony (extra-curricular and textual) probably was built into the UN Charter right from the beginning. In order to see how this might be so we need to go back to 1941. On Sunday August 3rd of that year, Winston Churchill boarded a train in London and began travelling North to Scotland.[25] Only a very few people knew of his whereabouts.[26] The London Blitz was still in progress though the Battle of Britain had been won, and just over a month previously, Hitler had launched his invasion of Russia, on June 22nd, the same day as Napoleon's march of Moscow (these two invasions, we might, say, established an international system based on condominium in 1815 and legalized hegemony in 1945).[27] In August 1941, though, Churchill had chosen to embark on a daring journey across the Atlantic in order to create a system of collective security.[28]

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[24] Simpson 2004, 203.

[25] I discovered after doing some research recently on the Atlantic Charter meeting that Churchill set sail from the UK mainland from a small town called Thurso at the northernmost tip of Scotland. This happens to be where I was born and grew up. In fact, as a child, I could see from my bedroom window the harbour from which Churchill had set out to create the United Nations. See e.g. Morton 1943.

[26] Indeed, when it was announced to the British people that Churchill had sailed to Newfoundland to draft a Charter for postwar order, they were hugely disappointed. There was a general belief that instead the meeting had produced an agreement that would mean the Americans had entered the war. In fact, the Charter did promise the defeat of Nazi tyranny at a point when the United States was still 'technically neutral'. And the United States did enter the war shortly after the meeting.

[27] The Atlantic Charter was never signed. Approval was sought through an exchange of telegrams. The Congress of Vienna did not meet, and the Charter was not signed.

[28] Morton 1943.

Roosevelt had the easier trip up the Eastern Seaboard in his yacht, *The Potomac*. The Atlantic Charter, then, was not drafted in the middle of the Atlantic but rather off the coast of North America, and in a way, of course, this anticipates the arrangement of forces at the UN itself. Churchill seems to have written the original draft himself.[29] There is a somewhat stronger tone in the original. Churchill, for example, speaks of an 'effective international organization' while the Charter talks more loosely of a general system of security (Principle 8). Even this was accepted only reluctantly by Roosevelt. The Prime Minister's original is also concerned to protect states from 'lawless assault' (something missing from the final draft). Also missing from the final draft is Churchill's reference to the need to bring about 'a fair and equal distribution of essential produce'. That, for obvious reasons, did not survive American scrutiny. There was also a dispute about free trade and protection in relation to this provision.

The tension over collective security was to become a familiar aspect of the post-war regime. It is striking, I think, that even Roosevelt was unenthusiastic about the prospects of a United Nations Security Organisation built around legalized hegemony. But, of course, this relationship between 'effective organization' under a rule of law and general system of security has survived into recent times. The interventions in Kosovo and Iraq (2003), are in a way, each symptoms of this struggle. The U.K. and U.S. argued, in each case, that, with the organisation having proved ineffective, they were acting under a general system of security.[30] Iraq could be re-read, then, not as a retreat from law to politics but rather as a continuation of themes present in 1941. Indeed, the Churchill/Roosevelt discussions resemble in some ways Tony Blair's meetings with George Bush at the Crawford ranch and at Camp David (though it's hard to imagine Churchill saying of Roosevelt: 'The President had immense simplicity in how he saw the world. Right or wrong, it led to decisive leadership'.[31]

But if there is a struggle between the idea of an effective organization under law (legalized hegemony) and the general system of security (expanded legalized hegemony), there is also an effort underway to think about what 'under law' might mean in conditions of legalized hegemony. And here we turn to a question (perhaps *the* question) at the heart of Professor Kooijmans' book. How can a legal order be constructed in the face of such pronounced hierarchies?

> For a legal system to be really law it must correspond with certain, non-arbitrary standards.[32]

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[29] Churchill 1950, at 386.

[30] Though this underplays the extent to which the United Kingdom tried to keep the United States within the parameters of institutional decision-making.

[31] Blair 2011, at 94.

[32] Kooijmans 1964, at 214-215.

4.3 Constraining Hegemony

E. H. Carr said:

> When modern writers on international politics find the highest moral good in the rule of law, we are equally entitled to ask, What law? And Whose law? The law is not an abstraction. It cannot be understood independently of the political foundation on which it rests and of the political interests which it serves.[33]

We know this already. We now seem to be at the stage where there is an attempt to work out how to understand legitimacy or the rule of law or legal equality in relation to institutions we also know are dominated by coalitions of Great Powers and which were established in order that these Powers act decisively and in ways only moderately mediated by any concern for lawfulness. So, we find ourselves going back and forth between knowingness and indignation. It seems possible to say that: '[t]he Security Council is fatally flawed, dominated by a duplicitous elite and subject to a veto that runs against the grain of law altogether' while at the same time calling on the Council to intervene in Syria or Libya or demanding that the Council operate in conformity to an existing rule of law or some concept of 'non-arbitrariness'. There seem to be several recent projects related to this demand for normative oversight of the political body.

One is the idea of *Global Administrative Law* where a set of process-norms derived from the public law of Western democracies is applied to international institutions like the Security Council. So, the idea that there might be a separation of powers or various procedural rules imposed on Security Council decision-making seem to belong in this genre.[34] In cases such as *Kadi* and *Al Jedda* we have, following on from *Tadic* and, more ambiguously, *Lockerbie*, the beginnings of a new system (or the fragmentation of an old system) where Council decisions become subject to some form of judicial scrutiny: negligible in *Lockerbie*, weak in *Tadic*, diffident in *Al Jedda* and intrusive in *Kadi*.[35]

A second is the idea of *constitutionalisation*: the idea that the Charter is a founding document from which certain basic rules of behavior can be read down. There has been a long-running debate, for example, between what we might think of as textualists and constitutionalists about how to interpret the Council's powers under, say, Article 39.[36] It is sometimes surprising how this disagreement plays out. I asked a group of military officers from around the Asia Pacific region recently what they thought a 'threat to the peace' was. All but one of them came up with, what I think of as, the constitutionalist reading, one that focused on either the

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[33] Carr 2001, at 179.

[34] Alvarez 1996.

[35] See e.g. *Al Jedda v Secretary of State for Defence* [2007] UKHL 58; Case C-402/05 P *Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

[36] Franck 1995.

practice of the council (a sociological version of this) or the existence of constitutional norms directing Council action; a threat to the peace was aggression or international dispute or human rights violation or international terrorism and so on. The sole dissenter in the room said: 'a threat to the peace is anything the council says it is'. This of course is the textualist-realist reading. Note that this is not some disagreement between law and politics. Textualists focus on the wording of Article 39 but also want to widen the Council's range of authority untramelled by legal constraints. Constitutionalists want the Council to be guided by the principles of the charter read against the bare legal text.

A third is the idea of *legitimacy*. For a while now international lawyers have been wrestling with this as a solution to the problems of law and ethics. Ethical imperatives push lawyers in one direction, legal rules in the other. Legitimacy seems to promise some in-between-point where ethics and law are in happy balance or harmony. So, interventions by coalitions of Great Powers can be described as illegal or barely legal but legitimate. Kosovo is the best example of this where a number of international lawyers (Simma, Cassese, Chinkin) recoiled from the prospect of simply declaring the intervention illegal and wanted to somehow qualify this with the language of legitimacy.[37] International law, though, is a retreat from ethics so it is impossible and nostalgic to return to the romantic fantasy of some transcendental position from which to judge the justness of war. On the other hand the legal rules seem unsatisfactory. Legitimacy promises some sort of answer. But what might legitimacy mean? It might go to the question of process so that an illegal act undertaken after a proper process might qualify as more legitimate than not.

The interventions in Kosovo and Iraq have been treated quite differently from each other in that respect. But I'm not sure that this is correct. They were both unlawful and they both followed a long sequence of institutional acts. The Security Council was 'seized' of the matter in each instance. And this became an argument against legality (if the Security Council was seized then how could it be lawful for NATO or a Coalition of the Willing to act unilaterally?) but for legitimacy (at least the Security Council *was* seized and the action took place in the context of repeated condemnations by the Council; in this way, the wars in Kosovo and Iraq might compare favourably to the removal of Arbenz in 1954 (and the catastrophic consequences of that action) or the German invasion of Poland.

Legitimacy, of course, might refer to the plausibility of some ethical argument for the intervention. Increasingly, humanitarianism seems to be conditioning or qualifying or prompting Council action. Indeed, it is hard to imagine the Council acting simply to restore or maintain international peace and security. Humanity has usurped security as the dominant metaphor. So, doctrines such as 'the responsibility to protect' or 'the protection of civilians' have become frames for understanding or provoking Council action and adding authority and legitimacy to that action. Of course, this can work the other way too: the greater the appeal to

[37] Simma 1999; Chinkin 2000, at 39; Cassese 1999.

humanitarianism the more likely that the resultant chaos will undermine original claim. There may even be a suspicion that humanitarianism is simply empire's latest trick: 'He who invokes humanity cheats'.[38]

Ultimately, these are each efforts to ground or limit political inequality through law either in the form of a set of constitutional norms, a commitment to non-arbitrariness, a gesture towards legitimacy or a more substantive legal humanitarianism. In this respect, they can be viewed as a continuation of an effort made by Professor Kooijmans in 1964 to reconcile the reality of political inequality with the necessity of rule under law.

4.4 Promoting Hegemony

As Pieter Kooijmans pointed out in *The Doctrine of the Legal Equality of States* sovereign equality has long historical roots.[39] I date the story from a period when 13th century proto-states like Sweden, France and England first challenged an existing European orthodoxy founded on a unitary (Catholic) spiritual dominion centred on (what is now) Germany and characterised as the Holy Roman Empire. This imperial international law gave way, eventually, to an order that has come to be named 'Westphalian' and is based on the will, consent and territoriality of 'equal sovereigns'. But this sovereignty-based law can feel incoherent. The 'will' of sovereigns - the putative basis for obligation - has always seemed dangerously close to an unmediated politics or national self-interest working *against* law. At the same time, the legal equality of states might be thought of as a way of taming the ethical impulse in international affairs by deterring those who would adopt excessively programmatic diplomacy (militarised humanitarianism, ecological grand strategy) and quasi-religious crusades ('eradicating evil', 'destroying terrorism', 'saving the planet'). The reproduction of these themes has been a feature of the past decade in ways that I have merely sketched in this essay.

Public international lawyers tend to think of themselves as counter-hegemonic. The standard response to action by an *ad hoc* great power coalition would be to deplore it. The agonising over Kosovo was a partial exception to this.[40] But what if

[38] This comes from Carl Schmitt quoting Nietzsche. Schmitt 1996, at 54. One final point: the question of what the Council *can* do seems to have gone through several phases: there was a constitutional phase in which the question seems to have been: *can* the Council do x? There has always been a pragmatic question: *should* the Council do x? There used to be an administrative question: *does* the Council have the power to delegate authority to individual groups of states? There is regularly a descriptive issue: what does the council tend *to do*? Now, we seem to be in a slightly unpredictable phase where the question that arises is: 'What has the Council actually authorized?'. This was the issue in Resolutions 1441 and in 1160 and in 1973. How are these resolutions to be interpreted (not just in the sense of what do they mean but also in the sense of what tools one might use to work out what they mean)?

[39] See e.g. Kooijmans 1964, in particular at 100; Goebel 1923.

[40] Charlesworth 2002.

certain action today is so imperative as to render sovereign equality an obstacle to planetary survival (in the same way that some people are beginning to argue that democratic politics cannot produce the sort of environmental policies that have become necessary to save the earth)?

I wrote a few years ago about Ian McEwan's novel, *Enduring Love*, in which five men run towards a hot-air balloon containing a small boy. The boy's uncle (the balloon's pilot) is holding onto the balloon's ropes in an increasingly frantic attempt to prevent the balloon and boy from being swept into the sky. The (now) six men then engage in a collective effort to bring the balloon under control but this becomes difficult as the wind picks up and the problems of collective action emerge. With each new gust of wind the dilemma becomes more acute. The balloon is lifted higher and higher off the ground, and, yet, it does seem as if the six men might just command the weight and strength to hold down the balloon. But no one is entirely sure. Who is the first to let go? No one is sure of that either but someone releases the rope and tumbles onto the ground. The balloon rises a little higher. Another man lets the rope go and drops to the ground. In the end, there is one man, Dr John Logan, hanging on to the rope of a rising balloon. He begins climbing up the rope (now high in the sky), but this is to no avail. The first Chapter of the novel ends with Logan dropping to the ground from a great height.

> We watched him drop. You could see the acceleration. […] He fell as he had hung, a stiff little black stick. I've never seen such a terrible thing as that falling man.

Logan is the victim of a community without a leader, a community of sovereign equals. There are no rules, at least none specific enough to allow predictability, no norms, at least none determinate enough to guide collective behaviour, and no laws except the unforgiving laws of nature. Who can blame the others for letting go? Who can fail to blame the others for letting go?[41]

We can see from this, then, that the idea of the legal equality of states can inhibit or postpone the sort of progressive politics that international lawyers like to think of themselves in alignment with. This is not new: as J.G. Starke put it some time ago, '[f]requently small states were able to hold up important advances in international affairs by selfish obstruction under the shelter of the unanimity rule'.[42] The thought is that some sort of universal law might be necessary to circumvent the problem of persistent objection or the reluctance on the part of states to sign up to environmental treaties. This would certainly accord with the views of Professor Kooijmans towards the end of his famous monograph. There is no need in such instances to fetishize unanimity or, indeed, majority rule or even equal voting. The important principle is that any system or valuation should be applied equally to all and that there be a rational-legal basis for any departures from strict sovereign equality.[43] In any event, the continued development of

[41] This passage is drawn from my essay, Simpson 2005.

[42] Starke 1984, at 104.

[43] Kooijmans 1964, at 241.

universalist, objective norms such as norms *jus cogens*, obligations *erga omnes* and international crimes, and the existence of 'objective treaties' each point to a move from strict positivism, absolute equality of consent and unanimity towards decision-making that is either majoritarian (General Assembly) or universalist.[44]

The environmental field is the place from which most of the pressure seems to be coming. Following the failures of Durban and Copenhagen (and the very equivocal 'successes' at Rio and Kyoto), a number of commentators have begun to argue for a way of by-passing the collective action problems inherent to a regime based on sovereign equality.[45] This often involves a coalition of big emitters breaking free of the collective decision-making of the Copenhagen model. As Dan Bodansky puts it:

> Although it is often said that climate change is a global problem requiring a global solution, in fact just twenty-five countries account for more than 80 percent of global greenhouse gas emissions. If the climate change negotiations were limited to a smaller group of countries – the so-called 'big emitters', or the big economies, or like-minded states, or perhaps regional groups – this would simplify the negotiations considerably.[46]

And, as Ian Clark has noted, this idea of regional hegemony or 'coalitional hegemony' in the environmental field mirrors the holy alliances found in the security field.[47] But, of course with planetary survival is at stake, there might be more enthusiasm for a truly radical departure from democratic, consensual decision-making. We are, after all, now a long way from Westphalia and Vienna and a long way, perhaps too, from the doctrine of sovereign equality but not so far, perhaps, from Professor Kooijmans half century old ruminations on the topic of equality and, in particular, the need for functional differentiation and legalised hierarchies in inter-state relations.

So, there seem to be a few struggles in progress around the idea of legalized hegemony and outlawry. On one hand, the experience of the Iraq War and the response to official legal arguments in favour of it by significant sectors of international society (a number of important states, the vast majority of international lawyers) signal that juridified hegemony has its limits. The special prerogatives of self-selecting coalitions of Great Powers will not always be widely accepted even where there is contemporaneous effort to demonise the attacked state and even where (or, perhaps, in particular when) there is a pre-existing history of official UN involvement. In the case of Iraq, institutional fidelity seemed to prevail over gestures towards 'general systems of security' (see my earlier discussions of The Holy Alliance and the Atlantic Charter earlier). On the other hand, with the expansion of the language of security into other fields, there is the prospect that both legislative equality (the idea that all states have some sort of

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[44] See, in Simpson 2004, discussion of hierarchy in Chapter Two and anti-pluralism Chapter Eight.

[45] See discussion in Clark 2011, at 220-224.

[46] Bodansky 2007.

[47] Clark 2011, at 222.

voice in law-making) and legalized hegemony (in its institutional guises) might be by-passed in favour of executive action (or expanded or *ad hoc* hegemony) to promote substantive conceptions of the common good.

References

Alvarez J (1996) Judging the Security Council. Am J Int Law 90:1–39
Broms B (1959) The doctrine of equality of States as Applied in International Organisations. Vammala, Helsinki
Bodansky D (2007) Targets and timetables. In: Aldy JE, Stavins RN (eds) Architectures for agreement: addressing global climate change in the Post-Kyoto World. Cambridge University Press, Cambridge
Bukovansky et al (2012) Special responsibilities: global problems and American Power. Cambridge University Press, New York
Blair T (2011) A journey. Arrow, London
Carty T (2006) Visions of the past of international society. Mod Law Rev 69:644–660
Carr EH (2001) The twenty years' Crisis. Palgrave Macmillan, London
Cassese A (1999) A follow-up: forcible humanitarian countermeasures and *opinio necessitas*. Eur J Int Law 10:791–799
Charlesworth H (2002) International law: a discipline of crisis. Mod Law Rev 65:377–392
Chinkin C (2000) The state that acts alone: bully, good Samaritan or iconoclast. Eur J Int Law 11:31–41
Churchill W (1950) The Second World War, Volume III: The Grand Alliance. Houghton Mifflin, Boston
Clark I (2011) Hegemony in international society. Oxford University Press, New York
Craven et al (2004) We are the teachers of international law. Leiden J Int Law 17:363–374
Dickinson E (1920) The equality of states in international Law. Harvard University Press, Cambridge, Massachusetts
Franck TM (1995) Fairness in international law and institutions. Clarendon Press, Oxford
Goebel J (1923) Equality of states. Columbia University Press, New York
Jessup P (1948) A modern law of nations. Macmillan, New York
Kooijmans P (1964) The doctrine of the legal equality of states. An inquiry into the foundations of international law. A.W. Sythoff, Leiden
Lorimer J (1883) The Institutes of the Law of Nations: a treatise of the principles of jurisprudence as determined by nature. W. Blackwood and Sons, Edinburgh and London
Morton HV (1943) Atlantic Meeting. Methuen, London
Oppenheim L (1920) International law: A Treatise, vol. 1, 3rd edn. Longmans, Green and Co., London; New York
Sellers M (2005) Review article: Gerry Simpson, Great powers and outlaw states: unequal sovereigns in the international legal order. Am J Int Law 99:949–953
Triepel H (1938) Die Hegemonie Ein Buch von führenden Staaten. Verlag von W. Kohlhammer, Stuttgart
Simma B (1999) NATO, the UN and the use of force: legal aspects. Eur J Int Law 10:1–22
Simpson G (2004) Great Powers and Outlaw States: Sovereign Equality in the International Legal Order. Cambridge University Press, New York
Simpson G (2005) Duelling agendas: international law and international relations (again). J Int Law Int Relat 1:61–74
Schmitt C (1996) The concept of the political. University of Chicago Press, Chicago
Starke JG (1984) Introduction to International Law. Butterworth, London

The American Institute of International Law (1916) Its Declaration of the Rights and Duties of Nations. In: Scott JB (ed) The American Institute of International Law, Washington, D. C.
Wellens KC (ed) (1990) Resolutions and statements of the United Nations Security Council (1946–1989)—A thematic guide. Martinus Nijhoff Publishers, Dordrecht
Wheaton H (1855) Elements of International Law, 6th edn. Little, Brown, Boston
Wight M (1966) Western values in international relations. In: Butterfield H, Wight M (eds) Diplomatic investigations. Allen and Unwin, London
Wilson CG (1910) Handbook on international law. West Publishing, St. Paul

Chapter 5
Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations

Jeffrey L. Dunoff

Abstract This paper explores some of the major changes in the practices of international organizations that have occurred in the decades since *The Doctrine of the Legal Equality of States* was published. First, much international law-making in contemporary international organizations consists of regulation and administration whose creation, content and application differs significantly from that of traditional forms of international legislation associated with international organizations. Second, in a highly fragmented international legal order, twenty-first century international organizations increasingly interact with each other in a wide variety of law-making and operational capacities. Given these changing roles and activities, it is no longer sufficient to view international organizations primarily as fora through which other actors – typically states – pursue their interests. Rather, twenty-first century international organizations often pursue their own goals and agendas as autonomous actors in international affairs. These developments have rendered traditional debates over sovereign equality within international organizations substantially less salient than they were when *Legal Equality* was written. In the future, the cutting-edge doctrinal and jurisprudential issues raised by twenty-first century international organizations largely will arise out of interactions among international organizations. As a result, legal scholars should shift their attention from inter-state interactions and processes *within* any particular IO to interactions and processes *among* twenty-first century IOs. Of course, decentering sovereign equality does not mean that the international system should celebrate or enshrine legal inequality. Rather, the international community should

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develop other concepts that incorporate the notions of inclusiveness and egalitarianism associated with sovereign equality, but that are more applicable to the actions of twenty-first century IOs.

Keywords Sovereign equality · International organizations · International law-making · Fragmentation · Regime interaction · Voting rules

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5.1 Introduction

It is a great honor to participate in this celebration of Pieter Hendrik Kooijmans' extraordinary career. As a Foreign Minister of the Netherlands, a Judge on the International Court of Justice, a Special Rapporteur to the United Nations Commission on Human Rights on Questions Relevant to Torture, and a professor of international law at the Free University of Amsterdam and at Leiden University, Kooijmans either participated in or commented upon many of the most important international legal developments of the past half-century. I am grateful to the organizers – *the Netherlands Yearbook of International Law*, the Amsterdam Center for International Law, and the T.M.C. Asser Institute – for the opportunity to participate in this timely reflection on Pieter Kooijmans' substantial contributions to international law.

It is entirely appropriate that the papers in this collection take Kooijmans' dissertation, *The Doctrine of the Legal Equality of States*, as their point of departure. Nearly 50 years after its publication, the volume remains a canonical examination of the fundamental principle of the sovereign equality of states. As a methodological matter, the book thoughtfully combines sweeping intellectual history with rich conceptual analysis. And as a substantive matter, Kooijmans develops a subtle and sophisticated understanding of sovereign equality as a legal concept in a world consisting of states that are manifestly unequal in size, wealth

and power. For these reasons, the book is justly celebrated, and still repays careful reading.

Of course, like virtually all historical inquiries, particularly those that trace the history of an idea, *Legal Equality* sets out a history that is deeply shaped by contemporaneous concerns and developments. Two of these developments, in particular, seem to have had a particularly strong influence on the book's orientation. First, the volume was drafted when the era of decolonization was accelerating. During 1960, 17 newly independent states – the largest number ever – gained admission to the United Nations, and in December of that year the General Assembly adopted the 'Declaration on Granting Independence to Colonial Countries and Peoples.' Thus, as Kooijmans was drafting his dissertation it was becoming increasingly clear that colonialism was dying and that a state-oriented international system would extend to the entire globe. The decolonization movement would, of course, fundamentally alter the global political system in many respects. Specifically, the newly independent states – many of whom had chafed under decades of colonial subordination – strongly pushed the concept of sovereign equality. Notably, they did so not only in traditional contexts, but also in ways that threatened to destabilize well established international norms and practices. Hence, it is not surprising that a talented and intellectually ambitious graduate student would choose to explore this topic.

Second, the volume was strongly influenced by the rise of and debates over international organizations (IOs). As explained more fully below, much of the contemporaneous debate on IOs focused on the UN, and in particular on the composition of the Security Council. By the early 1960s, the original membership of the UN had nearly tripled, and the new members felt underrepresented on the Council. In 1963, the General Assembly resolved that the Security Council would be enlarged from eleven to fifteen members, and this change went into effect on September 1, 1965.

Kooijmans could hardly have been unaware of these debates and developments. *Legal Equality*'s introductory chapter notes that '[t]he last decades have brought about a fundamental change […] in the organization of the community of states', and that within the United Nations 'the problem of the equality of states arose with renewed vigour and in a more concrete shape than ever before'.[1] Significantly, international organizations are central to the book's vision of a normatively desirable international legal order. Indeed, one of the book's most striking claims is that 'A general-political organization is of the greatest importance to secure peace and security on earth'.[2] Elsewhere, Kooijmans claims that 'a central organization' is necessary for 'the realization of [international] law.' In its closing pages, the volume links its central conceptual concern – how best to understand the legal equality of states – with its pressing political concern – the achievement of a just international order – by analyzing how sovereign equality manifests itself in

[1] Kooijmans 1964, at 3.

[2] Kooijmans 1964, at 241.

international organizations. In doing so, the book turns from the philosophical and abstract ideas that mark the volume's earlier chapters to address more prosaic topics, such as voting rules within IOs, the representation of states on international bodies, and the composition of the Security Council.

One of *Legal Equality*'s notable strengths is its acute sensitivity to the historical contingency of legal concepts. Building on this historical sensibility, I believe that I can best honor the book – and the spirit of intellectual inquiry that it so admirably represents – by highlighting some of the major changes that have emerged in the practices of international organizations since the book's publication. The critical question raised is whether, in light of these changes, it is necessary or desirable to reexamine, and perhaps reconceptualize, the concept of sovereign equality? How does the concept of sovereign equality advance our understanding of current debates and controversies? More provocatively, we might ask whether the traditional scholarly focus on sovereign equality tends to obscure or elide issues that are critical to understanding the practices of twenty-first century international organizations?

These are large questions, which cannot be adequately addressed in the space of this short essay. My more modest ambition is to highlight several developments that suggest it may be time to decenter the concept of the legal equality of states, at least when thinking about twenty-first century international organizations. First, as is widely-recognized, the legal activities and normative pronouncements of international organizations have changed substantially in the half-century since *Legal Equality* was published. In particular, much international law-making in contemporary international organizations consists of regulation and administration whose creation, content and application differs significantly from that of traditional forms of international legislation associated with international organizations. Second, in a highly fragmented international legal order, twenty-first century international organizations increasingly interact with each other in a wide variety of law-making and operational capacities. These interactions serve a number of diverse goals. Sometimes they are intended to create legal norms; other times they are designed to more effectively discharge operational responsibilities. In either case, the increasing density and importance of these interactions raise significant practical, doctrinal and jurisprudential questions that, to date, have been understudied and undertheorized in the legal literature.

Several implications follow. One is that in the context of these new law-making processes, debates over representation rights and voting rules within international organizations no longer revolve around claims that some voting procedures violate the legal equality of states. As a result, traditional debates over sovereign equality within international organizations are substantially less salient than they were when *Legal Equality* was written. Another is that, looking ahead, the cutting-edge doctrinal and jurisprudential issues raised by twenty-first century international organizations largely will arise out of interactions among international organizations. That is, moving forward, legal scholars should shift their attention from inter-state interactions and processes *within* any particular IO to interactions and processes *among* twenty-first century IOs. Finally, given their changing roles and

activities, it is no longer sufficient to view international organizations primarily as fora through which other actors – typically states – pursue their interests. Rather, twenty-first century international organizations are often autonomous actors in world politics, pursuing their own strategies and agendas.

Taken together, these developments suggest that, in the future, the venerable concept of sovereign equality will be significantly less central to understanding the nature, purposes, and practices of contemporary international organizations. Instead, diplomats, judges, scholars and citizens might more fruitfully begin to explore the legal concepts that should guide interactions among international organizations.

5.2 Contextualizing *Legal Equality*'s Core Concerns

In considering the activities of twenty-first century international organizations, it is useful briefly to recall what legal scholars in the early 1960s viewed as the most pressing issues concerning IOs. A quick glance through some leading English-language international law publications of the time provides a useful sampling of the issues that preoccupied international lawyers while *Legal Equality* was being drafted. By way of illustration, a review of the *International and Comparative Law Quarterly*; the *British Yearbook of International Law*; the *American Journal of International Law*, and the lectures presented at The Hague Academy, between 1960 and 1964 reveal that scholarly interest centered upon the United Nations and various activities taken under its auspices.[3] Hence, articles published during the 1960-1964 time period addressed topics such as:

– the recently concluded second UN Conference on the Law of the Sea. The primary topic of interest was the failure to reach agreement on two key substantive issues, the breadth of the territorial sea and limits on fisheries. Notably, both of the articles that discuss the conference – one by Derek Bowett and one by Arthur Dean, the Chair of the U.S. delegation to the negotiations – devote substantial attention to the voting rules used in the conference.[4] In particular, both papers note that the Conference sometimes worked as a Committee of the

[3] Several caveats are in order. First, the focus on English-language publications reflects my linguistic limitations, and is not a judgment about the relative quality or importance of English-language scholarship. Second, many of today's leading publications did not exist in the early 1960s. By way of example, the first issue of this *Yearbook* was published in 1970, and the first issue of the *European Journal of International Law* was published in 1990. Finally, the focus on U.S. and British publications is not intended to reflect a normative judgment. Indeed, the non-European English-language publications had a similar focus. For example, virtually all of the articles on international organizations in the *Indian Yearbook of International Law* between 1960 and 1964 addressed the UN and the focus of these articles overlap considerably with European publications. <http://www.isil-aca.org/contents.htm>.

[4] Bowett 1960, at 415; Dean 1960, at 751.

Whole, in which proposals could be adopted by a simple majority, and sometimes in Plenary, where a two-thirds majority was required. The difference between these voting rules proved decisive when a proposal for a six-mile territorial sea and six-mile contiguous zone failed to obtain the necessary two-thirds majority by one vote. The article by Arthur Dean reviews, in considerable detail, the negotiations and deal-making that the U.S. engaged in to try to obtain the necessary number of votes, and complains about block voting by Soviet and East European states and Arab nations.

– the legal issues raised by UN military actions in the Congo and elsewhere.[5] These articles explore the legal basis for the UN Force, the relationship between resolutions adopted by the Security Council and the General Assembly, and decisions, orders and directives issued by the Secretary General; and the application of the customary law of war to an international force which is part of a subsidiary organ of the United Nations. In this context, issues of substantial contemporary interest, such as the question of who represents a UN force internationally and who is responsible for its acts, were also addressed.

Other articles that addressed the UN included papers on the scope of the UN Secretary General's powers;[6] the double veto at the Security Council;[7] the activities of the UN Commission on Narcotic Drugs,[8] the legal authority for the Security Council to undertake factual investigations;[9] the China question at the UN;[10] UN practice with respect to the use of force;[11] the composition of the Trusteeship Council, particularly in light of the attainment of independence by increasing numbers of trust territories;[12] and the authority of the UN's political organs to make legal determinations.[13]

The Hague lectures illustrate a similar preoccupation with the United Nations. In 1961, A.K. Brohi presented 'Five Lectures on Asia and the United Nations'.[14] In 1963, Oscar Schachter lectured on the relation of law, politics and action at the UN[15]; and the following year H. Saba delivered a lecture on 'L'activité quasi-législative des Institutions Spécialisées des Nations Unies'.[16]

To be sure, scholarly writings on IOs were not exclusively focused on United Nations activities. Other articles on international organizations addressed a dispute

[5] Schachter 1961, at 1; Halderman 1962, at 971; Draper 1963, at 387; Seyersted 1961, at 351.
[6] Alexandrowicz 1962, at 1109.
[7] Gross 1960, at 118.
[8] Gregg 1964, at 96.
[9] Kerley 1961, at 892.
[10] Schick 1963, at 1232.
[11] Higgins 1961, at 269.
[12] Meron 1960, at 250.
[13] Schachter 1964, at 960.
[14] Brohi 1961, at 121.
[15] Schachter 1963, at 165.
[16] Saba 1964, at 602.

over elections to the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation;[17] the legal activities of the Council of Europe;[18] the interpretation of the IMF's Articles of Agreement;[19] which of an international organization's organs can exercise the IO's treaty-making powers;[20] state succession under the law and practice of the IMF;[21] the permissibility of unilateral withdrawals from international organizations;[22] and an analysis of proposals for the creation of a new international body to provide investment guarantees.[23]

Finally, a relatively small number of academic projects were more directly focused to the legal issues that preoccupied Kooijmans as he undertook his dissertation. For example, in 1960, Boutros Boutros-Ghali delivered a Hague lecture on 'Le Principe d'Égalité des Etats et les Organisations Internationales'. The following year, Marek Korowicz presented a Hague lecture entitled 'Some Present Aspects of Sovereignty in International Law', which included a chapter on 'sovereignty and equality' that focused on the UN's voting rules.[24]

The scholarly preoccupations of that era thus include many of the 'classic' questions of public international law doctrine, including the powers of, and restrictions upon, international organizations (or their member states) as set out in the treaties creating IOs; criteria for membership or participation in IOs; the rights and obligations of IOs *vis a vis* their members; legislative capacity of IOs; and termination of membership. Running through virtually all of these writings is what we might call the intergovernmental vision of international organizations: under this understanding, IOs are created by member states and are governed by representative consultative organs consisting of state agents. Once operational, IOs provide fora for states to negotiate and adopt resolutions and other international legal instruments addressing matters of mutual interest and to act cooperatively to achieve common goals. In particular, IOs facilitate the negotiation of treaties by reducing the transaction costs associated with negotiations, generating relevant information, and providing fora for negotiations. In addition, IOs can facilitate law-making by encouraging issue linkages and facilitating package deals among states. When IOs act, they do so to implement policies and programs that are largely created by delegates representing the interests of their home governments via a process of inter-state bargaining and collaboration. To be sure, many IOs have permanent secretariats, which can undertake important actions. But the

[17] Simmonds 1963, at 56.

[18] Robertson 1961, at 143.

[19] Fawcett 1960, at 321; Fawcett 1964, at 32.

[20] Detter 1962, at 421.

[21] Aufricht 1962, at 154.

[22] Feinberg 1963, at 189.

[23] Brewer 1964, at 62.

[24] Of course, these projects drew on a large literature addressing the legal equality of states. On this concept, see, e.g., Dickinson 1920; Kelsen 1944, at 207; Weinschel 1951, at 417.

dominant view of international organizations at the time *Legal Equality* was written was that IOs are properly understood as, essentially, associations of sovereign states.

Against this backdrop, Kooijmans' focus on the legal equality of states, including within international organizations, falls squarely within the dominant diplomatic and scholarly dialogue of the day. That said, it is appropriate to underscore one notable feature of *Legal Equality* that distinguishes it from other scholarly writings of its era (as well as our own). Like other scholarship produced during this time, *Legal Equality* highlights the central role of the state in international law; in Kooijmans' words, 'one can never overestimate the state'.[25] However, highlighting the importance of states as international legal actors does not lead Kooijmans to conclude that the state is an end in itself, or to endorse the normative priority of the state. To the contrary, *Legal Equality* rests upon a distinctive, religiously-inspired vision of the normative centrality of humanity:

> Man is the centre of Creation and as such the centre of each legal system, therefore also of international law. This element binds together the whole legal structure, whether it be private law, state law or international law; behind each of these we find Man as the keystone. In this respect Man is the reason for existence and *destinataire* of international law, too. The state, having placed itself between man and the international legal order, does not serve itself but is servant of the people that it unites.[26]

For Kooijmans, to understand the nature and purpose of international law it is necessary to 'return to the origin of the world, where we see that Man was created after God's Image and of one blood'. The commonality of 'this stamp of God' is 'the basis of the world-wide community of the entire human race.' 'The world-community is a given fact that should be accepted by the states when drawing up the rules of international law, for which they [states] are the competent organs.'[27]

To be sure, Kooijmans fully acknowledges that the religiously grounded world community he envisions has been only imperfectly realized. Kooijmans suggests that this failure is rooted in theological fact: 'human society happens to be imperfect and affected by evil in its very root'.[28] Interestingly however, his solution to this problem is neither theological nor religious. Rather, the solution is grounded in international law and, in particular, in international organizations: 'To give the idea of community its proper place and to enable it to fulfil its purpose, some sort of organization is desirable, even essential'.[29]

Hence, although it would be misleading to suggest that *Legal Equality* is centrally concerned with international organizations, IOs do play a critical role in

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[25] Kooijmans 1964, at 39.

[26] Ibid., at 37.

[27] Ibid., at 39.

[28] Ibid., at 200.

[29] Ibid.

the overall structure of the normative vision that animates the text. It is therefore appropriate that the book closes with a short discussion of various legal dimensions of sovereign equality within international organizations, including voting rights and the representation of states in international organs.[30] Notably, this discussion contains none of the religious vocabulary or sentiment found in the passages quoted above; rather, it rests on a view of IOs as bodies that generate norms that result from inter-state bargaining similar to that found throughout the literature on IOs at that time.

5.3 International Organizations as Law-Makers

In his analysis of the legal equality of states within IOs, Kooijmans highlights two issues of particular concern: the composition and powers of the Security Council, and the voting rules of international conferences and organizations. Both issues, of course, relate to decision-making and law-making powers of IOs. As noted above, these issues were also of general concern to international law scholars writing about IOs in the 1960s.

In the intervening years, the number, diversity and activities of IOs have all dramatically expanded. A quick glance at data complied by the *Yearbook of International Organizations* provides some measure of these developments. According to the *Yearbook*, in 1909, there were 37 international organizations. In 1964, the year *Legal Equality* was published, this number had jumped to 174. By 2011, this figure had multiplied to approximately 1536. Even adjusting for changes over time in the methods used to compile data and recurrent definitional debates over which bodies qualify as international organizations, these figures provide a sense of the extraordinary amounts of time and energy that the international community has devoted over the past half-century to creating international organizations.

Just as important as the dramatic change in the number of international organizations have been the qualitative changes in the nature of IO activities. For current purposes, I highlight just a few of these changes, namely a significant shift away from promulgating normative standards via traditional legislative processes and towards making and applying international law via a variety of non-traditional mechanisms; and a dramatic upswing in IO interactions *inter se*, resulting from the fragmented and overlapping jurisdictions contemporary IOs possess. The question that arises is whether the doctrinal vocabulary and conceptual apparatus developed by Kooijmans and other scholars writing in the 1960s around the concept of sovereign equality sheds substantial light on contemporary debates over IO activities.

[30] Ibid., at 239-241.

5.3.1 The Security Council

From the perspective of the legal equality of states, the granting of veto power over Security Council decisions to a handful of powerful states has long been viewed as problematic. Kooijmans accepts that certain states may indeed have special responsibilities when it comes to maintaining international peace and security; as a result he does not object, in principle, to granting these states special voting rights.[31] However, he does question whether the veto 'has been embodied rightly in the now prevailing procedure of voting'.[32] In particular, he objects to the fact that the permanent membership of the Council cannot be changed except by 'approval of [the permanent members themselves], which naturally renders such an alteration an illusion'.[33] He also objects to the fact that any veto-wielding member can 'make the application of the law upon itself impossible' while other states do not enjoy this privilege. His proposed remedy to this problem is that the use of the veto 'be subject to legal scrutiny'.[34]

While these are powerful objections to Security Council law-making and suggest that the Council's legislative powers should be subject to legal oversight, recent practice seems to have moved in the opposite direction. Since *Legal Equality*'s publication, repeated efforts to alter the composition of the Security Council, or to change the number or identity of states that enjoy the veto, have not been successful.[35] And while there is broad agreement that 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)',[36] efforts to subject Security Council decisions to legal review by other bodies, including international or domestic tribunals, have met with, at best, limited success.[37] Perhaps more importantly, while Kooijmans presents cogent arguments for narrowly construing the Security Council's legislative authority, over the past two decades, in particular, the Council has substantially enlarged the scope and reach of its law-making activities.

This process began in the aftermath of the first Iraq war, when the Council determined *proprio motu* the boundary between two states, imposed a highly

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[31] Ibid., at 241-242.

[32] Ibid., at 242.

[33] Ibid., at 243.

[34] Ibid.

[35] For analyses of various Security Council reform efforts, see, e.g., Blum 2005, at 632; Zacher 2004.

[36] *Prosecutor v. Tadic*, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72, 2 October 1995.

[37] International Court of Justice, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya v. United States of America)*, 1992 ICJ 1 (14 April); *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission,* 2008 ECR I-6351, Joined Cases C-402/05 P and C-415/05 P.

intrusive arms control regime for a state,[38] and created a claims commission.[39] Over the next few years, the Council again exercised its law-making functions in novel ways, including by creating the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. While claims that these actions were *ultra vires* were unsuccessful,[40] 'there is little question that by establishing these courts, the Council broke new ground in interpreting its powers as well as the *domaine réservé* of states.'[41]

The Council again expanded its legislative undertakings in unprecedented ways in the aftermath of the September 11, 2001 terrorist attacks. For example, in resolution 1373, the Council decided that 'all states shall' take a series of enumerated actions to restrict the financing of terrorist activities, and other actions designed to prevent support for terrorists and terrorist activities. The resolution also established a committee to monitor implementation and compliance with the resolution. As Paul Szasz noted, this resolution constituted a significant departure from past practice, which had always required specific actions that were related to particular situations or disputes and were time-limited. Resolution 1373, in contrast, created new binding rules of international law, but these rules were not specifically related to any particular act or situation and lacked any explicit or implicit time limitation.[42] Resolution 1540 represents another example of the Council promulgating general legislation. This resolution imposes a wide range of general obligations on 'all states' designed to deny non-state actors access to weapons of mass destruction and their delivery systems. As in resolution 1373, the Council created a subsidiary body to receive periodic reports from all states and to oversee compliance. Significantly, both resolutions represent the creation of binding legal norms of general applicability that most likely could not have been achieved through more traditional law-making processes.

The Council has acted as a 'global legislator'[43] in other ways as well. For example, in recent years it has adopted a series of resolutions that 'adapt' existing international legal norms to specific fact patterns.[44] For example, in Resolutions 1816, 1846 and 1851, the Council effectively modified UNCLOS article 105 by authorizing member states to take actions to suppress piracy not only on the high seas, but also in territorial waters and on land. The Council implicitly acknowledged that it was changing pre-exiting rules by noting that the resolutions 'apply only with respect to the situation in Somalia and shall not affect the rights or

[38] UNSC Res. 687, 3 April 1991.

[39] UNSC Res. 692, 20 May 1991.

[40] *Prosecutor v. Tadic*, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72, 2 October 1995; *Prosecutor v. Kanyabashi*, Trial Chamber, Decision in the Defense Motion on Jurisdiction, Case No. ICTR-96-15-T, 18 June 1997.

[41] Alvarez 2005, at 176.

[42] Szasz 2002, at 901.

[43] Rosand 2005, at 542; Talmon 2005, at 175.

[44] Remarks of Bellinger 2005.

obligations of member States under international law, including rights and obligations under UNCLOS, with respect to any other situation.'

Similarly, in resolutions 1497 and 1593, the Council determined that legal actions against peacekeeping personnel from states that are not party to the Rome Statute would be subject to the exclusive jurisdiction of the contributing state. This determination seems to be inconsistent with article 12(2) of the Rome Statute, which provides that the ICC may exercise its jurisdiction *ratione personae* either if (a) the crime occurred in the territory of a State party of the Rome Statute, or (b) the person accused of the crime is a national of such a State. The jurisdictional limitations the Council imposed also arguably violate customary international law norms regarding the jurisdiction of other states which could be justified on the basis of passive personality or universal jurisdiction principles.[45] Resolutions adopted in a variety of other contexts – ranging from the second Iraq conflict to sanctions on the Taliban – created new legal obligations that arguably adapted, amended, or abrogated preexisting international legal obligations.[46]

Moreover, it is significant that although the Security Council's voting rules understandably capture substantial scholarly attention, it is hardly the only international body that does not use one-nation, one-vote procedures.[47] Indeed, procedures that allocate differential voting powers to different states can be found in a wide variety of IOs. Perhaps best known are the voting procedures in the articles of agreement of international financial institutions, where members' quotas, and therefore their voting rights, are distributed in ways that correspond roughly to the size of each state's economy.[48] In the area of international trade, many international commodities agreements divide votes equally between exporting and importing nations in the councils of such organizations and allocate individual states a subset of votes based upon the volume of their exports or imports.[49] In the

[45] Indeed, several states found themselves unable to support the resolution for precisely this reason. See, e.g., UN Doc. S/PV.4803, 1 August 2004 (statements of German, French and Mexican representatives).

[46] For a fuller discussion, see Talmon 2009, at 65, from which many of these examples are drawn.

[47] For general discussions, see Gold 1974, at 687; Jenks 1965, at 48; McIntyre 1954, at 484; Zamora 1980, at 566.

[48] See, e.g., Art. V(3) International Bank for Reconstruction and Development, Articles of Agreement, opened for signature 27 December 1945, 1440 UNTS 134, as amended 16 UST 1942, 606 UNTS 294; Art. XII(5) International Monetary Fund, Articles of Agreement, opened for signature 27 December 1945, 1401 UNTS 39. Of course, using size of economy as a method of allocating votes is hardly a new idea. In 1692, William Penn advanced a plan for an international organization that would have a Council where each state would have a number of delegates proportional to its annual income, or share of international trade. Penn 1726.

[49] See, e.g., Art. 12, Grains Trade Convention, 1995, 7 December 1994, 1882 UNTS 195; Art. 12 International Coffee Agreement, 2001, 28 September 2000, 2161 UNTS 308; Art. 11 International Sugar Agreement, 1992, 20 March 1992, 1703 UNTS 203; see also Art. 10 International Tropical Timber Agreement, 2006, 27 January 2006, UN Doc. TD/TIMBER.3/12 (allocating votes among producers by region as well).

environmental area, the Montreal Protocol requires that, in the absence of consensus, decisions of the Executive Committee of the Multilateral Fund be approved by two-thirds majorities of both developing and industrial countries.[50] In the transportation area, the Convention on the Intergovernmental Maritime Consultative Organization (now the International Maritime Organization) allocates seats in the organization's council according to the 'interests' of its members (for example, international shipping services or seaborne trade). Similarly, the Convention on International Civil Aviation sets aside seats in the ICAO Council to 'States of chief importance in air transport' and states with the 'largest contribution to the provision of facilities for international civil air navigation.'[51] In the labor area, the International Labour Organization's Constitution gives 'Members of chief industrial importance' representational preference over other states in the organization's Governing Body.[52]

5.3.2 *International Regulation, Standard-Setting, and Administration*

Under the conventional view, certainly prevalent in the early 1960s, IOs cannot themselves make law (other than on internal matters). The conventional wisdom, at the time, was that 'states refuse to confer legislative powers on international organizations… Consequently, a study of the normative functions of the specialized agencies reveals that they do not possess, as a rule, any legislative competence.'[53] Once again, things have changed considerably in the past half-century. It is now widely acknowledged that the legislative activities of twenty-first century international organizations encompass much more than simply hosting the negotiation and drafting of treaties. Rather, they oversee and sponsor a wide-variety of law-making activities. While a comprehensive description of these various activities is neither possible nor necessary for current purposes, and as these activities have been extensively discussed elsewhere, I will provide an illustrative overview of some of the most significant non-traditional forms of IO law-making.

Perhaps most familiar is the form of international standard setting that many IOs engage in. Prominent examples include the International Atomic Energy

[50] Art. 10(9) Montreal Protocol on Substances That Deplete the Ozone Layer, as amended June 29, 1990, Doc. UNEP/OzL.Pro.2/3, Annex II (1990); see also id., Art. 10(5) (providing that the representation on the Executive Committee shall be 'balanced' between developing and industrial countries).

[51] See Art. 17 Convention on the Intergovernmental Maritime Consultative Organization, 6 March 1948, 9 UST 621, 289 UNTS 48; Art. 50(b) Convention on International Civil Aviation, 17 December 1944, 15 UNTS 295.

[52] Art. 7(2) Constitution of the International Labour Organization, Treaty of Peace with Germany (Treaty of Versailles), pt. XIII, 28 June 1919, 2712 Bevans 43.

[53] Erler 1964, at 153.

Agency's issuance of guidelines and other normative pronouncements on nuclear installations, the World Intellectual Property Organization's establishment of domain-name standards for the world wide web, and the International Civil Aviation Organization's (ICAO's) promulgation of standards and recommended practices for air safety. Less well known is that a large variety of specialized agencies and bodies engage in similar activities. In issues ranging from environmental standards and international banking to forestry management, public procurement, and the setting of international rules for accounting standards, IOs and subsidiary bodies are responsible not only for revising and adding treaty annexes, but also for issuing a large set of materials ranging from 'formally binding regulations or standards [to] ostensibly horatory advisory guides, codes, and recommendations.'[54]

Many of these normative pronouncements 'inhabit a netherworld between binding and nonbinding norms.'[55] As a result, prominent legal scholars have devoted substantial attention to debating, for example, whether certain ICAO standards are binding or not.[56] However, this doctrinal debate overlooks the fact that many technical or scientific recommendations, including those issued by ICAO, the WHO, the WMO or the IAEA, carry with them the imprimatur of a consensus of expert opinion. Hence, their normative pull is often strong, private actors often incorporate them in their market-based activities, and compliance with these norms is often at least as high as compliance with norms found in hard law instruments.[57]

Another non-traditional form of law-making that has expanded in recent years consists of what might be called 'external referencing', which takes place when 'international organizations develop international law through acts that reference external instruments of general application produced by other actors that are not legally binding in themselves.'[58] The WTO's Sanitary and Phytosanitary (SPS) Agreement provides a good example. This treaty addresses the ability of WTO members to use food safety standards to restrict international trade. To encourage the harmonization of food safety standards, the SPS Agreement provides that domestic food safety measures that are in conformity with international standards, guidelines or recommendations shall be 'presumed to be consistent' with the agreement. The definition of international standards found in Annex A to the SPS Agreement explicitly names standards and recommendations promulgated by the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention. Thus, the SPS Agreement grants a

[54] Alvarez 2005, at 218.

[55] Ibid., at 218.

[56] See, e.g., Buergenthal 1969; Kirgis 1997.

[57] Moreover, these standard setting activities are merely the most conspicuous examples of a wide variety of non-consensual law-making activities carried out under IO auspices. Helfer 2008, at 71; Brunée 2002, at 1; Churchill and Ulfstein 2000, at 623.

[58] Roben 2008, at 889.

privileged status to domestic standards that are in conformity with international standards issued by other IOs – *even though these standards are explicitly understood to be nonbinding in within the international organization that originally promulgated them*.[59] Such 'external referencing' is not limited to the WTO. For example, the Security Council has referenced IAEA resolutions in binding resolutions, and the World Bank has incorporated a wide number of non-binding instruments generated by other IOs into its loan agreements with states.

In addition, a number of IOs engage in law-making through what might be called 'administrative decisions'. For example, under UNCLOS article 162, the International Seabed Authority is empowered to issue binding regulations regarding the exploration of the deep seabed. In 2000, the Authority issued a Regulation on Prospecting and Exploration for Polymetallic Nodules in the Area, setting out the legal rules that contractors must follow when seeking to locate and evaluate resources in the deep seabed. Other times, these administrative decisions are less an exercise of generalized regulatory authority than an individual determination arising out of the application of international law principles to a particular fact pattern. One example is when the UNHCR determines whether an individual is entitled to refugee status.[60]

A final form of non-traditional law-making that was relatively rare when *Legal Equality* was written but increasingly common today is the development of legal doctrine by international courts and tribunals, as well as through various quasi-judicial pronouncements. During the past few decades, in particular, the number of international courts and tribunals – and the number of cases they are deciding – has mushroomed.[61] According to one recent study, as of 2010, international courts and tribunals had issued over 27,000 binding legal rulings, with some 88 % of these rulings having been issued since the end of the Cold War.[62] Although the international system has no formal doctrine of *stare decisis*, as a practical matter the precedential effect of these rulings regularly reaches beyond the parties to the dispute, and decisions issued by international courts and tribunals inevitably elaborate and develop international law.[63]

5.3.3 Interactions Among International Organizations

The developments discussed above emphasize that much of the detail and implementation of treaty norms – including rulemaking, administrative or institutional mediation among competing interests, and other forms of regulatory and

[59] For more on the SPS Agreement, see Dunoff 2006, at 153.

[60] See, e.g., Smrkolj 2008, at 1779.

[61] Romano 2011, at 241; Romano 1999, at 709.

[62] Alter 2013.

[63] See, e.g., Lowe 2012, at 209; Lauterpacht 2011, at 155.

administrative decisions and management – occurs outside of highly-publicized diplomatic conferences and other conventional treaty-making fora. This activity includes the creation of rules and standards of general applicability by subsidiary bodies, as well as decisions of varying levels of formality made in overseeing and implementing international regulatory norms. In the aggregate, these decision-making processes regulate and manage vast areas of international relations, and they have of late attracted substantial scholarly attention. However, virtually all of this scholarship focuses on law-making activity *within* specific international organizations. Just as important, but largely overlooked, are the law-making (and other activities) that result from interactions *among* international organizations.

Consider, by way of illustration, international efforts to regulate hazardous substances and activities. For many years, regulatory initiatives in this area have been marked by collaboration and interaction among several different international organizations. For example, in 1995, several IOs jointly created the Inter-Organization Programme for the Sound Management of Chemicals (IOMC). Participants include a diverse set of international organizations, including the WHO, OECD, FAO, ILO, UNEP, and the United Nations Industrial Development Organization, with the World Bank and UN Development Programme participating in an observer capacity. IOMC organizations coordinate their activities on chemicals management through an Inter-Organization Coordinating Committee, composed of representatives of the participating organizations, which meets twice a year. Discussions among representatives from the different organizations comprising the IOMC help to identify gaps or overlaps in international efforts, and to generate recommendations on common policies. Over time the IOMC has engaged in a number of important regulatory undertakings, including the establishment of a globally harmonized system for the classification and labelling of chemicals and efforts to regulate obsolete and unwanted pesticides in Africa.

Efforts to regulate DDT provide yet another example of how twenty-first century IOs collaborate on international regulatory efforts. The Stockholm Convention on Persistent Organic Pollutants (POPs Convention), which entered into force in 2004, bans the use of certain pesticides and chemicals that bioaccumulate. During negotiation of the treaty, controversy arose over whether to ban DDT. A broad coalition of environmental groups advocated for the elimination of this pesticide. However, many developing states and public health advocates opposed this effort on the grounds that DDT was a highly effective tool against malaria, a disease that causes enormous harm in developing countries, and no feasible alternative for malaria control existed. The WHO, which formally participated in the negotiations, argued that a ban would be premature, given the lack of a cost-effective substitute. The WHO position ultimately prevailed, and the POPs Convention restricts, but does not ban, the use of DDT.

Significantly, the POPs treaty expressly contemplates a continuing series of interactions between actors from the treaty secretariat and the World Health Organization. First, the treaty provides that parties may produce and use DDT only in accordance with WHO recommendations and guidelines. Thus, any changes in guidelines for DDT use produced within the World Health Organization

automatically produce regulatory changes within the chemicals regime.[64] In addition, states using DDT are required to provide to the POPs secretariat and the WHO information about the amount of DDT used, the conditions under which it is used, and how such use relates to the country's disease management strategy. Most importantly, the POPs Convention expressly provides that every three years there will be a consultation with the WHO to determine whether there is still a need to permit the use of DDT for vector control. The clear expectation is that, if and when the WHO determines that there is no longer a need to use DDT for malarial control, the chemicals regime will change its regulation of DDT. These various initiatives in the chemicals area illustrate how twenty-first century international organizations work among themselves to produce international regulatory norms.

Examples of international organizations working together to generate regulatory and administrative decisions abound. Margaret Young has described the interactions over fisheries subsidies among UNCLOS; the FAO; species-specific and regional fisheries management organizations; environmental bodies, such as the Secretariat of the Convention on the International trade in Endangered Species of Wild Flora and Fauna; and the WTO.[65] Young's work details the continuing and iterative nature of the exchange between and among actors from international bodies focused on fisheries, environment and trade. She demonstrates how specific WTO negotiating texts on fisheries subsidies have been influenced by a series of ongoing formal and informal interactions with participants from other international organizations, and the myriad ways that WTO draft texts expressly incorporate standards from other regimes. Although negotiations in this area continue, and the details of any final legal text are currently unknowable, it is highly likely that eventual WTO disciplines in this area will bear the imprint of the regime interactions Young describes.

In addition, twenty-first century international organizations increasingly interact in their operational activities. One well-known example involves the international community's efforts to respond to the HIV/AIDS pandemic. Although international efforts were slow to materialize during the early years of the pandemic, eventually a large number of international organizations developed programs to address different aspects of the HIV/AIDS crisis. The belated upsurge in international efforts was, however, highly decentralized. Over time, many of the international actors undertook activities that addressed the same issue, including, for example, assessment, testing, prevention of mother-to-child transmissions, and AIDS education. This overlap in operational programs and responsibilities raised concerns about duplicative or wasteful efforts, disorganization, and unnecessarily high administrative and transaction costs – as well as the opportunity for international actors to enjoy economies of scale and other synergies. As a result,

[64] Thus, the treaty is an example of the 'external referencing' discussed above.

[65] See, e.g., Young 2011; Young 2008, at 477. An arguably less successful example is the sometimes difficult interactions among the ILO, IMO and Basel Convention secretariat on the issue of ship scrapping. See, e.g., Joint ILO/IMO/BC Working Group on Ship Scrapping, Report of the Working Group, ILO/IMO/BC WG 1/8 (18 February 2005).

substantial diplomatic efforts were devoted to efforts to streamline, harmonize, and strengthen international efforts in this area.

As a result of these diplomatic efforts, international activities are currently centered at the Joint United Nations Programme on HIV/AIDS (UNAIDS). UNAIDS is a joint venture of ten different 'cosponsors' from a broad spectrum of international organizations, including the Office of the High Commissioner for Refugees (UNHCR); United Nations Children's Fund (UNICEF); World Food Programme (WPF); United Nations Development Programme (UNDP); United Nations Population Fund (UNPF); United Nations Office on Drugs and Crime (UNODC); International Labour Organization (ILO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); and World Bank. Each of these organizations sponsors extensive AIDS programs and activities. In an effort to minimize duplication and maximize the rapid, efficient and effective use of international resources, the ten organizations have worked together to develop an agreed-upon 'division of labor'. Thus, following extensive consultation and negotiation, by mutual agreement different entities have been identified as the lead organization in specific areas of operational activity, such as strategic planning, financial management, prevention, treatment, and monitoring. The lead organization in each area has primary responsibility for coordinating the provision or facilitation of support, establishing global and regional support mechanisms for the delivery of country-level support, and communicating with stakeholders in one or another identified area. This division of labor is designed to exploit the comparative advantage of each of the UNAIDS organizations and to facilitate the delivery of unified and consolidated programming.[66]

Similar accounts could be given of operational collaboration across many areas of international relations. For example, the Collaborative Partnership on Forests (CPF) is a continuing arrangement among 14 international organizations with substantial programs on forests.[67] Like UNAIDS, it was started as a way to streamline and harmonize pre-existing international efforts. Each CPF member has been designated as a 'focal agency' for one or more key forest issues for which it has special expertise. CPF members have worked together, inter alia, to launch a joint research platform focusing on integrating livelihoods and biodiversity conservation in tropical forest landscapes, and in coordinating their response to the 2004 Indian Ocean tsunami. The Global Environment Facility (GEF), an independent financial organization that was established as a partnership among the World Bank, UN Development Programme and UN Environment Programme, is the world's largest public funder of projects to improve the global environment.

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[66] For a fuller discussion, see, e.g., UNAIDS, UNAIDS Technical Support Division of Labour (2005).

[67] Members include the FAO, International Tropical Timber Organization, UNDP, UNEP, and secretariats of the Convention to Combat Desertification, Framework Convention on Climate Change, and UN Forum on Forests. For more on the Partnership, see Collaborative Partnership on Forests Framework 2008 and 2009, E/CN.18/2009/12 (9 February 2009).

The Global Alliance for Vaccines and Immunizations (GAVI Alliance) is a partnership involving IOs such as the WHO, UNICEF and World Bank, along with developing world and donor governments, vaccine manufacturers, civil society organizations, and private sector philanthropists, to increase access to immunization in poor countries.

Many other examples could be adduced. But even this cursory overview illustrates some of the ways that diverse international organizations – ranging from human rights to finance to environmental bodies – interact and collaborate in their operational activities. And while scholars have begun to appreciate that IOs can generate new legal norms through their operational activities,[68] to date scholars have not addressed how interactions among IOs can generate international law.[69] Thus, for example, when various IOs began to work together in UNAIDS, they found it necessary to coordinate previously diverse policies across a variety of fields, ranging from anticorruption and procurement policies to the setting of standards for the quality, safety and efficacy of medical products.[70] As with the various types of standard setting discussed above, these standards are of immense practical importance, rendering questions concerning their binding nature of secondary importance. In practice, a series of robust and dynamic operational interactions can and do generate important normative standards in ways that conventional law-making techniques cannot.

In the aggregate, the developments outlined above constitute a dramatic change in the nature of IO law-making activity. While twenty-first century IOs continue to host and service traditional multi-lateral negotiation processes, these activities are just a small subset of IO law-making activities. We shall now explore the implications of these developments for the concept of the legal equality of states.

5.4 Looking Ahead: Sovereign Equality and Twenty-First Century International Organizations

We should hardly be surprised that IO activities, particularly in the law-making realm, have changed substantially over the past half-century. Indeed, the fact that IOs have continued to evolve since publication of *Legal Equality* is perfectly consistent with one of the book's underlying messages, which is to emphasize the importance of change, and the need for law – and of theorizing about law – to change in response to changing needs and practices:

> 'Every period demands its own law, because the substratum, human society, varies according to the times. Continually declaring the same legal rules as valid for all times

[68] Johnstone 2008, at 87.

[69] For a very preliminary effort in this direction, see Dunoff 2012, at 136-174.

[70] See, e.g., WHO, Prequalification Programme: A United Nations Programme managed by WHO, available at <http://apps.who.int/prequal/>.

> leads to meaningless conclusions and gives evidence of an absolutization of one's own period and its *Zeitgeist*.'[71]

Legal Equality traces a history of changing understandings of sovereign equality. As the volume amply demonstrates, this concept has been central to theorizing about the international legal order since the origins of modern international law. One obvious question raised is whether the meaning of sovereign equality has evolved yet again in the half-century since the book was published. A less obvious – but more interesting – question is whether investigating the meaning and significance of sovereign equality should still be a central focus of scholarly inquiry – at least for legal scholars attempting to understand twenty-first century international organizations. As an analytic, conceptual, and doctrinal matter, what work does the concept of 'the legal equality of states' do when considering contemporary practices of IOs? How, if at all, does this concept enrich or advance our understanding of current debates surrounding international organizations?

It would be difficult to conclude that the concept plays a central role in framing or advancing understanding of the important developments discussed in Sect. 5.2 above. Consider, for example, debates over the expansion of the Security Council's legislative activities. From time to time, states and other international legal actors have objected to one or more of the Security Council's law-making initiatives discussed above. Notably, however, the objections are rarely, if ever, phrased in terms of a violation of the principle of the legal equality of states. Thus, some argue that the Security Council is insufficiently representative or democratic to promulgate generally applicable international law. Others claim that efforts to create binding legal obligations via Security Council resolution are inconsistent with the fundamental positivist notion that states cannot be bound to international legal norms absent their consent.[72] Narrower critiques explore whether certain general phenomena, such as terrorism or the proliferation of WMD constitute 'threats to the peace' for Charter purposes, or whether obligations of a general and abstract character constitute 'measures' under article 39 of the Charter.[73] In short, '[w]hether viewed in terms of accountability, participation, procedural fairness or transparency of decision-making', it is possible to conclude that 'the Security Council is a seriously deficient vehicle for the exercise of legislative competence.'[74] Notably, whatever the merits of one or another of these critiques, the significant feature for current purposes is that virtually none of the diplomatic or scholarly debate over Security Council legislation turns on the meaning or implications of the concept of sovereign equality.

Much the same is true with respect to other non-traditional forms of IO law-making, including standard setting, external reference, administrative decision,

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[71] Kooijmans 1964, at 210.

[72] Note that even if this objection ultimately rests on a notion of state sovereignty, it is not a notion of sovereign equality.

[73] Talmon 2005, at 180.

[74] Boyle and Chinkin 2007, at 115.

and judicial opinion. Again, a number of different criticisms of these processes have been advanced. Thus, international lawyers with positivist orientations claim that it is difficult if not impossible to firmly ground much IO law-making in the relevant treaty instruments, and criticize the exercise of law-making powers by IOs as *ultra vires*. Others criticize the various subsidiary forms of law-making that many IOs engage in as being insufficiently democratic. As Eric Stein summarizes this critique,

> [a] new level of normative activity superimposed on national democratic systems makes citizen participation more remote, and parliamentary control over the executive, notoriously loose in foreign affairs matters, becomes even less effective. … The problem becomes even more palpable when a member state is outvoted in an IGO organ or when the law of the IGO is enforced directly in the domestic legal order without the national parliament's imprimatur (i.e., it is 'self-executing', has 'direct effect'). Again, the IGOs themselves are considered 'undemocratic' since they operate with little transparency or public and parliamentary scrutiny. They are seen as being governed by an elite group of national officials who are instructed by their respective executives, and by international secretariats whose staffs at times act independently of the top IGO management.[75]

Finally, the IO processes outlined above can be seen as infringing on state sovereignty. The argument is that, as states find themselves increasingly embedded in an ever-larger web of international organizations, and international commitments, states find themselves increasingly unable to exercise the supposedly unfettered regulatory discretion associated with sovereignty.

Happily, for current purposes it is not necessary to resolve the validity of these claims; it is sufficient to note that these are all serious critiques and each has sparked a substantial literature. What is notable is the arguments that are not made; none of the high-profile debates over the nature and activities of twenty-first century IO law-making turns on the meaning or implications of sovereign equality. Indeed, the concept is rarely, if ever, invoked in these or any other of the most important diplomatic or scholarly debates over law-making by contemporary IOs.

We see a similar pattern in debates over changing the composition of or voting rules for international bodies. Consider the issue of Security Council reform, which has been under consideration both inside and outside the UN for at least the past two decades, if not longer. Thus, in December 1992, the General Assembly placed on its agenda the topic 'Question of equitable representation on and increase in the membership of the Security Council',[76] and the following year it created the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council.[77] From then until today, '[t]he principal arguments for representational reform of the Council were (and are) based on

[75] Stein 2001, at 489.

[76] UNGA Res. 47/62, 11 December 1992.

[77] UNGA Res. 48/26, 2 December 1993.

principles of power (differential responsibilities) and inclusiveness (regionalism).'[78] Conspicuously absent from the justifications for Council reform are arguments grounded in sovereign equality.

Much the same is true in debates over reform to voting rights at the international financial institutions. In response to pressure from rapidly industrializing states and others, in 2006 the IMF increased quotas for China and three other underrepresented states; subsequent decisions further increased China's voting power, along with that of other developing states. The World Bank has similarly reformed its voting rules to give greater voting powers to developing states. These are significant developments, which reflect important structural changes in the global economy.[79] Significantly, at both the IMF and the Bank, the impetus for reform was *not* a sense that weighted voting was inconsistent with the legal equality of states. Rather, the debates centered around the need to reflect dramatic changes in the composition of the global economy, and to enhance the voice and participation of developing and transition countries in the IFIs to strengthen their long-term effectiveness and financial capacity.

Of course, to note that the concept of sovereign equality has not been germane to recent debates over the powers and activities of IOs is not equivalent to claiming – let alone proving – that the concept of sovereign equality should not be part of these debates. Although it is not often invoked, perhaps the term provides a rich conceptualization that can be used to critique or reform current practices. Or perhaps the term can be used to reform contemporary IOs to make them more just, more legitimate, and more effective.

To be sure, there is one prominent conception of sovereign equality that could serve as a powerful vocabulary of critique and reform – a conception that understands sovereign equality to require either equality of representation or equality of voting power among states that are members of an IO. Under this conceptualization, the vote of the smallest and weakest state would carry as much weight as the vote of the largest and most powerful. However, as noted above, Kooijmans explicitly rejects this conception of sovereign equality. He accepts that 'a place shall be assigned to those states in particular that have special capabilities in the particular field, on the basis of experience or otherwise', and that such asymmetrical treatment does not necessarily violate the legal equality of states.[80] Thus, international bodies need not provide formally legal treatment to all members when countervailing considerations are in play.

To ensure that I am not misunderstood, it is worth emphasizing that the claim that sovereign equality sheds little light on contemporary debates over IOs is emphatically *not* to claim that the concept of the legal equality of states is no longer meaningful or has lost relevance in all contexts, and should therefore be abandoned. Nor is it to claim that recent developments mean that the international

[78] Cogan 2009, at 209.

[79] For a discussion, see Dunoff 2011.

[80] Kooijmans 1964, at 281.

community has or should seek to build an international legal order premised on sovereign *in*equality, whatever that term might mean. Finally, to note the rhetorical displacement of the term sovereign equality from current debates is not to suggest that hierarchy or exclusion should be enshrined in basic norms of the international system. Rather, the suggestion is that despite its historic importance, the notion of sovereign equality sheds very little light on current developments or debates over the activities of twenty-first century IOs. Moreover, by directing our attention to matters internal to IOs, it runs the risk of diverting our attention to many of the most pressing current and future issues regarding twenty-first century IOs, which revolve around the normative results when IOs interact *among* each other.

Thus, in understanding twenty-first century IOs, it is necessary to make two analytic moves that would have been virtually unthinkable at the time *Legal Equality* was written. *First*, we should recognize, and incorporate into our theorizing about the international system, the fact that the intergovernmental vision of IOs is no longer accurate, and that the actions of twenty-first century IOs are not simply by-products of state preferences. Modern IOs do much more than simply execute international agreements reached between states. In the contemporary international legal order, IOs render authoritative decisions over an immense range of issues that reach every corner of the globe. In so doing, they can – and often do – act as independent and autonomous actors on the global stage.

Second, in a highly fragmented international system, IOs undertake their normative activities and operational responsibilities across a domain that is often characterized by fragmentation and overlapping jurisdiction. This structure can result in redundancy, inefficiency and gaps – as well as the potential for inconsistencies and conflicts. This highly fragmented order has given rise to the forms of IO interaction described above. As a result, a proper understanding of twenty-first century IOs requires a firm grasp of inter-IO dynamics, and the ways that IOs create, share, and often contest, international regulatory space. Of course, the traditional concept of the legal sovereign equality of *states* is of limited utility when trying to understand dynamics between *international organizations*. Thus, in attempting to understand this new domain, we should ask whether there are other legal concepts or doctrines that can shed doctrinal and normative light on IO interactions?

While a complete response to this question is well beyond the scope of this essay, a few observations are in order. Specifically, I believe that there are several concepts on offer which attempt not only to incorporate the principled, inclusive, egalitarian elements commonly associated with sovereign equality, but also which are better designed to explicate a wide range of contemporary IO activity. For example, within the UN system itself, much attention has recently been devoted to strengthening 'the rule of law'. Indeed, the Secretary General has gone so far as to claim that '[r]ule of law at the international level is the very foundation of the Charter of the United Nations.' Although much of the analytic and programmatic energies behind this initiative are directed at strengthening the UN's operational activities related to technical assistance and capacity building on the national level, enhancing the rule of law at the international level is also an important part of this

effort. To this end, the Secretary General issued a 'guidance note' that outlines how the UN can support the rule of law, including with respect to interactions among international organizations. This document emphasizes 'coordination and cooperation' among IOs with the aim of ensuring 'efficiency, consistency and coherence' in these activities. The Secretary General's note also highlights the need to 'maximiz[e] effectiveness by leveraging the relative expertise of each organization involved.' While the implications of this concept on the international plane are not yet fully clear, this seems a potentially promising framework through which to understand, criticize, and justify interactions among IOs.

In legal scholarship, in addition to the rule of law,[81] scholars have begun to develop other concepts that can be employed to increase the legality and legitimacy of international organizations' expanded activities, including new law-making activities and processes of IO interactions. Two of the most prominent of these new approaches are international constitutionalism and global administrative law.

International constitutionalists urge the application of constitutional principles to improve the effectiveness and fairness of the international legal order.[82] While constitutionalist approaches vary widely in the scope of their ambitions, virtually all writings in this vein can be understood as an effort to give the largely unstructured and historically accidental order of global governance a rational, justifiable shape.

In a recent volume entitled *Ruling the World? Constitutionalism, International Law and Global Governance*, Joel Trachtman and I detail an approach to international constitutionalism that highlights international rules that enable or constrain the creation of international law.[83] Hence, our focus is on 'rules about rules', or what H.L.A. Hart called secondary rules.[84] This functionalist approach joins other constitutionalist approaches, ranging from those that emphasize human rights and judicial review in international institutions,[85] to broader calls for a legalization of transnational politics,[86] to visions of a global order governed by an identifiable constitutional text.[87]

The constitutionalist approach promises to bring hierarchy and order, or at least a set of coordinating mechanisms, into an otherwise chaotic and potentially contradictory system. Of course, many question whether a highly diverse constellation of international legal actors shares a comprehensive set of universal values that can bring order and hierarchy to the disorder associated with fragmentation.[88]

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[81] See, e.g., Waldron 2011, at 315.

[82] See generally Peters 2009, at 397.

[83] Dunoff and Trachtman 2009.

[84] Hart 1961.

[85] See, e.g., Petersmann 2008, at 827.

[86] See generally Kumm 2004, at 907.

[87] See generally Fassbender 2009, at 133-148.

[88] For a discussion, see Dunoff and Trachtman 2009, at 3–36.

Moreover, even if as a descriptive matter such a set of values existed, the desirability of a constitutionalist approach would turn, in part, on the normative attractiveness of the underlying value system.

An alternative and competing approach has been developed by 'global administrative law' (GAL) scholars.[89] This literature was developed in response to one of the key developments described above, namely that much modern global governance takes the form of regulation and administration by IOs. This activity occurs not in high-profile diplomatic conferences or treaty negotiations, but in less visible settings that GAL scholars identify as a 'global administrative space'. GAL scholars highlight the ways that different types of actors and different layers of governance together 'form a variegated "global administrative space" that includes international institutions and transnational networks as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects' and that transcend the traditional distinctions between public and private and national and international.[90] GAL writings describe these little-known international, transnational, and domestic processes and urges that they be reformed along lines that advance administrative law values, such as transparency, consultation, participation, reasoned decision making, and review processes.

Thus, both approaches explore the uses and limitations on the exercise of authority by IOs in transnational settings. However, unlike constitutionalism, which tends to be state-centric, GAL takes a broader view of international law's processes and actors. In particular, GAL properly directs attention to the role of non-state actors and of various public-private and private processes of norm making and norm application. In many other ways, however, the GAL project is much less ambitious than the constitutionalists'.[91] For example, while GAL writings focus largely on administrative exercises of power, constitutionalists also examine legislative and judicial practices. Moreover, constitutionalism addresses a much richer array of normative and institutional issues than GAL does. GAL focuses specifically on enhancing the accountability and legitimacy of global administrative practices. While accountability and legitimacy are central constitutional values, constitutionalists address a wider range of normative concerns that are associated with contemporary global governance.

GAL is less ambitious than constitutionalism in yet another way as well. GAL largely takes the existing order as is and proposes incremental change to existing institutions.[92] However, by failing to engage with larger structural and normative issues, GAL runs the risk of seeming to legitimate particular narrow practices that are themselves embedded in a larger system that is itself largely illegitimate.[93]

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[89] See Kingsbury et al. 2005, at 1; Krisch and Kingsbury 2006, at 1.

[90] Kingsbury 2009, at 23.

[91] See Dunoff and Trachtman 2009, at 33–34; Krisch 2010.

[92] Krisch 2010.

[93] Ibid.

Finally, insofar as GAL focuses on administrative practices found in regulatory spaces within specific international organizations. It thus has little to say about the institutional and normative issues raised by the increasingly dense relationships among international organizations.

5.5 Conclusion

This paper takes as its launching point Pieter Kooijmans' *The Doctrine of the Legal Equality of States*. Kooijmans' classic text outlines how and why the concept of sovereign equality has been understood to be fundamental to a society consisting primarily of states having a uniform legal personality. The volume explores the various meanings attached to this term over international law's history, and applies the concept to contemporaneous developments in international organizations.

The intervening years have not been particularly kind to the concept of 'sovereign equality'. In part, this is because the concept of sovereignty has come under sustained attack. Concerns over transnational terrorism, internal conflict in failed states, and grave violations of human rights ranging from ethnic cleansing to war crimes to genocide have combined to persuade many that sovereignty-based and state-centric understandings of international law and international relations are outdated, and should be replaced with understandings grounded in a respect for human rights. From this perspective, states are not bearers of any inherent value, but exist only for the benefit of individuals within the state. Hence, norms protecting the sovereign equality of failed or rogue states, such as rules of non-intervention, increasingly appear out of date, and an international legal order premised on them increasingly illegitimate.

In this short paper, I have approached the problem of the continuing vitality and utility of the concept of sovereign equality from a quite opposite direction. Instead of developing a critique that flows from the enhanced status of individuals, I have tried to 'update' Kooijmans' analysis by examining substantial changes in IO activities since the time *Legal Equality* was published. To do so, I have highlighted some of the significant shifts in IO's law-making activities, and the dramatic rise in the number and importance of IO interactions *inter se*. I have also argued that the concept of sovereign equality sheds little light on the controversies associated with the activities of twenty-first century IOs; as a result I believe that it is necessary to decenter the discourse of sovereign equality to understand and conceptualize these shifts. Of course, displacing sovereign equality does not mean that we should celebrate or enshrine legal inequality. Rather, we should look for other concepts that incorporate the notions of inclusiveness and egalitarianism associated with sovereign equality, but that are more applicable to the actions of twenty-first century IOs.

References

Alexandrowicz CH (1962) The Secretary General of the United Nations. Int Comp Law Q 11:1109–1130

Alter KJ (2013) The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review. In: Dunoff JL, Pollack MA (eds) Interdisciplinary perspectives on international law and international relations: the state of the art. Cambridge University Press, New York, pp 345–370

Alvarez J (2005) International Organizations as law-makers. Oxford University Press, New York

Aufricht H (1962) State succession under the law and practice of the International Monetary Fund. Int Comp Law Q 11:154–170

Bellinger JB III (2005) Remarks of legal adviser, U.S. Department of State. United Nations Security Council Resolutions and the application of international humanitarian law, human rights and refugee law, International Conference, San Remo, Italy. http://www.state.gov/s/l/c8183.htm. Accessed 23 June 2012

Blum YZ (2005) Proposals for UN Security Council reform. Am J Int Law 99:632–649

Bowett DW (1960) The second United Nations Conference on the Law of the Sea. Int Comp Law Q 9:415–435

Boyle A, Chinkin C (2007) The making of international law. Oxford University Press, Oxford

Brewer W Jr. (1964) The proposal for investment guarantees by an international agency. Am J Int Law 58:62–87

Brohi AK (1961) Five lectures on Asia and the United Nations. A.W. Sijthoff, Leyden

Brunée J (2002) COPing with consent: law-making under multilateral environmental agreements. Leiden J Int Law 15:1–52

Buergenthal T (1969) Law-making in the International Civil Aviation Organization. Syracuse University Press, Syracuse

Churchill R, Ulfstein G (2000) Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law. Am J Int Law 94:623–659

Cogan JK (2009) Representation and power in international organization: the operational constitution and its critics. Am J Int Law 103:209–263

Dean A (1960) Second Geneva Conference on the Law of the Sea. Am J Int Law 54:751–789

Detter TIH (1962) The organs of international organizations exercising their treaty-making power. Br Yearb Int Law 38:421–444

Dickinson E (1920) The equality of states in international law. Harvard University Press, Cambridge

Draper GIAD (1963) The legal limitations upon the employment of weapons by the United Nations force in the Congo. Int Comp Law Q 12:387–413

Dunoff JL (2006) Lotus eaters: the Varietals dispute, the SPS Agreement, and WTO dispute resolution. In: Bermann G, Mavroidis P (eds) Trade and human health and safety. Cambridge University Press, New York, pp 153–189

Dunoff JL (2011) China's role in the evolving global order: reflections on ten years of membership in the World Trade Organization. (Chinese) J Int Econ Law 18:3

Dunoff JL (2012) A new approach to regime interaction. In: Young M (ed) Regime interaction in international law: facing fragmentation. Cambridge University Press, Cambridge, pp 136–174

Dunoff JL, Trachtman JP (2009) A functional approach to international constitutionalization. In: Dunoff JL, Trachtman JP (eds) Ruling the world? Constitutionalism, international law, and global governance. Cambridge University Press, New York, pp 3–36

Erler J (1964) International legislation. Can Yearb Int Law 2:153–163

Fassbender B (2009) Rediscovering a forgotten constitution: notes on the place of the UN Charter in the international legal order. In: Dunoff JL, Trachtman JP (eds) Ruling the world? Constitutionalism, international law, and global governance. Cambridge University Press, New York, pp 133–148

Fawcett JES (1960) The place of law in an international organization. Br Yearb Int Law 38:321–342
Fawcett JES (1964) The International Monetary Fund and international law. Br Yearb Int Law 40:32–76
Feinberg N (1963) Unilateral withdrawal from an international organization. Br Yearb Int Law 39:189–219
Gold J (1974) Weighted voting power: some limits and some problems. Am J Int Law 68:687–804
Gregg RW (1964) The United Nations and the opium problem. Int Comp Law Q 13:96–115
Gross L (1960) The question of Laos and the double veto in the Security Council. Am J Int Law 54:118–131
Halderman JW (1962) Legal basis for United Nations armed forces. Am J Int Law 56:971–996
Hart HLA (1961) The concept of law. Oxford University Press, Oxford
Helfer L (2008) Nonconsensual international lawmaking. Univ Ill Law Rev 2008:71–126
Higgins R (1961) The legal limits to the use of force by sovereign states: United Nations practice. Br Yearb Int Law 38:269–319
Jenks CW (1965) Unanimity, the veto, weighted voting, special and simple majorities and consensus as modes of decision in international organisations. In: Bowett DW et al. Cambridge essays in international law: essays in honour of Lord McNair. Stevens Publishing Company, London, pp 48–63
Johnstone I (2008) Law-making through the operational activities of international organizations. George Wash Int Law Rev 40:87–122
Kelsen H (1944) The principle of sovereign equality of states as a basis for international organization. Yale Law J 53:207–220
Kerley EL (1961) The powers of investigation of the United Nations Security Council. Am J Int Law 55:892–918
Kingsbury B (2009) The concept of 'law' in global administrative law. Eur J Int Law 20:23–57
Kingsbury B et al. (2005) Foreword: global governance as administration—National and transnational approaches to global administrative law. Law Contemp Probl 68:1–14
Kirgis F Jr (1997) Specialized law-making processes. In: Joyner C (ed) The United Nations and international law. Cambridge University Press, Cambridge, pp 65–94
Kooijmans PH (1964) The doctrine of the legal equality of states. An inquiry into the foundations of international law. A.W. Sythoff, Leiden
Krisch N (2010) Global administrative law and the constitutional ambition. In: Dobner P, Loughlin M (eds) The twilight of constitutionalism. Oxford University Press, Oxford, pp 245–265
Krisch N, Kingsbury B (2006) Introduction: global governance and global administrative law in the international legal order. Eur J Int Law 17:1–13
Kumm M (2004) The legitimacy of international law: a constitutionalist framework of analysis. Eur J Int Law 15:907–931
Lauterpacht H (ed) (2011) The development of international law by the International Court. Cambridge University Press, Cambridge
Lowe V (2012) The function of litigation in international society. Int Comp Law Q 61:209–222
McIntyre E (1954) Weighted voting in international organizations. Int Organ 8:484–497
Meron T (1960) The question of the composition of the Trusteeship Council. Br Yearb Int Law 36:250–278
Penn W (1726) An essay towards the present and future peace of Europe. In: Portsmouth NH (ed) A collection of the works of William Penn. J. Sowle, London, pp 838–848
Peters A (2009) The merits of global constitutionalism. Indiana J Glob Legal Stud 16:397–411
Petersmann EU (2008) Judging judges: from 'principal-agent theory' to 'constitutional justice' in multilevel 'judicial governance' of economic cooperation among citizens. J Int Econ Law 11:827–884

Roben V (2008) International law, development through international organizations. In: Wolfrum R (ed) Max Planck Encyclopedia of public international law. Oxford University Press, Oxford, pp 889–895
Robertson AH (1961) The legal work of the Council of Europe. Int Comp Law Q 10:143–166
Romano CPR (1999) The proliferation of international judicial bodies: the pieces of the puzzle. N Y Univ J Int Law Politics 31:709–752
Romano CPR (2011) A taxonomy of international rule of law institutions. J Int Dispute Settl 2:241–277
Rosand E (2005) The Security Council as 'global legislator': ultra vires or ultra innovative. Fordham Int Law J 28:542–590
Saba H (1964) L'activité quasi-législative des institutions spécialisées des Nations Unies. A.W. Sythoff, Leiden
Schachter O (1961) Legal aspects of the United Nations action in the Congo. Am J Int Law 55:1–28
Schachter O (1963) The relation of law. Politics and action in the United Nations. A.W. Sythoff, Leiden
Schachter O (1964) The quasi-judicial role of the Security Council and the General Assembly. Am J Int Law 58:960–964
Schick FB (1963) The question of China in the United Nations. Int Comp Law Q 12:1232–1250
Seyersted F (1961) United Nations forces: some legal problems. Br Yearb Int Law 37:351–475
Simmonds KR (1963) The constitution of the Maritime Safety Committee of the IMCO. Int Comp Law Q 12:56–87
Smrkolj M (2008) International institutions and individualized decision-making: an example of the UNHCR's refugee status determination. Ger Law J 9:1779–1804
Stein E (2001) International integration and democracy: no love at first sight. Am J Int Law 95:489–534
Szasz P (2002) The Security Council starts legislating. Am J Int Law 96:901–905
Talmon S (2005) The Security Council as world legislature. Am J Int Law 99:175–193
Talmon S (2009) Security Council treaty action. Revue Hellenique de Droit International 62:65–116
Waldron J (2011) Are sovereigns entitled to the benefit of the international rule of law? Eur J Int Law 22:315–343
Weinschel H (1951) The doctrine of the equality of states and its recent modifications. Am J Int Law 45:417–442
Young M (2008) Fragmentation or interaction: The WTO, fisheries subsidies and international law. World Trade Rev 8:477–515
Young MA (2011) Trading fish, saving fish: the interaction between regimes in international law. Cambridge University Press, Cambridge
Zacher M (2004) The conundrums of international power sharing: the politics of Security Council reform. In: Price R, Zacher M (eds) The United Nations and global security. Palgrave Macmillan, New York, pp 211–217
Zamora S (1980) Voting in international economic organizations. Am J Int Law 74:566–608

Chapter 6
Equality of States and Immunity from Suit: A Complex Relationship

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Abstract This article takes Pieter Kooijmans' 1964 book as the launching point for a discussion of contemporary issues relating to the legal equality of States in the context of immunity from suit. It assesses the strengths of the '*Grundnorm*' of sovereign equality and examines whether it has any real role to play in providing answers to current problems, including whether immunity should be set aside in the face of claims that a foreign State or its agent has committed human rights violations. Close attention is paid to the 2012 Judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case. That Judgment demonstrates that sovereign equality has not yet been replaced as the generating principle of law in the realm of immunity. At the same time, there is an emerging alternative approach centered on the individual rather than the State.

Keywords Equality of states · Sovereign equality · State immunity · Human rights · International crimes · International Court of Justice

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6.1 Introduction

Pieter Kooijmans' *The Doctrine of the Legal Equality of States*, published by Sijthoff in 1964, evidences a fine mind and impressive erudition. It already demonstrates the fairmindedness, liberalism and hardheaded realism that was to be present in the remarkable career that has followed.

His book addresses the issue of legal equality through a study of the great legal theories in classic international law and in the post-Grotian period. Pieter Kooijmans then proceeds to a study of legal equality by reference to 'new theories' (in which Kelsen's critical positivism was then ranked) and new doctrines.

Today we particularly associate the concept of the legal equality of States with the post-war prohibition on the use of force, save in self-defence, and with the doctrine of sovereign immunity. As to the latter, there were few problems and little to dispute until midway through the last century.

This essay, however, takes the work that Pieter Kooijmans has done in his book as the basis for a discussion of contemporary issues relating to the legal equality of States in the context of sovereign immunity.

The equality of States is 'a fundamental axiomatic premise of the legal order'.[1] For some, it is the '*Grundnorm*', and those aspects of international law with which we most associate the concept of equality of States – for example, the prohibition of the use of force save in self-defence, non-intervention, sovereign immunity – are seen as rules that flow from this *Grundnorm*. Even for common law lawyers less used to thinking of '*Grundnorms*', the equality of States is indeed the essential starting point.

This essay will attempt to assess the strengths of this norm today and to ask whether the notion of sovereign equality of States has any real role to play in providing the answers to the contemporary stresses bearing upon the concept of sovereign immunity. From this essential point of departure of the equality of States (and respect for their sovereignty) came the original agreement that there was absolute immunity for States from the adjudicative and enforcement jurisdiction of other States.

[1] Kokott 2007, para. 1.

Early cases according immunity to a State frequently cited the principle of sovereign equality of States, and its invocation has not disappeared today.[2] This has been the position in customary international law. Over the years certain 'exceptions' to this principle of immunity have emerged. Some of these exceptions have been to accommodate another principle that flows from sovereign equality of States, namely that a State has jurisdiction over persons within and events occurring within its own territory. Alluding – perhaps in not the clearest terms – to national jurisdiction and State immunity, the International Court of Justice recently said that

> [t]his principle [sovereign equality] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty, and the jurisdiction which flows from it.[3]

Nonetheless, the national legislation and treaty texts which have sought to address this principle of customary international law do not speak of the primary rule being that of State jurisdiction over its own territory, giving rise to certain exceptions. They speak of sovereign immunity as the point of departure, with 'exceptions' thereto by way of permitted exercise of national jurisdiction.[4]

As the Court of Appeal for Ontario put it in the *Bouzari v. Iran* case that

> the concept of sovereign equality of states … [is] a principle rooted in customary international law. However, over the years, the dictates of justice have led to some attenuation in the absolute immunity of states, through the evolution of certain specified exceptions to the general rule. Nevertheless, the doctrine of restrictive immunity[5] which has emerged continues to have the general principle of state immunity as its foundation.[6]

And in 2002 in *Schreiber v. Canada (Attorney-General)* Lebel J observed that

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[2] See *Underhill v Hernandez* (1897) 118 US 456; *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1; *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, ICJ, Merits, Judgment of 3 February 2012, para. 57; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* ICJ, Merits, Judgment of 14 February 2002, paras. 1 and 62. See also the 2009 Naples Resolution of the *Insitut de droit international,* Article II(1): 'Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.'

[3] *Jurisdictional Immunities of the State*, para. 57. This last point had already been emphasized in the Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, para. 3.

[4] See, e.g., 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, Annex, UN Doc. A/RES/59/38, art. 5 and the 1978 UK State Immunity Act, s 1(1).

[5] See below Sect. 6.2.

[6] *Bouzari et al. v. Islamic Republic of Irani* (2004) 243 DLR (4th) 406, paras. 40-41.

> [d]espite the increasing number of emerging exceptions, the general principle of sovereign immunity remains an important part of the international legal order …[7]

And so it is that all national legislation and international treaties on the matter of State immunity are drafted in terms of 'the rule' (absolute immunity) and 'exceptions' (articulated in the instrument concerned).[8]

6.2 Restrictive Immunity

The transition from the universal acceptance of immunity for States in all circumstances to a confinement of that immunity to *acta jure imperii*[9] is interesting to trace. Of course, as the strangulated wording in the United Nations Convention on the Jurisdictional Immunities of States and their Property of 2004 (UNCSI, still not in force) in Article 10 evidences, it is still not universally agreed that absolute immunity is not available in all cases.

In looking to see whether the old rule of absolute immunity could have exceptions, various factors were in play, such as the increased participation of States in commercial activities. The Italian courts in the 1880s took the first steps, with the courts of that country basing their judgments on legal policy reasoning, differentiating between the State as a sovereign and as a subject of private law.[10] Belgian courts and the mixed courts of Egypt also endorsed the restrictive doctrine in their judgments at the turn of the twentieth century.[11]

Some considerable years after these judicial decisions, there was the so-called Tate letter of 1952,[12] in which the United States announced, as a matter of policy, that it would no longer grant immunity from US jurisdiction to potential defendants who had been trading.

The English courts in *The Philippine Admiral*,[13] and a stream of cases that then followed, used these events in Italy and the US to show that there was, in the famous words of Lord Denning,[14] a 'trickle' that had become a 'flood' in accepting the *acta jure imperii* limitation to immunity from jurisdiction. The main problem

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[7] *Schreiber v. Canada (Attorney General)* (2002) 216 DLR (4th) 513, para. 17.

[8] See 1978 United Kingdom State Immunity Act s 3(3); 1976 United States Foreign Sovereign Immunities Act s 1605; 1972 European Convention on State Immunity Articles 1-15; UNCSI, arts. 5, 10-17.

[9] For a brief description, see Fox 2008, at 224-226.

[10] See, e.g., *Guttieres v. Elmilik* (1886), Foro It. 1886-I, 913 (cited in Fox 2008, at 224).

[11] *SA des Chemins de Fer Liégeois-Luxembourgeois v. l'Etat Néerlandais*, Pasicrisie belge 1903, I294; Hoyle 1987.

[12] Letter of 19 May 1952 from the Acting Legal Adviser of the Department of State, Jack Tate, to the Acting Attorney-General Philip B. Perlman (reprinted in 26 Dep't St. Bull. 984-985 (1952)).

[13] *Philippine Admiral (Owners) Appellants v. Wallem Shipping (Hong Kong) Ltd and Another* (1977) AC 373.

[14] *Trendtex Trading Corporation v. Central Bank of Nigeria* (I977) QB 529, at 556.

of UK courts of the time, who wished to follow this new line of restrictive immunity, was being able to extract themselves from the precedent of previous cases[15] which affirmed the immunity was total.

Two particular points of interest arise. The first is that, if a widely ratified international treaty text cannot be achieved, then a rule can only be changed if there is evidence of such change in the acknowledged sources of international law, to show State practice. The Italian cases and the Tate Letter (judicial findings and pronouncements of the Executive) were numerically modest examples, but Italy and the US were important trading nations, and the widespread mood in other States in a comparable position was to gain the same protection for themselves.[16] Second, while the principle of sovereign equality of States continued to be invoked by those insisting upon absolute immunity,[17] the argument for the move to restrictive immunity was that States sometimes acted as traders, and the principle of sovereign equality of States had no pertinence.

6.3 Territorial Torts

Where torts are concerned, there is a sharp counterpointing of the principle of *par in parem non habet imperium* with the principle of jurisdiction over one's own territory. So important is the principle of territorial jurisdiction that there is significant evidence in State practice of where it has in effect prevailed. Article 11 of the European Convention on State Immunity of 1972 (ECSI) renders non-immune 'proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred'. The United States Foreign Sovereign Immunities Act of 1976 (FSIA) stipulates that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment …[18]

[15] E.g., *The Tervaete* (1922), at 274; *The Cristina* (1938) AC 485.

[16] Fox 2008, at 226-230.

[17] See, e.g., *FG Hemisphere LLC v. Democratic Republic of Congo*, Hong Kong Court of Final Appeal: Bokhary, Chan and Riberio PJJ, Mortimer and Sir Anthony Mason NPJJ: FACV No. 5, 6 and 7 of 2010, decided 8 June 2011.

[18] FSIA, s 1605(a)(5).

The United Kingdom State Immunity Act of 1978 (SIA) provides that

> A State is not immune as respects proceedings in respect of:
>
> (a) death or personal injury; or
> (b) damage to or loss of tangible property,
>
> caused by an act or omission in the United Kingdom.[19]

And it is interesting to see that in the UNCSI it was agreed that

> [u]nless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission, which is alleged to be attributable to the State, if the act or omission occurred in the whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[20]

The drafting may leave something to be desired, but the general thrust is clear.

There is thus a general consensus that the right of a State to exercise its jurisdiction over personal injuries and damage to property occurring on its territory prevails over the entitlement of a State to insist that the equality of States prevents another State from exercising jurisdiction over its acts.

We will wish to return to the ramifications of the tort exception to immunity. But it is convenient at this juncture that the UK SIA specifies further in Section 3(1)(b) a State is not immune as regards a contract obligation ('whether a commercial transaction or not') which falls to be performed wholly or in part in the United Kingdom.[21] But there does seem to be a more general consensus that there is no immunity in respect of a contract of employment between the State and an individual for work performed or to be performed in whole or in part in the territory of the forum State.[22] The strength of territorial jurisdiction is today outweighing the principle of equality of States – *par in parem non habet imperium* – once thought essential.

And added to that list of exceptions to the general immunity rule are other events that have a close connection with the territory of the forum State: the constitution of companies; ownership, possession and the use of property; and intellectual and industrial property that is under the protection of the law in the forum State.[23]

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[19] UK SIA, s 5.

[20] UNCSI, art. 12 headed 'Personal injuries and damage to property'.

[21] This provision does not appear in the UNCSI nor FSIA. It is included in ECSI in Article 4.

[22] UNCSI, Article 11; UK SIA, s 4.

[23] See Articles 12-13 UNCSI; s 6-8 UK SIA; Articles 6-8 ECSI; s 1605(a) FSIA.

6.4 Current Problems

With this much recounted, it can be seen that the concept of immunity, save for territorial contracts and torts, and save for when a State is acting commercially, today leaves many problematic areas.

- The first relates to crimes under domestic law in the forum State.
- The second relates to crimes under international law, in the forum and elsewhere.
- A third relates to claims that the grant of immunity denies rights granted to individuals under human rights treaties.

These problems will be briefly deployed, along with the underlying question of whether the principle of equality of States has any real role in resolving them.

6.4.1 Crimes by a Foreign State, or Agent of the State, in the Territory of the Forum

Why, it may be asked, if there is no immunity for contracts for performance within the forum State (the test of *acta jure gestionis* having no relevance), and for torts occurring within the forum State, should immunity continue for *crimes* performed within the forum?

It can indeed be argued that, in the balance to be struck between the law of immunity and the exercise of territorial jurisdiction, the tipping of the balance in favour of the latter is even stronger where a violation of the territorial State's criminal law is concerned.

The International Court approached this question in somewhat complex circumstances in the case of *Djibouti v. France*.[24] Among the many claims, it was asserted that those claiming to be in the service of Djibouti had entered France with the intent of tampering with witnesses in a domestic litigation relevant to the case before the ICJ. Did a State have to afford immunity to agents of a foreign State who are performing criminal acts – clearly going beyond mere torts – on its territory?

The Court in effect sidestepped this difficult issue. The persons concerned did not benefit from the Vienna Convention on Diplomatic Relations of 1961. Moreover, none of the normal diplomatic exchanges that would have been expected had occurred. Thus the claim for immunity of persons said to be State organs is really, said the International Court, a claim for the immunity of the State concerned, Djibouti. And, said the Court, '[t]he State which seeks to claim immunity for one of its State organs [would be] expected to notify the authorities

[24] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ, Merits Judgment of 4 June 2008.

of the other State concerned.'[25] And, added the Court – pointedly in the light of the claims about the actions of the persons concerned –

> the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.[26]

So, in the event, the question was not directly answered as to whether there was not – notwithstanding an absence of pertinent clauses in the relevant treaties and national legislation – a greater policy interest in the principle of territorial jurisdiction over crimes than in the principle of the equality of States.

The *Pinochet* case[27] cannot safely be read as determinative of general principles, partly because of the very specific facts of the case, including that Spain, Chile and the UK were parties to the UN Convention against Torture at the relevant time (since 1988) and that Pinochet was no longer in public office at the time of the request for extradition. The influence of the case is also constrained by the very different reasoning offered in the speeches of their Lordships. But later, in *Jones v. Saudi Arabia*,[28] Lord Bingham of Cornhill, making allusion to the fact that it concerned criminal proceedings, observed that certain members of the House of Lords had said that immunity for such acts in civil proceedings remained unaffected.[29]

6.4.2 Crimes Under International Law on the Territory of the Forum

This matter, which has long been festering, has come to the fore again, in more striking form, in the recent case of *Germany v. Italy*. At the heart of this case was the question of whether Italy had violated international law by allowing claims against Germany to proceed in Italian courts.[30] These were certainly not *acte jure gestionis* and did not fall within any of the acknowledged exceptions to immunity. For its part, Italy claimed that it is not for violations of the law of armed conflict

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[25] Ibid., at 244, para. 196.

[26] Ibid., at 244, para. 196.

[27] *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 A.C. 61 (2000) AC 147.

[28] *Jones v. Saudi Arabia (*2006) UKHL 26.

[29] See, e.g., Lord Hoffman, who commented that there was nothing in the Torture Convention which creates an exception to immunity in civil proceedings. *Jones v. Saudi Arabia*, at 23.

[30] The claims fell into three categories: victims and their relatives of the large-scale killing of civilians in occupied territory as part of a policy of reprisals; members of the civilian population who were deported from Italy to what slave labour in Germany; and members of the Italian armed forces who were denied the status of prisoner of war to which they were entitled and who were also used as forced labourers. *Jurisdictional Immunities of the State*, para. 52.

that international law accords immunity to a State. It also insisted that vile crimes could simply not constitute *acte jure imperii* – the sovereign acts of a State. These were not the sovereign acts that were ever intended to be protected by this doctrine. The Court, in its detailed judgment, observed that

> [t]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1 of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.[31]

However, sovereign equality

> has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory.[32]

The Court went on to say that exceptions to the immunity of a State 'represent a departure from the principle of sovereign equality'.[33] All the relevant treaties and acts say that the rule is immunity, although there are exceptions.[34] But the Court hinted at territorial jurisdiction as the 'prime rule': 'Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.'[35]

Perhaps we begin to see a small movement away from sovereign equality as a norm for all seasons in the present world… There has long been the feeling that although immunity is described in the relevant acts and treaties as 'the' rule, with increasing numbers of exceptions, the 'reality' is that a State has no immunity unless it can show it is engaged in *acta jure imperii*.

In the case of *Germany v. Italy*, there were three points canvassed of very particular importance. The first is whether the terrible acts behind this litigation could ever be described as *acta jure imperii*. The second was whether permitted jurisdiction in the case of acts by a State amounting to torts on the territory of the forum State should not *a fortiori* allow jurisdiction in the case of crimes committed by a State on the territory of the forum State. And the third – and slightly different contention – was that fearful acts, often contrary to *jus cogens*, were not protected by the law of immunity. Put differently, (which was the way the Court chose to cast it) it is not the terrible nature of the acts involved that provide a foundation for jurisdiction.

Some words may be said on each of these. Could acts contrary to international law ever constitute *acta jure imperii* on which a State could rely in an immunity

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[31] Ibid., para 57.

[32] Ibid., para. 57.

[33] Ibid.

[34] UNCSI, ECSI, the 1983 draft Inter-American Convention on Jurisdictional Immunity of States, and the national legislation of Argentina, Australia, Canada, Israel, Japan, Singapore, South Africa, UK, and USA.

[35] *Jurisdictional Immunity of the State*, para. 57.

claim? The Court did not find this hard to answer. Indeed, Italy, in response to a question by a member of the Court, acknowledged that the acts concerned were *acta jure imperii*, notwithstanding that they were unlawful.[36] And the fact that Germany admitted throughout that the acts were unlawful 'does not alter the characterization of those acts as *acta jure imperii*'.[37] This must be right: the tests for *acta jure imperii* do not relate to legality. The tests are different ones.

On the matter of torts by States on the territory of another, there appeared to be mixed practice as to whether relevant legislation or treaties applied *at all* to foreign armed forces.

The Court, in a very thorough analysis on this point, noted that in no national legislation was the 'tort exception' limited in terms to the *acta jure imperii*. And Article 31 of the ECSI had the effect that the acts of armed forces in the territory of another fell outside the Convention and were to be decided by customary international law. Although there was no comparable clause in the UNCSI, no one had challenged certain ratifying States which had stated their understanding that the Convention does not apply to military activities.[38] The Court's trawl of national legislation showed variation in terminology, but

> in none of the seven States in which the legislation contains no general exception for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving armed forces of a foreign States …[39]

The Court found that State practice in the form of judgments of national courts 'suggest[s] that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.'[40] This conclusion was reached after very thorough survey of State judicial practice. The Court found that this is also confirmed by judgments of the European Court of Human Rights.[41]

As explained above, this analysis is thorough and can be regarded as correct. At the same time, we have noted that the principle of sovereign equality has bowed in the face of sovereign exercise of jurisdiction over events within a State's own territory. But the Court's (entirely correct) analysis of the law of immunity with respect of armed forces suggests that the sovereign exercise of jurisdiction over acts in one's own territory tips back in favour of *par in parem non habet imperium* where foreign military acts are concerned.

This situation has to be seen as curious and in the view of this writer is unlikely to stand the test of time. It is inherently anomalous that the exercise of territorial

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[36] Ibid., para. 60.

[37] Ibid.

[38] Ibid., para. 69. Moreover, when presenting to the Sixth Committee of the General Assembly the Report of the Ad Hoc Committee, the Chairman of the Ad Hoc Committee stated that the draft UNCSI 'had been prepared on the basis of a general understanding that military activities were not covered'. UN doc. A/C.6/59/SR.13, para. 36.

[39] *Jurisdictional Immunity of the State*, para 71.

[40] Ibid., para. 72.

[41] Ibid., para. 71.

jurisdiction prevails over immunity where torts are concerned, but not where criminal acts of a foreign military are concerned. There will surely be more to this legal story in the years to come.

So far as what we may term 'regular crimes' by the foreign military are concerned (i.e., theft, rape, etc.), very often bilateral and multilateral status of forces agreements (SOFAs) allocate jurisdiction and provide for the settlement of disputes between the visiting armed forces of the sending State, sent under agreement, with sovereign equality intact, and the receiving State which had consented to its presence on its territory.

But where a foreign military unlawfully enters the territory of another State, and there commits heinous crimes, the same issues are surely not in play.

6.4.3 *The Claim that Immunity Removes Other Substantive Rights*

Without purporting to enter into this topic in any detail, it may be recalled that a tension has arisen between the international law doctrine of sovereign immunity and Article 6(1) of the European Convention on Human Rights, which guarantees to an individual 'access' to court. It has been contended in a series of cases[42] that where a court denies that it has jurisdiction for reasons of immunity, the applicant individual has been denied his entitlement to access to a court.

The European Court of Human Rights has responded that European Convention rights are to be interpreted within the framework of general international law, and not as an instrument existing outside of it.[43] It has been assisted in reaching this conclusion by observing that the reasons for the immunity 'restriction' upon Article 6(1) are not in themselves objectionable.

A more terse analysis was offered by Lord Bingham in the *Jones v. Saudi Arabia* case, where – supporting an observation made elsewhere by Lord Millet – he commented that in his view, there was 'no access to give'.[44] He did not see this as a conflict of norms, rather as the fact that, without jurisdiction, there are no substantive rights at play.

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[42] E.g., *McElhinney v. Ireland,* ECtHR, No. 31253/96, 21 November 2001, para. 39; International Law Reports, vol. 123, para. 38; *Grosz v. France,* ECtHR, No. 14717/06, 16 June 2009; *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, para. 61; International Law Reports, vol. 123, at 24. *Jones v. Saudi Arabia* is now pending before the ECtHR as *Jones v. UK*.

[43] *Al-Adsani v. United Kingdom*, para. 55.

[44] *Jones v. Saudi Arabia*, para. 14.

6.5 Immunity from Jurisdiction and Perpetration of International Crimes

Here the focus of discussion has been whether there is now an emerging trend to link the alleged crime with the availability of jurisdiction in the hands of the forum State.

Such issues as immunity in the face of heinous crimes; alternative recourse for injured parties; how to gauge whether 'new' customary law now exists; the distinctions between procedure and substantive law; and the question of whether crimes under international law can ever be *acta jure imperii*, are all at issue here. These are important, and difficult: but the principle of equality of States plays little part in resolving them.

The jurisprudence of the International Court of Justice is replete with dicta to the effect that it is not the nature of acts complained of that establishes jurisdiction. It will be recalled that the background to *Germany v. Italy* (2012) was that the Italian Court of Cassation in the *Ferrini* Judgment of 11 March 2004 had held that immunity did not apply in circumstances in which the act complained of constituted an international law crime.[45] The reasoning of the *Ferrini* Judgment was confirmed in other cases where the Italian Court of Cassation held that with respect to crimes under international law, the jurisdictional immunity of States was to be set aside.[46]

In *Germany v. Italy,* the ICJ at the outset acknowledged that the particular acts in issue of the German Reich had caused untold suffering, and that the vile acts concerned had displayed a complete disregard for elementary considerations of humanity.[47] After recounting in detail the events concerned, the Court noted that both parties acknowledged that immunity is a matter of international law and that it is not a matter of mere comity. As between Germany and Italy, any entitlement of the former to immunity would have to be derived from customary international law. Italy was not a party to the ECSI; neither Italy nor Germany were parties to the UNCSI, which in any event is not in force.

In the second of its arguments, Italy claimed that the acts of the German Reich amounted to war crimes and crimes against humanity, and there had indeed been violations of peremptory norms. In Italy's view this deprived Germany of any entitlement to immunity.

The Court points out the flaw in logic in acceding to this proposition:

> immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature.[48]

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[45] *Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004 Rivista di diritto internazionale, vol. 87, 2004, at 539; International Law Reports, vol. 128, at 658.

[46] *Giovanni Mantelli and others* and the *Liberato Maietta* cases (Italian Court of Cassation, Order No. 14201 (Mantelli) Foro italiano, vol. 134, 2009, I, at 1568); Order No. 14209 (Maietta) Rivista di diritto internazionale, vol. 91, 2008, at 896).

[47] *Jurisdictional Immunities of the State,* para. 52.

[48] Ibid., para. 82.

The Court goes on to explain that a court cannot establish whether a serious violation of human rights law has been committed before deciding on whether immunity is available.[49] The dilemma is that

> [i]f immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would be necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.[50]

I fully agree that, as things stand today in State practice (national decisions, relevant treaties), it is not the heinousness of the offence that makes immunity unavailable. And this is even the case with offences that violate *jus cogens*. But the arguments of logic do not in fact seem to be insurmountable: it is really the will of States to develop the law, rather than principles of logic, which is *pro tem* the insurmountable hurdle. When international law supported the doctrine of absolute immunity, it could have been argued that to move to a doctrine of qualified immunity would require entering into the merits to see if the act in question was *gestionis* or *imperii* – thus putting matters relating to the merits ahead of the immunity decision.

In the event, this turned out to be a quite manageable transition. When it is contended that the forum courts have jurisdiction over acts of a foreign State or State company, and the State insists that the acts in question are *jure imperii*, attracting immunity, the forum courts hear arguments of the parties on precisely *that* question: namely the character of the acts as *imperii* or *gestionis*. And insistence by a sovereign State in a foreign court that the acts in question are not *gestionis* is neither a waiver of its claimed immunity nor does it necessitate going into the merits beyond ascertaining the nature of the acts. In other words, preliminary arguments on the categorization of certain acts claimed to have been perpetuated by the foreign State could take place with it being agreed that entitlement to immunity is not thereby waived, and without entering into the merits to decide if those acts *did* in the event occur, and at whose hands.[51]

In short, the constant contention by the International Court that alleged violations of international human rights law or the law of armed conflict necessarily fail to attract immunity, without entering into the merits before jurisdiction, is not

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[49] See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion, 29 April 1998, where the Malaysian courts intended to hear the legal actions in defamation against Mr Cumaraswamy first, and then revert to the question of his entitlement to immunity.

[50] *Jurisdictional Immunities of the State,* para. 82.

[51] Article 8(2) of UNCSI provides that '[a] State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.'

wholly persuasive. Logic does not stand in the way of a change in the law of State immunity as regards major violations of human rights and the law of armed conflict. But I do fully accept that there is no sign yet that States are willing to embark upon this change.[52] Indeed, even when opportunities for change have been put to them, as in the drafting of the UNCSI, they appear determined to defend the *status quo*.

There have been attempts to resolve, in different ways, the disturbing ethical dilemma presented by the law of State immunity posited when a State, or a State entity, or those for whom a State has responsibility, engages in heinous crimes. Some have contended that the driving rationale for State immunity has been the inappropriateness of the courts of one State pronouncing on the *acta jure imperii* of another: *par in parem non habet imperium*. Perhaps most of the repugnance in the face of immunity in respect of international crimes could be resolved by a naming of the concept of what constitutes *acta jure imperii*.

For some, therefore, it is inconceivable that acts of savagery could be 'governmental acts' properly so-called. This contention has been heard in many cases.[53] In the *Pinochet* case in the United Kingdom House of Lords this argument was embellished by some judges[54] by the contention that a government which had just ratified the Torture Convention, which specifically prohibited certain acts, could not have intended that such acts be designated *acta jure imperii*, attracting immunity. The argument has immediate attraction – but it has to be remembered that parties to the Torture Convention have committed themselves to not engaging in torture; not to insisting that non-parties would have forfeited any claim to insist that such acts could in certain circumstances be seen as *acta jure imperii*.

The matter can be put differently. Before the changes initiated in Italy, in the United States and the United Kingdom, it was generally accepted that absolute immunity prevailed, by virtue of the principle of equality of States. The exception that came to be widely (but not totally)[55] accepted was that jurisdiction could be exercised when a State was acting as a trader, and not as a sovereign.[56]

To return to today's preoccupation with impunity in the face of heinous crimes, such acts are not *acte jure gestionis*, the permitted exception. The question of whether such dreadful acts can properly be characterized as *acta jure imperii* is an important and interesting one. In the *1º Congreso Partido* case in the House of

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[52] '… someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.' Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria,* para. 556.

[53] See cases cited in *Jurisdictional Immunities of the State*, para 85.

[54] For example, Lord Nicholls of Birkenhead.

[55] *FG Hemisphere LLC v. Democratic Republic of Congo*. See also the challenges during the negotiation of the UNCSI's exception for commercial transactions, which Fox observes was '[t]he most intractable problem on which there was sharp disagreement in the [International Law Commission] and through the discussion in the UNGA Sixth Committee.' Fox 2008, at 537.

[56] There were, of course, considerable problems about trading that was done through State companies: and in the eyes of the State concerned, sovereign activity was still being engaged in.

Lords, Lord Wilberforce (the then presiding judge) held that an *actus jure imperii* was 'an act that could not have been performed by an actor other than a State'.[57] Thus a State order to turn a ship away from a port, for political reasons, was *not* in his view an *actus jure imperii*: anyone could have ordered the turning around of a vessel. And the question of *purpose*, as is now well-established, is irrelevant to the characterization of the act. The UNCSI regresses from this established position; while it specifies the 'nature of the contract or transaction' is the primary criterion for the commercial transaction exception in Article 10, it adds 'purpose' as a second criterion to be taken in account

> if the parties to the … transaction have so agreed or if, in the practice of the State of the forum, that purpose is relevant to determining the non commercial character of the contract or transaction.[58]

In many UK cases, 'purpose' is rejected as a criterion.

If one accepts the Wilberforce definition of an *actus jure imperii* being an act that could not have been performed by an actor other than a State – which I find attractive, as limiting the scope of possible *acta jure imperii* claims – then one is inevitably faced with what degree or quantum of activity that falls within that definition. I have always thought it possible to argue in *Jones v. Saudi Arabia*[59] (now in the European Court of Human Rights) that the ill-treatment inflicted upon the claimants is not an *actus jure imperii*, as it *could* have been performed by any one, and not just by a State. The deference of immunity to jurisdiction was thus not necessarily to be accorded.

Regrettably, however, little attention has been paid to the Wilberforce dictum illuminating what is to be understood by an *actus jure imperii*. It has simply been accepted that State acts are immune from the exercise of jurisdiction in other States, no matter how contrary to international law and violative of human rights they might be. This is made crystal clear in *Germany v. Italy.* And, while correct, it is disturbing. The pattern is for a court or tribunal to intone (as did the ICJ in *Germany v. Italy*) that, although the forum court could not exercise jurisdiction, the State protected by immunity must accept its responsibility for the act and that the acts concerned cannot be formally exonerated. And that is then the end of the matter. There is no real redress for the injured State.[60]

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[57] *Playa Larga (Owners of Cargo Lately Laden on Board) Appellants v. I Congreso del Partido (Owners) Respondents, Marble Islands (Owners of Cargo Lately Laden on Board) Appellants v. Same Respondents* (1983) 1 AC 244, at 262.

[58] UNSCI, Article 2(2).

[59] *Jones v. Saudi Arabia*.

[60] See also the Court's remarks, devoid of operational reality, stating that a bar to jurisdiction because of immunity 'does not represent a bar to criminal prosecution' in certain circumstances. *Arrest Warrant*, para. 61.

6.6 Where are Immunity Issues Decided?

A phenomenon that is worth marking is the contemporary reluctance of States, in contrast to what has traditionally been done, to protest that the courts of the forum State lack jurisdictional competence to proceed and robustly to explain there (without in any way waiving immunity) why that is so. Developing States, in particular, do not feel that they wish to advance their arguments about immunity in this time-honoured way, especially when the courts of the forum are those of former colonial powers. Instead – and this brings us back to the question of respect for State sovereignty – they insist rather that the issue of a summons to a State official to attend as a witness,[61] the issue of a warrant for a witness hearing,[62] or the issue of a warrant against a State official[63] is an affront to State sovereignty, for which affront recourse to the ICJ is necessary.

Recent cases of the Court, which in former times would have been disposed of in national courts, include: *Arrest Warrant, Certain Criminal Proceedings in France* (since withdrawn), and *Djibouti v. France*.[64] At a certain level this is unfortunate, as national courts are the natural repository for findings on the law as it relates to State immunities. One only has to look at paragraphs 73 to 77 of *Germany v. Italy* Judgment to see this point illustrated. Too ready recourse to the ICJ for affronts to sovereign dignity is not a desirable path to embark upon. National courts still have a major role to play in the development of the law on State immunity.

There is a widespread and understandable clamour today to limit the immunity that States still have in respect of their *acta jure imperii* if such acts manifestly violate human rights. Why, it may be asked, if the great change from absolute to qualified immunity occurred in the last century on the basis of such few acts that could be claimed as 'sources of law', could a further limitation not be achieved today?

In my view, it cannot be done by the International Court alone. Although it should give judgments in a way that is conducive to the progressive development of international law, it cannot achieve desirable policy objectives if the way is not

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[61] *Djibouti v. France.*

[62] *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, ICJ, withdrawn on 16 November 2010.

[63] *Arrest Warrant.* See also *Application by Rwanda against France*, ICJ, 18 April 2007, which has not yet been entered on the General List pending the consent of France to the jurisdiction of the Court under Article 38(5) of the Rules of Court.

[64] See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (pending since 19 February 2009), regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hissène Habré, or to extradite him to Belgium for the purposes of criminal proceedings.

paved by the relevant sources of international law: treaties, and State practice in the form of relevant national legislation and national judicial decisions.[65] But there does not exist national legislation which envisages that immunity before the courts of another States should be waived if the claim is of massive violations of human rights. And the *only* judicial cases which made such a finding were exactly the Italian cases challenged by Germany in the *Germany v. Italy* case. And why, it is interesting to ask, should these Italian cases not perform exactly the same catalyzing role as did the cases of the 1880s in the move to rejecting immunity for *acta jure gestionis*?

The answer would seem to lie in the fact that in the move from absolute immunity to qualified immunity, the idea was taken up by others, such as the US and the UK. But the concept of an exception to the immunity rule for serious violations of human rights has not only not been followed elsewhere, but has not been introduced into the text of the UNCSI of 2004, even when that possibility was canvassed.[66] It also is nowhere suggested in the various national legislation that today exists on the question of State immunity.[67] Indeed, all such legislation – as well as the UNCSI and ECSI – is in fact still drafted in terms of absolute immunity of States with certain limited exceptions. And an exception to immunity by reference to the nature of the claim concerned is, with one exception,[68] nowhere to be found.

It is out of kilter with the times that States are immune from process in respect of acts generally agreed to be among the most vile, and abhorred by international law. But change will have to come from the legislating and executive acts of States, and perhaps the treaties they draw up. The ICJ can then, if the right type of legal dispute comes before it, seize upon trends to throw its weight behind a new limitation. But it cannot so act with no assistance in the actions of States, whether judicial or treaty regulation. It is a narrow line between international judicial activism in interpreting the law – which may on policy grounds be welcome – and the pure making of law, which is not the role of the Court.

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[65] This point is made with great clarity in O'Keefe 2011.

[66] The UNGA Sixth Committee Working Group stated that the question was of current interest, but 'the existence or non-existence of immunity in the case of violation by a State of jus cogens norms of international law' did not really fit into the present draft nor did it seem 'ripe enough … to engage in a codification exercise'. UNGA Sixth Committee Convention on Jurisdictional Immunities, Report of the Chairman of the Working Group, 12 November 1999, UN Doc. AC.6/54/L.12, paras. 46–8.

[67] E.g., UK SIA, US FSIA, 1981 South Africa Foreign States Immunities Act; 1985 Canada State Immunity Act; 1985 Australia Foreign States Immunities Act; 1985 Singapore State Immunity Act; 1995 Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals); 2008 Israel Foreign State Immunity Law; Japan, 2009 Act on the Civil Jurisdiction of Japan with respect to a Foreign State; Pakistan, 1981 State Immunity Ordinance.

[68] Torts committed on the territory of the forum state, see above.

Activists have the wrong target in their sights. They should bring pressure to bear on States, rather than berate the Court for conservatism, as they have done so in the wake of the *Germany v. Italy* case.

6.7 A Different 'Primary Rule' or '*Grundnorm*'?

So far, we have been examining the current state of sovereign immunity in international law, a matter which admits of no generalized answer – and testing the current standing of 'sovereign equality of States', as the generating principle of law. But there is, of course, a different approach altogether, which should be mentioned in concluding this essay.

As early as 2007, Kokott writing in the Max Planck Encycopedia of International Law, observed that

> another, rivaling Grundnorm of the international legal order is gaining ground, that States are no more than instruments whose inherent function is to serve the rights of individuals. The transformation from inter-state law to an individual-centered system has not yet found a definitive new equilibrium …[69]

It is this idea that is elaborated so robustly – and alone of all the Judges – by Judge Cancado Trindade in his dissenting Opinion in the *Germany v. Italy* case.

Judge Cancado Trindade's Opinion is not predicated upon one or more of the claimed 'exceptions' to the State immunity rule, itself based on the principle of *par in parem non habet imperium*. It comes at matters from a different direction entirely. He says that he seeks to rescue some doctrinal development, forgotten in our days.[70] In a learned discourse, based on 'the teachings of the most highly qualified publicists', as a 'source' in Article 38(1)(d) of the ICJ Statute, he points to individuals and to learned institutions who have emphasized fundamental human values as the most profound element in our understanding of international law.

Judge Cancado Trindade, with great thoroughness, goes through all expected issues, including the tensions in the case law of the European Court of Human Rights between issues of State immunity and right of access to justice. He performs the same task for national courts (which are an important source of law for State immunity).

Having done this in a systematic fashion, he then moves to new territory, surveying the tensions at play 'in the Age of Rule of Law at National and International Levels'. He writes of the rule of law as an idea that moves away from

[69] Kokott 2007, para. 4.

[70] *Jurisdictional Immunity of the State*, para. 3.

legal positivism and 'comes closer to the idea of an "objective justice", at national and international levels'.[71] And – here comes the big departure point for other liberally minded lawyers – he is not impressed by the contention that issues of jurisdiction always come ahead of substance. He writes that we are witnessing

> *jurisdictionalization* of the international legal order itself, with the expansion of international jurisdiction (as evidenced by the creation and co-existence of multiple contemporary international tribunals), the reassuring enlargement of the *access to justice* - at the international level - to a growing number of *justiciables* …[72]

Judge Cancado Trindade speaks of the distortions of the State-centric outlook of the international legal order.[73] His rejection of the availability of sovereign immunity to Germany in the particular case is attacked on a variety of fronts. Above all, for him the central norm of the international legal system is the individual's entitlement to justice, with reparation as the reaction of law to grave violations.

He finds that the Court's analysis in parsing

> incongruous case-law of national courts and the inconsistent practice of national legislations … [is an] exercise … characteristic of the methodology of legal positivism, overattentive to facts and oblivious of values.[74]

In a striking passage, he speaks of this tracing of cases and legislation as 'positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment'.[75] He speaks with a certain contempt about the counterpositions of 'primary' to 'secondary' rules, or of 'procedural' to 'substantive' rules. He comments, '[w]ords, words, words … where are the values?'[76] He rejects the Court's distinction between procedural law, where it 'situates immunity, … as it did in 2002 in the *Arrest Warrant* case' and substantive law. He observes:

> To me, the separation between procedural and substantive law is not ontologically nor deontologically viable: *la forme confound le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice.[77]

All of these powerful arguments are impressively summarized in his Concluding Observations.

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[71] Ibid., para. 150.

[72] Ibid., para. 151 (footnotes omitted).

[73] Ibid., para. 161.

[74] Ibid., para. 293.

[75] Ibid., para. 294.

[76] Ibid., para. 294.

[77] Ibid., para. 295.

I have not thought here to offer a reasoned analysis of the views of Judge Cancado Trindade. I believe, for the reasons I have stated above relating to the various elements in play, that the Judgment of the ICJ in the *Germany v. Italy* case correctly reflects current international law. And, as I have made clear, I regard those NGO voices criticizing the failure of the Court to apply 'a human rights exception' as misdirected.

Everything thus far said has been based on what flows from the concept of equality of States, so carefully analyzed by Pieter Kooijmans in his book. While most writers are insisting that there is/should be an exception to equality of States in the context of human rights violations, Judge Cancado Trindade posits the interesting thought that the *Grundnorm* itself may be changing – towards a *Grundnorm* that replaces emphasis on sovereign equality by the test of access to justice at the international level and the individual's entitlement to justice. So here we have a more profound difference of view and time will tell whether it will develop in the practice in the States and in the literature.

6.8 Conclusion

Pieter Kooijmans' final pages in *The Doctrine of the Legal Equality of States* traverse, in a stimulating fashion, what he terms the 'practical elaboration of the principle of the legal equality of States'. But, understandably, the question of sovereign immunity was not there included. This essay has sought, somewhat presumptuously, to add to what he has written in these last pages.

It has to be borne in mind that States have an enormous stake in seeing the continuation of equality of States as an underlying norm. That principle continues to be seen as a protection for weaker States against the stronger. And all States are nervous of intervention by others in their own affairs, which possibility is minimized by the norm of sovereign equality of States. Our conclusion is that the notion of sovereign equality has had a key role in the formation of the doctrine of sovereign immunity; but that no comparable role is to be expected from it in the formulation of solutions to the complicated issues arising today in the field of sovereign immunity. The battle for a contemporary international law on sovereign immunity is still being fought. And the issues that are most intractable seem unlikely to find assistance in the notion of sovereign equality in arriving at an outcome satisfactory to all. More likely, it is other principles, together always with policy-oriented judicial decision-making – that in due course might do so.

References

Fox H (2008) The law of state immunity, 2nd edn. Oxford University Press, Oxford
Hoyle MSW (1987) The mixed courts of Egypt 1896–1905. Arab Law Q 2:57

Kokott J (2007) States, sovereign equality. In: Wolfrum R (ed) Max Planck Encyclopedia of public international law. Oxford University Press, Oxford. http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1113. Accessed 16 Sept 2012

O'Keefe R (2011) State immunity and human rights: heads and walls, hearts and minds. Vanderbilt J Transnatl Law 44:999–1045

Chapter 7
Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court

Sarah M.H. Nouwen

Abstract Writing in 1964, Pieter Kooijmans challenged the principle of legal equality of states: it would have to prove its value or be discarded. He also predicted the relevance of the principle for a new subject of international law: the individual. Almost fifty years later, this article reviews how the principle has fared in international criminal law, a field of international law relevant both to states and to the individual. The review shows how the emergence of a more vertical international legal order has weakened the position of the principle of equality between states. The weakening of the principle in the relation between states has in turn affected the equality between individuals, which has contributed to further actual inequality between states. Contrary to one of Kooijmans's scenarios, the emerging international legal order has not diminished the role of the 'factual conditions of power politics'. Legal questions on permitted differentiations always involve inherently political assessments. For instance, Kooijmans's concept of 'juridically relevant' differences requires a determination of which differences are 'of intrinsic value for the existence of legal order', and thus a decision on what that order should look like and how it is to be pursued. Moreover, factual conditions of power politics continue to encroach upon the principle of legal equality. Perhaps the principle of legal equality, like the fight against impunity, is more of an ideal than a reality. But the pursuit of the fight against impunity has thus far undermined the fight for more equality.

Keywords Legal equality · Immunity · International Criminal Court · Equality before the law · Africa · Impunity

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> 'The value of the principle of the legal equality of states is now being put to the test. While in the past, in the unorganized society of states it may have been possible to explain certain encroachments upon equality through the factual conditions of power politics etc., now that the first steps have been taken towards an international legal order, the principle of equality shall either have to prove its value or be radically discarded.'[1]

> 'It is … incorrect to think that equality in international law coincides with the equality of states. Equality is a legal principle which requires "positivization" in every field of law. Since the states are no longer the only subjects of international law there is also a need for realization of equality elsewhere. And since the individual in particular will play an increasingly important role in international law, a closer study of the demands of justice and equality is not superfluous here.'[2]
>
> P.H. Kooijmans

7.1 Legal Equality on Trial

Writing in 1964, Pieter Kooijmans challenged the principle of legal equality of states. In the emerging international legal order, the principle would have to prove its value or be radically discarded. Adding to the challenge, he anticipated an increasing role of the individual in international law and suggested the relevance of the principle of equality for this new subject.

[1] Kooijmans 1964, at 4.

[2] Ibid., at 246.

Almost fifty years later, it is appropriate to assess how the principle of equality has fared. At least three pertinent questions emerge. First, now that the principle of legal equality of individuals has been clearly established, in particular in international human rights law,[3] how does this principle relate to that of legal equality of states? What is the impact of *de facto* inequality between states on the legal equality of individuals? What is the impact of *de facto* inequality between individuals for the legal equality of states? Reviewing these questions in the field of international criminal law, we will see that *de facto* inequality between states increases legal inequality between individuals, which in turn entrenches *de facto* inequality between states.

But how does this *de facto* inequality relate to the principle of legal equality? This brings us to the second question, namely what is nowadays the meaning of legal equality? Aristotle, Kooijmans and modern international human rights law have all recognised that the principle of legal equality does not prohibit *all* different treatment. According to Aristotle, likes must be treated alike, and different things differently, to the extent of the inequality.[4] In Kooijmans's view, legal equality requires equal treatment only in case there are no *juridically relevant* differences, namely differences 'that are of intrinsic value for the existence of legal order.'[5] Modern international human rights law allows differentiation where there is a reasonable and objective justification, in other words, a legitimate aim, proportionality and subsidiarity.[6] All in all, different treatment can be justified by differences that justify different treatment. However, as Kooijmans recognised,[7] the circularity of these explanations begs the question: which inequalities must be considered, what is a 'legitimate aim' and which differences are 'of intrinsic value to for the existence of legal order'? Kooijmans admitted that 'it cannot be said exactly when the law takes certain inequalities into account.'[8] His guiding question is 'whether the international legal order demands that in a concrete situation the existing differences between the states should be considered as relevant, and should therefore be drawn into the standard of valuation, or whether they are irrelevant.'[9]

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[3] See, *inter plurima alia*, the 1976 International Covenant on Civil and Political Rights 999 UNTS 171, arts. 14(1) and 26; the 1966 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195; the 1950 (European) Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, art. 14(1) read in conjunction with art. 6; the 1978 American Convention on Human Rights 1144 UNTS 123, art. 8, the 1982 African [Banjul] Charter on Human and Peoples' Rights 21 ILM 58, arts. 3 and 19 and the Arab Charter on Human Rights, arts. 3, 11 and 12.

[4] Henrard 2008, para. 1. See also Kooijmans 1964, at 20-25.

[5] Kooijmans 1964, at 30.

[6] See Henrard 2008, para. 27.

[7] Kooijmans 1964, at 223. 'It is regrettable … that the problem of equality is so often pushed aside with the maxim, "The equal equal, the unequal unequal", without the realization that this maxim itself does not mean much, precisely because the question is *what* is equal for the law, and *what* is unequal.'

[8] Ibid., at 33.

[9] Ibid., at 238.

This brings us to the third question considered in this review. Has the 'unorganized society of states' transformed into an international legal order in which 'certain encroachments upon equality' can *no longer* be explained 'through the factual conditions of power politics'? This question must go beyond asking whether equality is now purely a matter of law and outside the realm of the political. As Aristotle implied, questions of equality are *inherently* political.[10] Whilst Kooijmans at times juxtaposes the legal and the political,[11] his concept of equality also depends on a political judgement. Citing his doctoral supervisor, Gesina van der Molen,[12] he defines politics as 'the pursuance of certain aims, the attempt to realize certain interests, for a certain group.'[13] Determining which differences are 'of intrinsic value for the existence of legal order' requires identifying an ideal order and is itself an attempt to realise such an order, and thus political. The emphasis of the question must thus be not on the political as such, but on the role played by the *factual conditions of power* politics. Rephrased, the real question is whether encroachments upon legal equality can no longer be explained by *de facto* inequality.

After a few preliminary reflections on the concept of legal equality (Sect. 7.2) and introducing the concept in the context of the field of international criminal law generally (Sect. 7.3), this article focuses on the International Criminal Court (ICC). It illustrates how the ICC theoretically upholds the legal equality of both states and individuals (Sect. 7.4), but practically also entrenches existing inequalities (Sect. 7.5). It will then analyse the arguments that the ICC has used in response to this reality of *de facto* inequality (Sect. 7.6), which revolve around denial and justification of inequality, the latter possibly transforming material inequality into legal inequality.

7.2 Legal Equality of States: A Matter of Perspective

Introductions to the principle of legal equality between states often hasten to explain what the principle does *not* amount to. Legal/formal/juridical equality on the one hand is not the same as material/political/economic/factual/substantive/*de facto* equality on the other.[14] However, it is one thing to observe (correctly) that

[10] Aristotle (translated by Ross) 1999, at 76. 'All men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit.'

[11] See, for instance, Kooijmans 1964, at 221.

[12] Gesina van der Molen was the first woman to obtain a PhD at Amsterdam's Free University, a resistance fighter and an international legal scholar.

[13] Kooijmans 1964, at 94.

[14] See, for instance Oppenheim 1905, at 19-20, para. 14 and Aust 2010, at 100. See also Crawford 2012, at 449, observing, with a reference to Orwell's *Animal Farm*, '[o]bviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others' (footnote omitted).

the principle of legal equality does not entitle or commit states to distribution of wealth or political power, or that material inequality does not necessarily indicate legal inequality.[15] It is quite another to say (incorrectly) that political or economic distribution does not affect legal equality. The two concepts of equality are distinct but not hermetically separated. Moreover, whether a particular situation amounts merely to material inequality or actually also *prima facie* violates the principle of legal equality depends on one's concept of legal equality. Views vary on the minimum amount of equality required for the principle of legal equality to be complied with. According to Kooijmans, for instance, legal equality means that '[a]ll states should occupy the same position at conferences, which aim at establishing certain rules of international law.'[16] Others, however, do not include equality in the law-making process as covered by the principle; in their view, legal equality covers merely legal personality and capacity.[17]

The point of this contribution is not to draw the boundary between legal and material equality or to identify the minimum amount of equality required for legal equality to be respected. Instead, it shows that significant material/political/economic/factual/substantive inequality may leave the principle of formal equality with little meaning. This is even more so where material/political/economic/factual/substantive inequalities provide a justification for formal inequality, namely when they are deemed 'juridically relevant differences' because 'of intrinsic value for the existence of legal order'.

One's minimum requirement of equality is not the only factor that influences one's assessment of whether the principle of legal equality is respected. The distance of observation is also significant. At close sight, states may seem to be in an unequal legal position. However, international law can still square this situation with the principle of legal equality if, further away, one can observe a legal justification for this inequality. One such justification is that a state has consented to legal inequality. (In 1964, Kooijmans would have disagreed, fulminating as he did against positivists' reliance on the principle of consent).[18] But also with the principle of consent, the question may arise as to how real this consent has been and thus how real, and relevant, the principle of legal equality is or remains.

7.3 Legal Equality and International Criminal Law

International criminal law, involving as it does both states and individuals, is a pertinent area of international law in which to take stock of the principle of legal equality and to explore the relationship between equality of states and individuals.

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[15] Kooijmans 1964, at 124-125.

[16] Ibid., at 102.

[17] See, for instance, Shaw 2008, at 215.

[18] Kooijmans 1964.

This field was in its infancy when Pieter Kooijmans wrote on legal equality in 1964. However, the Nuremberg trials had already revealed two key features of the principle of legal equality as applied in the context of international criminal law. First, as a matter of principle, international criminal law enhanced legal equality of individuals by dismissing someone's official position as a juridically relevant inequality. According to Principle III of the Nuremberg Principles, '[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'[19]

Whilst enhancing the legal equality between *individuals*, the denial of the relevance of official capacity may at first sight appear as undermining the legal equality of *states*. The fact that state officials cannot invoke the defence of official capacity also denies the relevance of immunity *ratione materiae*, and thus of the principle of equality of states. Immunity law is a concretisation of the principle of equality of states: it prohibits states to exercise jurisdiction over other states, including the individuals who acted on behalf of those other states.[20] However, here the distance of observation becomes relevant: from a further distance, Nuremberg Principle III as such does not seem to undermine the legal equality of states since it is formulated in general and abstract terms and applies to the officials of *all* states.

What did contribute to *de facto* inequality between states, and individuals, is the second feature related to the principle of legal equality in international criminal law that the Nuremberg trials began to reveal: selective application and enforcement of universal norms. The Nuremberg and Tokyo tribunals were established with a view to prosecuting and punishing only the Axis powers.[21] In practice, it was thus only the Axis powers that faced the consequences of the unavailability of the state-official defence.

Substantive international criminal law, 'universal' in character, did not provide a justification for the unequal enforcement. Instead, the unequal enforcement was the consequence of the Tribunal's limited jurisdiction, which in turn was the result of political decision-making, in this case by the victors of World War II. In the victors' eyes, this unequal treatment may well have been in the interest of legal order; perhaps less so in the eyes of those who suffered from possible international crimes committed by the Allied powers. Either way, the unequal enforcement subsequently served to *justify* inequalities in the post-WWII legal order.[22] The 'factual conditions of power politics' thus determined which inequalities were

[19] International Law Commission, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Report of the International Law Commission covering its Second Session, 5 June - 29 July 1950, UN Doc. A/1316, Principle III.

[20] See e.g. Crawford 2012, at 448-449. But *cf contra* Kooijmans 1964, at 245.

[21] 1945 Charter of the International Military Tribunal 82 UNTS. 280, arts. 1 and 6; and 1946 International Military Tribunal for the Far East Charter TIAS 1589, arts. 1 and 5.

[22] See, for instance, 1945 Charter of the United Nations, 1 UNTS XVI, arts. 53 and 107.

deemed 'of intrinsic value for the existence of legal order' and these inequalities were subsequently 'juridicalised' in that legal order, for instance in the membership of the UN Security Council.[23] Inequality could thus not merely be explained by power politics; law, the product of such politics, also entrenched inequalities by bringing them within its realm.

The Nuremberg experience thus planted the seeds of a field that in theory enhances legal equality between individuals and upholds equality between states, but that has a highly unequal outcome in practice because of selective application. Unequal application of international criminal law, in turn, plays a role in justifying inequality by highlighting the criminality of some and, through its silence, overlooking that of others. When applied to crimes committed by people in powerful positions or to crimes committed on the territory or by nationals of powerful states, it confirms the principle of equality of individuals and states by demonstrating that even the powerful are held to account by the law. By contrast, if international criminal jurisdiction is exercised only over crimes committed by less powerful people, or by the nationals or on the territory of less powerful states, this suggests that international law justifies this different treatment. It gives *de facto* inequality a normative endorsement, implying as it does that those targeted also *should be* less powerful, given their international criminal record, whilst the enforcers of international criminal law *should be* more powerful, given the need for international criminal law's policemen to be stronger than the criminals.

Established just over fifty years after the Nuremberg trials, the ICC appears promising for legal equality at first sight. Its jurisdiction covers crimes committed on the territory or by nationals of states parties who have committed themselves to the Statute without being sure as to whether they will be subject of ICC intervention in any future scenario. Rather than the victors subjecting the losers to international criminal justice (as in Nuremberg and Tokyo), or powerful states (in particular the permanent members of the Security Council) subjecting less powerful states (in particular, states who are not permanent members of the Security Council, such as the former Yugoslavia and Rwanda), in the ICC all states parties have subjected crimes committed on their own territory and their own nationals to the Court's jurisdiction, for the present and the unknown future. Moreover, the Security Council's power to refer situations in states not parties to the Statute renders the Court's jurisdiction potentially universal.

In the reality of its first ten years of operation, however, the ICC has struggled in upholding both the equality of states and that of individuals. The International Criminal Court seems to have become a Court for African Crimes: the Court has opened investigations and prosecutions only with respect to crimes committed on the territory, and by nationals, of African states.[24] This, in turn, has challenged

[23] See also Simpson, who uses the term 'juridical sovereignty' for the interaction between sovereign equality and two legal forms in which distinctions between states are mandated or authorised. Simpson 2004, at 6.

[24] See, more elaborately, Nouwen 2012, at 171.

equality among individuals. Whilst the Court has issued a few arrest warrants for powerful individuals (most notably, incumbent President Bashir), these have always been powerful individuals within relatively weak states. Neither weak nor powerful individuals of powerful states have been investigated or prosecuted. Moreover, even when investigating crimes within less powerful states, the Court has mostly investigated and prosecuted less powerful persons (in particular, government opponents).

7.4 The ICC and Legal Equality: In Theory

In theory, it is possible to argue that the ICC upholds the legal equality of both states and individuals. As regards states, a key question is whether they are equal in the establishment of jurisdiction. For individuals, a key question is whether that jurisdiction is equally exercised with respect to them.

With respect to states, the Statute *seems* to create inequality between states parties and non-states-parties. The conditions under which the Court can exercise its jurisdiction over the nationals of these two categories of states differ.[25] However, from a more distant perspective the inequality between states parties and non-states-parties disappears. As Kooijmans observed,

> not all states have an exactly equal number of international obligations and rights. This is a consequence of the fact that states can make treaties, and may derive rights and duties possessed by other states. … In itself this need not mean a denial of the legal equality of states, as long as it is stipulated that it is not a question of concrete rights and duties, but of equal possibilities for all states to obtain certain rights: no 'equality of rights' but 'equality of capacity for rights'.[26]

Theoretically, in the creation of the Rome Statute (RS), all states had an equal capacity for obtaining obligations. In contrast to the Nuremberg and Tokyo tribunals, which were created by the victors of World War II, and the tribunals for the former Yugoslavia and Rwanda, which were established by the Security Council, the ICC was created by treaty.[27] Unlike a legal instrument of a foreign power or a Security Council resolution, a treaty is the result of a law-making process that, theoretically, respects the sovereign equality of states. In Rome, delegations from states from all over the world were present. Moreover, after the Statute's adoption, states were free to decide whether to join or not.

The theoretical situation is more complex as regards the Court's jurisdiction over non-states-parties. According to the Statute, the Court can exercise its

[25] See 1998 Rome Statute of the International Criminal Court, 2187 UNTS. 90 (hereinafter RS), art. 12.

[26] Kooijmans 1964, at 102.

[27] See more elaborately on (in)equality before the Nuremberg and Tokyo tribunals and the ICTY and ICTR, Cryer 2005, at 206-221.

jurisdiction with respect to states that have not consented to it, namely when a national of a non-state-party commits a crime on the territory of a state party, a national of a state party commits a crime on the territory of a non-state-party, or the Security Council refers a situation in a non-state-party.[28]

In the first two scenarios, the Court's jurisdiction can be justified by reference to the fact that the state in the territory where the crime was committed, or of whom the suspect is a national, would have had jurisdiction itself under international law. It has merely pooled this jurisdiction with an international court.

In case of a Security Council referral, the jurisdiction is based on the Security Council's powers pursuant to the UN Charter. The inequality in the Security Council (both in terms of permanent membership and even more so in terms of the veto power) is undeniable. Yet, again, at a further distance the legal inequality in the Council can be justified by consent to a treaty, at least theoretically: UN member states have agreed to a regime in which some states have more powers than others. In reality, this theoretical justification is rather weak – newly independent states had little choice other than participating in the existing legal order and 'consenting' to a division of powers based on the post-WWII reality.[29] In Kooijmans's theory, more relevant than the existence of 'consent' is whether the inequality of states in terms of Security Council powers reflects power differences that are of 'intrinsic value to the existence of legal order'.[30] Kooijmans questioned whether the veto of the Great Powers in the Security Council could be squared with the principle of legal equality.[31] Whatever the justification – consent, the requirements of legal order or none – the result of the UN Charter is, in Gerry Simpson's words, one of 'legalised hegemony': Great Power prerogatives are realised through legal forms.[32] Law thus not merely reflects the inequalities present in the decision-making on its creation, but also legitimises them. Similarly, the ICC's selective application of international criminal law (for instance, why not in Sri Lanka, Israel or Chechnya) can be partly 'justified' by reference to decision-making in the Security Council; in other words, to the UN Charter and thus to international law itself.

With respect to individuals, the distinction between states parties and states not parties creates inequality in the circumstances under which individuals fall within the Court's jurisdiction. But once within the Court's jurisdiction, individuals are theoretically equal before the law. Article 21(3) of the Rome Statute (RS) provides, first, that '[t]he application and interpretation of law pursuant to [article

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[28] RS, arts. 12 and 13.

[29] But according to Kooijmans the principle of equality is of little to help to new states objecting to being bound by pre-existing law: '[it] is an inadmissible exaggeration of the principle of equality … to hold that each new member of a legal community should first lend his approval to the law of which he will be subject in the future.' Kooijman 1964, at 5.

[30] See ibid., at 112. 'For only then can a special position be awarded to the Great Powers, if the inequality as to power is a relevant factor for the establishment of a legal order.'

[31] Ibid., at 243.

[32] Simpson 2004, at x.

21 on the applicable law] must be consistent with internationally recognised human rights.' One such internationally recognized human right is equality before the law.[33] Secondly, article 21(3) RS explicitly prohibits 'adverse distinction founded on grounds such as gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

Following Nuremberg, the Rome Statute also explicitly declares one type of inequality as irrelevant to its application, providing that it

> shall apply *equally* to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[34]

The Rome Statute goes one step further than the Nuremberg principles, and indeed, than the Statutes of the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), by also declaring irrelevant immunities *ratione personae*. Article 27(2) provides:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The Statute at the same time ensures that in their horizontal relations, states continue to be able to respect the sovereign equality of states, providing as it does that

> [t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[35]

There is no contradiction between articles 27(2) and 98(1): they apply in different relationships. Article 27(2) applies in the context of the relationship between the ICC and an individual; article 98(1) in the relationship between the ICC and states parties among themselves. Taken together, these provisions enhance legal equality of individuals by not allowing an official position as a defence or procedural bar and at the same time protect the sovereign equality of states by not forcing states to violate customary immunity rules in the execution of cooperation requests from the ICC.

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[33] See, the International Covenant on Civil and Political Rights, arts. 14(1) and 26, the International Convention on the Elimination of All Forms of Racial Discrimination, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14(1) read in conjunction with art. 6, the American Convention on Human Rights, art. 8, the African [Banjul] Charter on Human and Peoples' Rights, arts. 3 and 19 and the Arab Charter on Human Rights, arts. 3, 11 and 12.

[34] RS, arts. 27(1) (emphasis added).

[35] RS, art. 98(1).

7.5 The ICC and Legal Equality: In Practice

> 'On what grounds do we decide that Robert Mugabe should go the International Criminal Court, Tony Blair should join the international speakers' circuit, bin Laden should be assassinated, but Iraq should be invaded, not because it possesses weapons of mass destruction, as Mr Bush's chief supporter, Mr Blair, confessed last week, but in order to get rid of Saddam Hussein?'
>
> Desmond Tutu[36]

In practice, the ICC has been criticised for treating states and individuals unequally. The Sudanese ambassador to the United Nations, for instance, has described the Court's first Prosecutor as 'a screwdriver in the workshop of double standards'.[37] Not only representatives of states involuntarily subjected to ICC intervention have criticised the Court's apparent selection bias. The Chairman of the African Union stated that while the AU was 'not against international justice,' it seemed that 'Africa [had] become a laboratory to test the new international law.'[38] Whilst the Court has kept crimes committed on other continents under 'preliminary examination',[39] it has opened investigations only with respect to situations on the African continent. All 30 individuals for whom the Court has issued public arrest warrants or summonses to appear are African.

Given the apparent inequality in the *outcome* of the ICC's work, we must assess to what extent inequality in earlier stages could be an explanatory factor. Here we look at four stages: the creation of jurisdiction, the triggering of jurisdiction, the use of prosecutorial discretion and the (ir)relevance of immunity law.

7.5.1 The Creation of Jurisdiction

As has been set out above, by virtue of its treaty base, the ICC's jurisdiction over crimes committed on the territory or by nationals of states parties is more based on sovereign equality of states than the jurisdiction of earlier international criminal tribunals. In theory, states could participate in the drafting of the treaty on an equal basis and were free to decide whether to ratify the Statute or not.

The reality, however, has been different. First, states did not participate in the drafting of the Statute on an equal basis. After the International Law Commission

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[36] D. Tutu, 'Why I Had No Choice but to Spurn Tony Blair', *Observer*, 2 September 2012.

[37] S. Tisdall, 'Technicians in the Workshop of Double Standards', *Guardian*, 29 July 2008.

[38] 'Vow to pursue Sudan over "crimes"', *BBC News*, 27 September 2008. See also, inter plurima alia, 'Rwanda's Kagame says ICC targeting poor, African countries', *AFP*, 31 July 2008; R. Lough, 'African Union accuses ICC Prosecutor of Bias', *Reuters*, 29 January 2011.

[39] See ICC-OTP, Report on Preliminary Examination Activities (13 December 2011), http://www.icc-cpi.int/NR/rdonlyres/63682F4E−49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf. Accessed 16 January 2013.

had made a first draft, much of the re-drafting was done by a small group of states during informal working sessions. Agreements reached in these informal settings placed states not present at these discussions before a '*fait accompli*'.[40] As Tallgren and Buchet observe with respect to the informal meetings that took place in Syracuse, at an academic institute co-founded by the chair of the *Ad Hoc* Committee on the Establishment of an International Criminal Court: '*Les exclus de Syracuse ont le sentiment, difficilement contestable, que le processus leur échappe*'.[41]

In the final round of negotiations in Rome, the 160 states present were formally equal participants. But the requirement that Kooijmans derived from the principle of legal equality for the law-making process, namely that '[a]ll states should occupy the same position',[42] was not fulfilled. Most of the negotiations on the Rome Statute did not take place in the plenary, but in dozens of small monolingual groups, all addressing some small element of the Statute. In these discussions, states occupied *different* positions due to different sizes of delegations, different abilities to negotiate in the dominant language and different invitations to meetings.

The size of the delegation influenced the ability to attend, and thus influence, the parallel negotiations that took place during the Rome conference. As a delegate from a small European nation opined: 'To be successful at this meeting, you really need at least 10 people to attend all the committees and working groups. … And then you still need faxes, computers, an entire arrangement that smaller delegations simply don't have here.'[43] Whilst many European states were represented by more than 30 people (indeed, France by 45) and the US by over fifty, delegations of developing countries comprised not more than a handful of members. Uzbekistan was represented by one delegate.[44] The larger delegations could attend all meetings, influence the discussions and submit 'an endless supply of clauses and amendments'.[45] Small delegations missed most of what went on.[46] As a result, many informal consultations were conducted only among Western states. According to one ambassador during the conference, '[a]s the negotiations continue, the amount of input from the developing countries declines'.[47]

At the last minute an initiative was launched to strengthen the delegations of developing countries by seconding foreign members (often young western post-

[40] Buchet and Tallgren 2012, at 175.

[41] Ibid.

[42] See Kooijmans 1964, at 102.

[43] F. Haq, Yes, size does matter. Terraviva (1998), http://www.ips.org/icc/tv250602.htm. Accessed 9 November 2012.

[44] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.183/13 (Vol.11), at 5-41.

[45] F. Haq, Yes, size does matter. Terraviva (1998), http://www.ips.org/icc/tv250602.htm. Accessed 9 November 2012.

[46] Ibid.

[47] Ibid.

graduates) to their teams. However, these new members were more committed to the goal of establishing a strong International Criminal Court than to defending the interests of a state they hardly knew. Similarly, *l'Organisation internationale de la francophonie*, at the time still called *l'Agence de coopération culturelle et technique*, encouraged timid delegations of some African countries to speak up during the conference – in support of positions taken by Paris.[48]

Another factor leading to inequality in the ability to participate was that of fluency, linguistically and culturally, in the language of the dominant group. The key negotiations took place in English and in 'informal' sessions; those delegations that required translations from and into another language, or those that were skilled only in formal negotiations, could not keep up with the pace, or fit into the format, of the negotiations, largely conducted 'informally' and in English.[49]

Finally, even with human resources and language skills, some delegations still missed most of the key negotiations because they did not manage to obtain an invitation for the crucial 'informal' meetings. As Gerry Simpson recalls:

> Sovereign equality operated in the plenaries but there were small groups of powerful states in meetings euphemistically called 'informal informals', good citizen middle-ranking states in 'like-minded groups' and representatives from 'outlaw' states like Iran and Iraq exiled in coffee shops.[50]

In the Rome negotiations, states were unequal.

In the subsequent stage of deciding whether to join this new legal regime, the principle of equality played a double role. On the one hand, the *promise* of equality before the law provided a reason for less powerful states to support the Rome Statute. An international institution could do what less powerful states could not do individually, namely hold to account the more powerful states. In that way the ICC could promote equality before the law. Indeed, the rule of law, as opposed to the rule by law, is primarily to protect the weak. Hence the insistence of many developing countries that the Court's jurisdiction included the crime of aggression, a crime characteristically committed by the more powerful vis-à-vis the less powerful.[51] (And, on the other side of the coin, hence the US resistance to the Court).

On the other hand, *de facto* material inequality limited the actual freedom of some states to decide whether to join the Statute. Some states have been put under pressure to ratify. The EU has made support for the Rome Statute an explicit

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[48] See Buchet and Tallgren 2012, at 185.

[49] See ibid., at 176. With respect to Japan: '*Japon, qui malgré l'expérience directe qu'il peut faire valoir dans ce contexte, et en dépit de sa participation très active aux phases préalables, au cours desquelles il s'était distingué par la production de propositions écrites très complètes sur les principes généraux du droit pénal ou la coopération judiciaire, est mis en difficulté par l'empressement et le caractère informel des négociations*.'

[50] Simpson 2004, at xiv.

[51] On international law's promise to, and often deception of, countries in the Global South in other fields of law, see Pahuja 2011.

condition for some development cooperation.[52] The US, by contrast, has adopted legislation restricting foreign assistance to countries with which it has not concluded bilateral agreements promising non-surrender to the ICC.[53] As a result of these conflicting incentives, Africa is not just the continent with most states parties to the Rome Statute, but also with most so-called 'Bilateral Immunity Agreements' with the US.[54]

In addition to explicit pressure, many developing states felt that ratification of the Rome Statute was a useful and harmless way to belong to the club. For states that are constantly struggling to continue fulfilling the criteria of statehood, in particular control over a population on a territory and independence, sovereignty is manifested mostly by external recognition. Such external recognition is given, time and again, when a state ratifies a universal treaty: by becoming party to the treaty and its regime, the state showcases that it belongs to the international community of states. Some of these states perceive of ratifying 'human rights treaties', the category within which the Rome Statute is often mistakenly classified,[55] in the first instance not as a *threat* to state sovereignty, but as way to *prove* it.[56] It is thus that some sub-Saharan African states have been serial but also sleepwalking ratifiers of human rights treaties:[57] serial in that they have ratified so many; sleepwalking in that they often failed to scrutinise the possible consequences prior to ratification.[58] In case of the Rome Statute, these consequences are more far reaching than with most human rights treaties.

In sum, a normative commitment to the anti-impunity struggle is thus not the only factor explaining Africa's leading participation in the Statute. Material conditions of dependency have made it difficult in practice for many states to use their

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[52] See Agreement amending the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Members States, in particular art. 11(6)(a). 'The Parties shall seek to take steps towards ratifying and implementing the Rome Statute.'

[53] See American Servicemembers' Protection Act (ASPA) and the Nethercutt Amendment (part of the US Foreign Appropriations Bill).

[54] See http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf. Accessed 14 January 2013.

[55] For a clear distinction between the loose and proper concepts of 'human rights law', see O'Keefe 2011, at 1003-1004.

[56] See also *S.S. Wimbledon,* Permanent Court of International Justice, Judgment of 17 August 1923, PCIJ ser. A vol. 1, at 25. 'No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is in attribute of State sovereignty.'

[57] Thanks to lawyer Barney Afako for a discussion on this topic.

[58] For instance, in Uganda, relevant ministers conceded never to have read the Rome Statute prior to ratification, indeed prior to the referral of the situation concerning the Lord's Resistance Army to the ICC (interviews, Kampala, October 2008). It was only when the ICC was seen as an obstacle to the successful conclusion of the Juba peace process that they began to scrutinise the Rome Statute. See, more elaborately, Nouwen 2013, Chaps. 3 and 5.

sovereign right *not* to join the Rome Statute. In other words, for some states parties, 'consent' to the creation of the Court's jurisdiction is more fiction than real.[59]

As an aside, none of this is to say that only the world's most powerful states have refrained from ratifying the Rome Statute. Indeed, some less powerful states have done so, too, precisely because they were suspicious of the Court's equality promise and predicted that the Court would be used as a western instrument of intervention or punishment. A participant in a meeting of the African Union Peace and Security Council reported how one North-African state warned other African countries against ratifying the Rome Statute, because it would amount to inviting in 'an Amnesty International with legal powers'.[60]

With respect to non-states-parties subjected to the ICC's jurisdiction by way of a Security Council referral, their consent to jurisdiction can be construed only by way of consent to the UN Charter. For their part, the basis of the ICC's jurisdiction is no different from that of the tribunals for the former Yugoslavia and Rwanda, namely *ad hoc* creation of jurisdiction for specific incidents. Whether and where such jurisdiction is created is dependent on Security Council politics. Accordingly, the Security Council created tribunals for the former Yugoslavia, Rwanda and Lebanon, and referred the situations in Darfur and Libya to the ICC, but did not create international criminal jurisdiction for crimes committed in the Occupied Palestinian Territories, Iraq or Afghanistan.

International tribunals have not seriously engaged with the inequality before the law ensuing from the Security Council's selectiveness. As a defendant, former Serbian president Milošević argued before the ICTY that 'an international court established to prosecute acts in a single nation and primarily, if not entirely, one limited group is pre-programmed to persecute, incapable of equality'.[61] The Trial Chamber dismissed the motion by shifting the focus from the creation of the jurisdiction to the application of the law. It stated that human rights bodies had held that

> there is nothing inherently illegitimate in the creation of an ad hoc judicial body, and that the important question is whether that body is established by law, in the sense that, as it is stated in the *Tadic Jurisdiction Appeal*, it 'should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights'.[62]

The Chamber found that the ICTY met this requirement and dismissed the challenge.[63] In other words, once a defendant is before it, the tribunal will protect a

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[59] See also Clarke 2009, at 37; Waddell and Clark 2007, at 16, summarising Barney Afako's intervention.

[60] Interview with the participant, Khartoum, December 2008.

[61] *Milošević motion*, 30 August 2011, cited in *Prosecutor v. Slobodan Milošević*, Trial Chamber, Decision on Preliminary Motions, Case No. IT-02-54, 8 November 2001, para. 8 (*Milošević Preliminary Motions decision*).

[62] Ibid., para. 9 (footnotes omitted).

[63] Ibid., para. 10 and 11.

fair trial, including equality of arms. But the tribunal avoided the question of unequal enforcement of international criminal law as a result of the Security Council's selectiveness.

7.5.2 The Triggering of Jurisdiction

With respect to states parties, the Court's jurisdiction can be triggered by states parties referring situations (involving their own nationals and territory, or those of other states) or by the Office of the Prosecutor's (OTP) use of its powers *proprio motu* to open an investigation.[64] While state referrals are inherently dependent on political decision-making, the Prosecutor's *proprio motu* powers ensure, according to the Court's first Prosecutor, 'that the requirements of justice could prevail over any political decision.'[65]

And yet, in his first years of action, the first Prosecutor of the ICC seemed reluctant to use these powers. Instead, he invited states to refer situations on their own territory (through a so-called 'self-referral') to the Court. For the OTP, a self-referral had at least two potential advantages.[66] First, fears of the ICC's trampling state sovereignty could be calmed: when states referred situations on their own territory to the Court, ICC intervention would seem in accordance with state sovereignty – the state *invited* the ICC to intervene – and a vote of confidence in the Court. Secondly, a self-referral could ease the Court's greatest handicap, namely its total dependence on state cooperation for acts ranging from issuing visas for its investigators to executing its warrants of arrest. A state that invites the ICC is more likely to cooperate than a state that opposes ICC intervention.[67]

From a perspective of equality, the result of this policy is that jurisdiction is triggered particularly by those states where the government welcomes, or at least does not oppose, ICC intervention and less so in states where the government opposes ICC intervention. During the first decade of the ICC's existence, the OTP has primarily opened investigations in states where the government invited the ICC in (Uganda, Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Mali). In the situations that were referred by the Security Council (Darfur and Libya), there was no such cooperation from the incumbent government (but very much so from rebel movements). But the OTP could offset resistance from the respective governments by support, at least politically, from the Security Council. To date, the OTP has used its *proprio motu* powers only twice, and in one of these situations (Côte d'Ivoire) the state concerned had invited

[64] RS, art. 13.

[65] Moreno-Ocampo 2007–2008, at 219.

[66] See, more elaborately, Nouwen and Werner 2010a, b.

[67] See also L. Moreno-Ocampo, Address to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, 6 September 2004).

the ICC by accepting its jurisdiction on an *ad hoc* basis.[68] Only in Kenya did the OTP use its *proprio motu* powers against the will of the government (but without opposition from powerful international actors). The Court has kept several other situations under 'preliminary examination' (for instance, Colombia, Georgia/Russia, Afghanistan). For some situations, this 'preliminary' examination has lasted over a decade (Colombia). The OTP has decided not to open an investigation into the conduct of British servicemen in Iraq.[69]

The fact that some 'weaker' states have invited the ICC to intervene shows that governments of such states do not necessarily consider ICC intervention as against their interests. (Indeed, they consider it in their interests as long as the ICC strengthens the *government's* position vis-à-vis its internal enemies).[70] The practice of self-referrals does not, however, counter the strong impression that the triggering of the Court's jurisdiction – and thus the first determination of potential suspects – have been greatly influenced by the extent to which the OTP expected cooperation from states, if not from the state concerned, then from other states, in particular from powerful states, and if not for the situation at hand then more generally for the Court's work. Thus far, the OTP has not used its *proprio motu* powers in situations where powerful states would strongly oppose ICC intervention (Colombia, Afghanistan, Iraq).

With respect to non-states-parties, a referral by the Security Council both establishes and triggers jurisdiction.[71] The practice so far shows the same selectiveness as with the *ad hoc* tribunals: the Security Council decides to refer some situations (Darfur, Libya) and not others (Iraq, Syria, Israel/Occupied Palestinian Territories). Irrespective of the political reasons, from a rule-of-law perspective the Council's message is that those with friends among the permanent members of the Security Council are beyond the reach of international criminal law.

The Council has also sent this message when actually referring situations to the Court by trying to exclude troops of states not parties to the Statute from the Court's jurisdiction.[72] In the context of referrals by states, the OTP has communicated to states that a state cannot focus the OTP's proceedings on only certain groups – a referral concerns all persons in a situation.[73] But in response to the Security Council's attempts to select groups for ICC proceedings, the OTP has remained silent and has simply opened an investigation. It is thus unclear whether the OTP has considered the paragraph limiting the scope of the investigation as

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[68] RS, art. 12(3).

[69] ICC-OTP, Letter to Senders re Iraq (9 February 2006), http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. Accessed 16 January 2013.

[70] See Nouwen and Werner 2010a.

[71] RS, arts 13(b) and 12 *a contrario*.

[72] UN Doc. S/RES/1593 (2005), para. 6 and UN Doc. S/RES/1970 (2011), para. 6.

[73] Letter from the Chief Prosecutor to the President of the Court Uganda, 17 June 2004, attached to *Situation in Uganda*, Decision assigning the situation in Uganda to Pre-Trial Chamber II, Presidency, Case No. ICC-02/04-1, 5 July 2004, at 4.

severable or whether it has treated it as valid.[74] It thus remains to be seen whether the Court allows the Security Council to be selective in ways that states are not (and in ways that the Statute *prima facie* does not seem to allow).

Seen through the equality lens, two features of the OTP's current practices stand out. First, in terms of equality of individuals, the OTP has generally not reversed inequality before the law at the domestic level. At the domestic level, impunity is particularly a risk in case of crimes committed by individuals protected by those in power; governments tend to shield from justice those who are loyal to them, while prosecuting their political opponents when possible. Rather than focusing on those who control the legal machinery at the domestic level, however, the ICC has also focused on the enemies of those in power (or, in the case of Libya, of those who were likely to be in power soon). Only in Sudan and Kenya has it opened cases against officials of the ruling (and not crumbling) regime. In most situations, the Court has thus not reversed possibly existing inequalities in the application of domestic law.

Secondly, in terms of equality between states, the Court has not opened investigations into situations where powerful states on whose support it relies (e.g. the UK) or that it wishes to obtain (mostly the US) object to ICC intervention. This – justice conforming to power – is the reality of a court that is modelled on an ideal of legal independence but in practice is dependent on states' cooperation for almost everything it does.[75]

7.5.3 The Use of Prosecutorial Discretion

The OTP uses prosecutorial discretion not only when deciding whether to trigger the Court's jurisdiction, discussed above, but also when the Court's jurisdiction has been triggered, to decide whether to an open an investigation and whom to prosecute.

In most criminal justice systems, prosecutors have some discretion, even in those systems in which the *Legalitätsprinzip* obliges the prosecutor to prosecute. But at the international level, two factors in practice enlarge the discretion. First, many of the situations in which the ICC intervenes are characterised by a 'universe of criminality',[76] in which it is impossible for almost any justice system, let alone the ICC with potentially global jurisdiction, to investigate and prosecute all

[74] See also Nouwen 2013, Chap. 4.

[75] See also Simpson 2007, at 46, on the paradox of cosmopolitanism which is that it represents an attempt to transcend sovereignty while remaining largely reliant on particular instantiations of it. See also A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[76] Rastan 2008, at 439.

crimes. Secondly, there is little possibility for judicial review of the OTP's refraining from opening an investigation or prosecution.[77]

Prosecutorial discretion always leads to some kind of selective enforcement of the law. This is not necessarily wrong; there may be good reasons for it.[78] The question is whether the grounds on which the selection is made are legally acceptable. From the perspective of equality, prosecutorial discretion will mean that some get prosecuted and others not; whether this is legally justified depends on whether there are legally relevant differences in the cases.

Legally, the ICC Prosecutor has little discretion in deciding whether to open an investigation after a referral, and more in deciding whom to prosecute and what to charge.[79] However, in the Prosecutor's view, the OTP, 'in the light of its limited resources', has substantial discretion as to whether to open an investigation.[80] The OTP has declared itself willing to consider, '[i]n addition to … the factors listed under Article 53',[81] the availability of evidence, the security of victims, witnesses and staff,[82] the feasibility of conducting an effective investigation in a particular territory[83] and whether 'the necessary assistance from the international community [will] be available, including on matters such as the arrest of suspects'.[84] The last enumerated factor makes selection dependent on whether states show willingness

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[77] RS, art. 53(3) provides for a review procedure in the event of a referral, but as long as the OTP does not decide *not* to open an investigation or prosecution, there is little to review. Moreover, without the OTP's providing any information, the Chambers do not know whether the OTP should have sufficient material to open an investigation or pursue a prosecution.

[78] See also Cryer 2005, at 192.

[79] Contrast RS, art. 53(1) with art. 53(2).

[80] ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (2003), at 1. http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf. Accessed 16 January 2013.

[81] ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 8. It could be argued that the Prosecutor has more discretion when deciding whether or not to open an investigation by using his or her *proprio motu* power than after a referral. According to art. 15(1) the Prosecutor 'may' initiate an investigation and according to art. 15(3) 'shall' submit a request for authorization if he or she concludes that there is a reasonable basis to proceed (taking into account, pursuant to rule 48, the criteria of art. 53). After a referral, art. 53 determines that the Prosecutor 'shall' initiate an investigation, *unless* certain criteria are fulfilled.

[82] ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 8.

[83] ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (2003) at 1, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf. Accessed 16 January 2013.

[84] ICC-OTP, Paper on Some Policy Issues before the Office of the Prosecutor (September 2003) at 2, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf. Accessed 16 January 2013. But *cf contra* ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 1 'The duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, nor the importance of the

to cooperate. From the perspective of Kooijmans's theory, the OTP treats states' willingness to cooperate as a juridically relevant difference, potentially justifying unequal enforcement of international criminal law.

From a practical perspective, the criterion of expected cooperation is understandable: in late Professor Cassese's metaphor, the ICC is a giant without arms and legs and needs artificial limbs to walk and work.[85] However, the use of artificial limbs could also result in *de facto* immunity for those that provide them: the prosecutorial part of the body is unlikely to hurt its artificial limbs that allow it to walk and work. Take the following examples: the ICC's case against the Lord's Resistance Army (LRA) has been based to a large extent on evidence obtained through generous cooperation from the Ugandan government. As in traditional diplomacy, such cooperation is encouraged by and rewarded with courtesies. For instance, senior officials of the OTP, including then Prosecutor Moreno-Ocampo, took senior officials of the Ugandan government, including Amama Mbabazi, once Minister of Defence and partly responsible for the Ugandan army's conduct, on a leisurely boat trip in The Netherlands.[86] Given the extensive support from the Ugandan government to the ICC in its LRA case and these strong diplomatic relations, how likely is it that the same Prosecutor independently investigates the same Ugandan government for *its* potentially criminal conduct in the conflict with the LRA or in eastern DRC?

The dependence on cooperation influences not merely the selection of prosecutorial targets within a situation, but also the selection of situations itself. Take the United States, a state not party to the Rome Statute but clearly of relevance to the ICC: it has the potential to make the Court much more effective or seriously to obstruct its work. During the first years of the Bush administration, it threatened to do the latter. However, since it discovered that in reality the Court selected only those situations and cases that coincided with its interests, the US has done the former by providing cooperation. The OTP, in turn, has welcomed the announcement of US support, stating *inter alia*:

> We have our shopping list ready of requests for assistance from the American government … The American government first has to lead on one particular issue: the arrest of sought war criminals. … We need … the operational support of countries like the U.S., to the DRC, to Uganda, to the Central African Republic, to assist them in mounting an operation to arrest [LRA leader Joseph Kony]. They have the will – so it's a totally legitimate operation, politically, legally – but they need this kind of assistance. And the U.S. has to be the leader.[87]

(Footnote 84 continued)
cooperation of any particular party, nor the quality of cooperation provided. The selection process is independent of the cooperation-seeking process.'

[85] Cassese 1998, at 13.

[86] See Nouwen and Werner 2010a, at 952.

[87] G. Lerner, Ambassador: U.S. moving to support International Court. CNN (25 March 2010). See also, critically, S. Al-Bulushi and A. Branch, Africa: Africom and the ICC - Enforcing international justice in Africa? (2010), http://allafrica.com/stories/201005271324.html. Accessed 8 November 2012.

This leadership role is paid for in the currency of legal equality. By providing the US a leadership role in enforcement, the Court also, implicitly, promises impunity: the Court is unlikely to amputate its most instrumental artificial limb by threatening it with prosecution. The result is a violation of the principle that 'whatever is [un]lawful, [un]just or [in]equitable for one State [or individual] in a particular situation, should be equally [un]lawful, [un]just, and [in]equitable for all other States [and individuals] in that situation.'[88]

Is this different treatment justified? The law does not say so explicitly. One rationale could be that given its military presence throughout the world and its diplomatic clout, a US leadership role in enforcement of ICC decisions could enhance the Court's effectiveness. If the OTP adopts this argument, explicitly or implicitly, it effectively transforms this political argument into what it would take to be a juridically relevant fact, thus justifying a departure from the principle of equality. Or, in Kooijmans's line of argument:

> The Great Powers are … not given a privileged position *because* they have acquired it on the strength of their status of power, but they are given a special function when, on account of their relevant special characteristics, they can serve the cause of law in this function; a function that, in a different field and on the basis of different characteristics, can be given to smaller states.[89]

The OTP's view as to what is 'of intrinsic value for the existence of [*its*] legal order' could thus transform a material inequality into an inequality recognised and juridicalised by international law, like Nuremberg did with respect to the post-World War II legal order. As a result, what governments have to offer the Court in terms of cooperation influences the likelihood that people protected by them will be held to account by the ICC. States that have a lot to offer in terms of cooperation when their enemies are prosecuted or that are protected by powerful states can effectively immunise their nationals from the Court's jurisdiction. *Vice versa*, those who are not protected by their governments, indeed, sought by them (for instance, rebel movements in Uganda, DRC and CAR) or those governments that lack protection from the hegemonic order (for example, members of the present Sudanese and former Libyan government) are targeted by ICC proceedings.[90] Inequality between states thus also leads to inequality among individuals before the Court.

7.5.4 The (Ir)relevance of Immunity Law

Finally, once the Prosecutor has selected the situation and the case, distinctions may have to be made on grounds of immunities. As has been set out above, whilst

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[88] Kokott 2011, para. 23, on sovereign equality.

[89] Kooijmans 1964, at 112.

[90] This is not unique to the ICC. The Rwandan government could influence the ICTR's prosecutorial policy by refusing or threatening to refuse cooperation. See Cryer 2005, at 221. See also Ibid., at 230.

article 27 makes it impossible for a *defendant* successfully to invoke immunity before the Court, article 98 prohibits the *Court* to proceed with a request for surrender or assistance if this required the requested State to act inconsistently with its obligations under international law with respect to a third state. According to one ICC Pre-Trial Chamber, article 98 is relevant not for all 'third states' in the sense of 'states other than the requested states' but only to states other than the requested state that are not parties to the Statute. For, in its view, 'acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings of the Court.'[91]

This waiver is not obvious – the fact that states agree that Heads of State as *defendants* may not invoke procedural immunity (article 27(2)) does not mean that they therefore also agree that their Heads of State do not enjoy procedural immunity when confronted with an ICC arrest warrant in another state. Be that as it may, for states not parties to the Statute it is *a fortiori* evident that they have not consented to any waiver of immunity. From the perspective of legal equality of *states*, respect for such procedural immunity is thus essential; parties to the Statute may have agreed among themselves to waive immunity *ratione personae,* but this agreement *inter se* does not allow them to infringe the rights of states not parties to the Statute.

The Pre-Trial Chamber, however, has held that 'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[92] In response to Malawi's refusal to execute an arrest warrant for the incumbent President of Sudan, the Chamber found 'that the principle in international law is that immunity of either former or sitting Heads of State can not (*sic*) be invoked to oppose a prosecution by an international court' and that this 'is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction'.[93] In other words, according to the Chamber *international* tribunals are allowed to do what national courts are not allowed to do, namely to ignore immunity. Conceptually, this is unconvincing. When two states conclude a treaty establishing a tribunal, this is an international court because of its origins in an international instrument. Why would these two states together be allowed to do what they are not allowed to do individually?

The Chamber did not address this conceptual issue. Instead, it advanced precedents, ranging from the opinion of a Commission on the aftermath of World War I and the Nuremberg and Tokyo tribunals to the tribunals for the former Yugoslavia and Rwanda. None of these precedents apply to the situation at hand, however, since the cited instruments contained provisions denying the availability

[91] Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir of 12 December 2011, Pre-Trial Chamber I, Case No. ICC-02/05-01/09-139, para. 18 (Malawi Cooperation Decision).

[92] Ibid., para. 43.

[93] Ibid., para. 36.

of a defence of official position to escape 'responsibility'; they did not contain a provision on the (un)availability of immunity *ratione personae*, probably because most of these tribunals dealt only with *former* officials, for whom immunity *ratione personae* was no longer relevant.[94]

In its decision, the Chamber also cited the International Court of Justice (ICJ), which had reasoned, *obiter*, that 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain* international criminal courts'.[95] In its decision, the ICC Chamber omits the crucial word 'certain', suggesting that 'international courts' *in general* can ignore immunity law.[96] Undeniably, the ICJ had explicitly cited the ICC as an example. However, the ICJ had cited article 27(2), not a rule of customary law. The ICJ did not argue, as the ICC Chamber did, that article 27(2) reflects a customary rule before international tribunals as a result of which article 98(1) is of no relevance. In other words, by relying on article 27(2), the ICJ did not exclude the continued relevance of article 98(1) in the event of a cooperation request to a third state.

The ICC Pre-Trial Chamber has tried to justify the distinction between proceedings before national and international courts on the basis of the following reasoning:

> This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action. Cassese emphasised that this danger does not arise with international courts and tribunals, which are '*totally independent of states* and subject to strict rules of impartiality'.[97]

The Court then cited the only relevant precedent, namely the denial of immunity *ratione personae* to Charles Taylor by the Special Court for Sierra Leone. That Court, too, had denied such immunity on the basis of a distinction between national and international tribunals:

> A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[98]

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[94] In *Milošević* the ICTY dodged the issue of immunity *ratione personae* by interpreting his motion as an invocation of immunity *ratione materiae*. See *Milošević Preliminary Motions decision*, para. 28. See, more elaborately, Nouwen 2005, at 665.

[95] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Judgment of 14 February 2002, at para. 61 (emphasis added).

[96] *Malawi Cooperation Decision*, para. 33.

[97] Ibid., para. 34 (footnotes omitted; emphasis added).

[98] Ibid., para. 35. The original is *The Prosecutor v. Charles Ghankay Taylor*, Appeals Chamber, Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-1-AR72(E), 31 May 2004, para. 51.

From the perspective of equality of states, the key point in this reasoning is that the principle is considered of no relevance to international tribunals. In the views of Professor Cassese, the Special Court for Sierra Leone and the ICC Pre-Trial Chamber, international tribunals may do what states individually may not do; namely, ignore the immunity of a head of state even where it has not been waived by the state. Equality of states has no relevance when some states unite in the name of 'the international community'.

From the perspective of *individuals* before the Court, this approach theoretically enhances equality: one's official capacity does not matter. In practice, however, this decision affects only individuals of those states actually targeted by the Court. Then inequality reappears because, as we have seen above, the idea that the ICC is '*totally independent of states*' is a fiction – for cooperation, it is entirely dependent on states. As long as the ICC prioritises obtaining such cooperation, allows such dependence to influence its decision-making and therefore dances to the tune of power, inequality between states leads once more to inequality among individuals.

7.5.5 Conclusion on the ICC and Legal Equality in Practice

The visible inequality as the *outcome* of the application of the Rome Statute is preceded by inequality in earlier stages, namely in the creation of the Court's jurisdiction, its triggering, the use of prosecutorial discretion and the reasoning with respect to immunity law. Inequality is particularly the result of the fact that in order to be seen as 'effective', the ICC requires cooperation. Legally independent, but practically heavily dependent on states, and in particular averse to antagonising states with the power to make or break the Court, the ICC may be in the process of transforming material inequalities into seemingly relevant juridical differences, thus legitimising inequality.

7.6 Responses to Inequality

In response to allegations that the ICC has enforced the Rome Statute unequally, namely only with respect to Africa, ICC officials have put forward three types of arguments:

1) Those who say that this Court targets Africa are apologists for war criminals;
2) A western Court for African Crimes? Quite the reverse, this is *Africa's court*!
3) *And rightly so* – the world's worst crimes are committed on the African continent and Africa does not have the capacity to deal with these crimes itself.

The first two types of arguments are forms of denial; the third is one of justification.

7.6.1 Ad Hominem *Denial: 'Those Who Say that this Court Targets Africa are Apologists for War Criminals'*

An example of this type of denial argument is the following statement by the ICC's first Prosecutor:

> The Africa bias is a baseless debate started and promoted by President Bashir. … I will not apologize for protecting the rights of African victims. As Archbishop Tutu said, you have to choose your side, to protect the criminals or their victims.[99]

This type of argument transforms the allegation of an Africa bias from an empirical observation into propaganda of an alleged war criminal and treats those who make the empirical observation as apologists for war criminals. The argument is so weak that it merits no discussion. It suffices to observe that no one resorted to it when Bishop Tutu himself criticised the unequal application of international criminal law.

7.6.2 *Denial by Reversal: A Western Court for African Crimes? On the Contrary, this is* Africa's Court!

The second type of denial argument is that Africa actually fully supports the ICC and its actions. The ICC Prosecutor has tried to make this point when stating during an address at a symposium in Africa:

> Today, I would like to present facts, not perceptions. The facts will show you that African institutions, African leaders and African activists are building the system of international justice designed by the Rome Statute to protect the victims of massive crimes.
>
> 3. Africans are leading the adoption of the Rome Statute and its implementation….
>
> b. African states led the ratification process. Senegal was the first state party. Africa is the most represented region of the world in the Rome Statute. 23% of the state parties.
>
> c. African judges are 25% of the bench.
>
> d. African leaders referred three situations to the Court.[100]

In another speech, the then Deputy Prosecutor added some more factors to the list of evidence that Africa supports the ICC:

- The Court is defending African victims
- African civil society is building a global coalition against impunity
- African leaders have condemned impunity

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[99] L. Moreno-Ocampo, Working with Africa: The view from the ICC Prosecutor's Office (Cape Winelands, 9 November 2009), at 9 http://www.iss.co.za/uploads/9Nov09Ocampo.pdf. Accessed 8 November 2012. See also Ibid., at 8.

[100] Ibid., at 2.

– African core values are consistent with norms of the Court / the ICC also reflects African forms of justice.[101]

This type of argument ignores the possibility that African states support the ideals that the ICC embodies, but at the same time object to the unequal application of the Statute across the globe.

7.6.3 *Justifying Inequality:* And Rightly So—*the World's Worst Crimes are Committed on the African Continent and Africa Does not Have the Capacity to Deal with These Crimes Itself*

The final type of argument does not deny inequality, but justifies it on the ground that the situations are not equal. In Kooijmans's terminology, there are juridically relevant differences. The argument is that the worst crimes are committed in Africa; Africa does not have the capacity to address them, and the ICC must intervene to bring justice. Portraying the situation in these colours, the OTP has, for instance, stated:

> About targeting Africa. There are 14 accused, all of them are Africans. There are more than 5 million African victims displaced, more than 40.000 African victims killed, thousands of African victims raped. Hundreds of thousands of African children transformed into killers and rapists. 100% of the victims are Africans. 100% of the accused are African.[102]

By painting this image, the OTP not only explicitly justifies its Africa focus. It also exonerates the rest of the world by implication. The fact that all the attention of the world's only permanent International Criminal Court is usurped by Africa suggests that the world's worst crimes and worst criminals reside in and stem from that continent. Crimes committed on other continents, and by other actors, are invisible as a result of the ICC's blind eye.

The second part of the 'and rightly so' argument is that African countries are incapable of addressing these crimes themselves and that therefore the ICC must intervene. In the words of a senior legal officer of the ICC: 'No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and

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[101] ICC-OTP, Deputy Prosecutor's Remarks: Introduction to the Rome Statute Establishing the ICC and Africa's Involvement with the ICC (14 April 2009), http://www.icc-cpi.int/NR/rdonlyres/214816FF-DD8F-4908-97CF-B315C33F24FE/280279/20090414FatouRomeStatute.pdf. Accessed 8 November 2012.

[102] Moreno-Ocampo, see above n. 99, at 3. See also the film 'The Reckoning' (by Yates, de Onis and Kinoy 2009).

accountability'.[103] The ICC paints Africa, in Ferguson's words, in the cliché of 'western presence and eternal African absence – as if the earth, like the moon, had a permanently darkened half, a shadowed land fated never to receive its turn to come into the "light" of peace and prosperity'.[104] As Achille Mbembe has observed, this dark story of Africa tells us 'nearly everything that African states, societies, and economies *are not*', while telling us little or nothing what they actually *are*.[105] What Edward Said has observed with respect to the relations between 'East' and 'West' applies, *mutatis mutandis*, to the relationship between Africa on the one hand and 'the international community' and, operating in its name, the 'International Criminal Court' on the other. To paraphrase Said, the idea of Africa is a form of 'meridionalism':

> a way of coming to terms with [Africa] that is based on [Africa]'s special place in … western experience… [Africa] has helped to define …the west … and its contrasting image, idea, personality and experience. [Western] culture gained in strength and identity by setting itself off against [Africa] as a sort of surrogate and even underground self.[106]

Africa provides the radical other that the 'international community' uses for the construction of its own identity: civilised, orderly, enlightened, developed, modern, and, in the context of the ICC, just. In this vision, unequal application of the law is not an injustice in itself, but justified in light of supposedly juridically relevant differences between Africa and the rest of the world. But rather than merely justifying unequal application of the law, the unequal application of the law also entrenches existing inequalities. No matter how socially constructed and arbitrary, the idea of Africa is thus also real and consequential.[107]

7.7 Conclusion

So how has the principle of legal equality fared, in particular in international criminal law, since Pieter Kooijmans challenged the principle in 1964? Kooijmans suggested that the emergence of an international legal order meant fewer possibilities to explain encroachments upon equality by reference to power politics. He did *not* state that the emerging international legal order would be more respectful

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[103] Cited in ICC-OTP, Deputy Prosecutor's Remarks: Introduction to the Rome Statute Establishing the ICC and Africa's Involvement with the ICC (14 April 2009), at 3. http://www.icc-cpi.int/NR/rdonlyres/214816FF-DD8F-4908-97CF-B315C33F24FE/280279/20090414FatouRomeStatute.pdf. Accessed 8 November 2012.

[104] Ferguson 2006, at 10.

[105] A. Mbembe, *On the Postcolony*, cited in Ferguson 2006, at 10.

[106] Said 1995, at 1.

[107] Ferguson 2006, at 5.

of the principle. He was right not to do so. As the developments in international criminal law with respect to immunity illustrate, the argument of an emerging international legal order is invoked precisely to *deny* the relevance of the principle of equality of states. The principle is treated as belonging to the old era in which the law of nations was a law between states rather than above them;[108] as a principle relevant in the perhaps traditionally horizontal legal order of states, but anachronistic in the emerging vertical legal order. This emerging vertical order is presented as having its own values to pursue, some of which are prioritised over the principle of legal equality between states. The 'fight against impunity' is a key example. Consequently, the principle of legal equality may be losing its position as 'basic constitutional doctrine of the law of nations.'[109]

But what has come instead? Is it no longer possible to explain encroachments on the principle with reference to 'the factual conditions of power politics'? Officially not; dressed up as 'juridically relevant' differences, power politics are transformed into legal justifications for unequal treatment. But the underlying reality is still that of the factual conditions of power politics. Think of the different treatment of those on whom the ICC depends and of those on whom it does not. The notion of juridically relevant differences, or that of 'reasonable and objective justification' for that matter, does not transform what is political into legal, but makes the legal another battlefield for the contestation or legitimisation– inherently political activities – of inequality.

The weak position of the principle of legal equality of *states* – explicitly, as in the immunity decisions; implicitly, as a result of the introduction of juridically relevant differences, or in practice – has a bearing on the legal equality of *individuals*, another subject of international law for whom Kooijmans predicted the relevance of the principle. Individuals may be equal once they are called before the law, but they are, in practice, unequal in the chances of having to appear before the law, as a result of inequality between states. This in turn cements inequalities between states: the work of the ICC does not purely reflect 'international

[108] See, e.g. Oppenheim 1905, at 19-20, para. 14. 'Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.'

[109] Brownlie 2008, at 289. Indicative is the difference between the 7th edition of Brownlie's Principles, written by Ian Brownlie, and the 8th edition, edited by James Crawford. Whereas the 7th edition still opened the chapter on 'sovereignty and equality of states' with the sentence '[t]he sovereignty *and equality of states* represent the basic constitutional doctrine of the law of nations' (emphasis added), the opening line of the same chapter in the 8th edition is: 'The sovereignty of states represents the basic constitutional doctrine of the law of nations' (Crawford 2012, at 447). The subsequent text also illustrates that Crawford is more sceptical of the actual role played by the principle: whereas Brownlie still wrote 'states are equal', Crawford writes 'then *in this respect* [sovereignty] *at least* [states] are equal' (emphasis added).

criminality' but also constructs the world's understanding of it. As a result of the Court's exclusive focus on Africa, African states are, yet again, portrayed as the unequal shadow of a western role model; a role model that can serve as such because it is exonerated by the Court's looking elsewhere.

The final question is whether the demise of the principle of equality, at least in the enforcement of international criminal law, matters. The answer depends on which value one prioritises. Those promoting international criminal justice often concede, with regret, that international criminal law is enforced unevenly. However, they stress that the glass is half full rather than half empty and that the glass is progressively filled: more and more individuals, hopefully one day irrespective of their nationality, will be subjected to international criminal law. This is the argument of those for whom anti-impunity is the primary value to be pursued. They are filling the anti-impunity glass.

For others, however, equality is the primary principle to be pursued. That is particularly so for those, states and individuals, who have suffered from a lack thereof. They focus on the ICC's impact on equality. Their glass, that of equality, is half empty, if not emptier. Moreover, they see the unequal enforcement of international criminal law as risking emptying their glass completely: less impunity can mean more inequality. Rather than sharing the faith of anti-impunity activists that one day everyone will be accountable to the law, they challenge this evolutionary narrative for its lack of empirical grounding.[110] In their view, the ICC's anti-impunity work legitimises rather than challenges existing inequalities. Under the mantle of a 'legal' and 'just' anti-impunity fight, the 'international community' – 'a post-Cold War nom de guerre for the Western powers'[111] – reconstitutes itself on an altar of superiority by punishing its enemies. And then, as Adam Branch observes, 'the doctrine that some justice is better than no justice can end up not only making justice conform unapologetically to power, but also making justice an unaccountable tool of further violence and injustice.'[112]

The evaluation of the changing status of the principle of equality in the field of international criminal law thus depends on which value, accountability or equality, one values most. That prioritisation of values is a political exercise. For those at the forefront of the fight against impunity, accountability trumps equality. Others judge inequality, among states and individuals, as a greater injustice. They are not willing to sacrifice the principle of equality on the stage of accountability.

Who will win over the next 50 years? This will largely depend on the politics of fragmentation.[113] As Martti Koskenniemi has revealed, each specialist regime of international law has been developed precisely in order to enhance certain

[110] See A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[111] Mamdani 2009, at 12.

[112] A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[113] On which, see Koskenniemi 2007, 2009.

international legal values more than others. It is therefore not surprising that international *criminal* courts prioritise the anti-impunity struggle over the protection of the principle of legal equality. One could expect a more nuanced assessment of the relationship between competing values of international law from a court that adjudicates international law more generally, such as the ICJ.

It is particularly illustrative how Kooijmans as an ICJ judge dealt with the tension between two values of international law: accountability for international crimes on the one hand and immunity, a manifestation of the sovereign equality of states, on the other, when writing as one of three judges in a Separate Opinion in the *Arrest Warrant* case:

> The frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value …[114]

Whether the principle of equality survives, if only as an aspiration, depends in part on whether and to what extent it will be protected by scholars and judges like Pieter Kooijmans.

References

Aristotle (1999) (Translated by Ross WD) Nicomachean ethics. Batoche Books, Kitchener

Aust A (2010) Handbook of international law, 2nd edn. Cambridge University Press, Cambridge

Brownlie I (2008) Principles of public international law, 7th edn. Oxford University Press, Oxford

Buchet A, Tallgren I (2012) Sur la route de Rome: les négociations préalables à l'adoption du statut de la cour pénale internationale. In: Fernandez J, Pacreau X (eds) Statut de Rome de la Cour pénale internationale: commentaire article par article. Editions Pedone, Paris, pp 171–194

Cassese A (1998) On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law. Eur J Int Law 9:2–17

Clarke K (2009) Fictions of Justice: The ICC and the challenge of legal pluralism in Sub-Saharan Africa. Cambridge University Press, Cambridge

Crawford J (2012) Brownlie's principles of public international law, 8th edn. Oxford University Press, Oxford

Cryer R (2005) Prosecuting international crimes: Selectivity and the international criminal law regime. Cambridge University Press, Cambridge

Ferguson J (2006) Global shadows: Africa in the neoliberal world order. Duke University Press, Durham and London

[114] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* ICJ, Judgment of 14 February 2002, (Joint Separate Opinion Judges Higgins, Kooijmans and Buergenthal), para. 79.

Henrard F (2008) Equality of individuals. Max Planck encyclopedia of public international law. http://www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e1113.pdf?stylesheet=EPIL-display-full.xsl. Accessed 11 Dec 2012

Kokott J (2011) States, sovereign equality. Max Planck Encyclopedia of Public International Law. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1113&recno=2&searchType=Quick&query=Kokott. Accessed 11 Dec 2012

Kooijmans P (1964) The doctrine of legal equality of states: An inquiry into the foundations of international law. A.W. Sythoff, Leiden

Koskenniemi M (2007) The fate of public international law: between technique and politics. Mod Law Rev 70:1–30

Koskenniemi M (2009) The politics of international law—twenty years later. Eur J Int Law 20:9–17

Mamdani M (2009) Saviors and survivors: Darfur, Politics and the war on terror, Verso, London, New York

Moreno-Ocampo L (2007–2008) The International Criminal Court: seeking global justice. Case W Reserve J Int Law 40:215–225

Nouwen S (2005) The Special Court for Sierra Leone and the immunity of Taylor: the Arrest Warrant case continued. Leiden J Int Law 18:645–669

Nouwen S (2012) The International Criminal Court: A peacebuilder in Africa? In: Curtis D, Dzinesa GA (eds) Peacebuilding, power and politics in Africa. Ohio University Press, Athens, pp 171–192

Nouwen S (2013) Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan. Cambridge University Press, Cambridge (forthcoming)

Nouwen S, Werner W (2010a) Doing justice to the political: the International Criminal Court in Uganda and Sudan. Eur J Int Law 21:941–965

Nouwen S, Werner W (2010b) The law and politics of self-referrals. In: Smeulers A (ed) Collective violence and international criminal justice—an interdisciplinary approach. Intersentia, Antwerp, pp 255–274

O'Keefe R (2011) State immunity and human rights: heads and walls, hearts and minds. Vanderbilt J Transnatl Law 44:999–1045

Oppenheim L (1905) International law: A treatise, vol I. Longmans, Green, and Co, London, New York, Bombay

Pahuja S (2011) Decolonising international law, Development, economic growth and the politics of universality. Cambridge University Press, Cambridge

Rastan R (2008) What is a 'case' for the purposes of the Rome Statute? Crim Law Forum 19:435–448

Said E (1995) Orientalism: Western conceptions of the Orient. Penguin Books, London

Shaw M (2008) International law, 6th edn. Cambridge University Press, Cambridge

Simpson G (2004) Great powers and outlaw states: Unequal sovereigns in the international legal order. Cambridge University Press, Cambridge

Simpson G (2007) Law, War & crime: War crimes trials and the re-invention of international law. Polity, Cambridge

Waddell N, Clarke P (2007) Peace, justice and the ICC in Africa. Meeting Series Report, Royal African Society London. https://www.royalafricansociety.org/documents/Peace,JusticeandtheICC-seriesreport.pdf. Accessed 8 Nov 2012

Chapter 8
Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law

Geoff Gordon

Abstract Peter Kooijmans' inquiry into the doctrine of the legal equality of states and, with it, the foundations of international law, reflects a peculiar brand of cosmopolitan thought, namely innate cosmopolitanism. Though under-recognized, innate cosmopolitanism is an argument for re-conceiving the modern international legal order according to a deep unity underlying the whole of human relations. As such, innate cosmopolitanism is distinct from better-recognized examples of cosmopolitan thinking, including liberal cosmopolitanism and cosmopolitan constitutional theory. Rejecting the normative individualism of liberal cosmopolitanism, and eschewing the formal orientation of constitutional theory, innate cosmopolitanism envisions the world as a viable collectivity that is perceived to exist, irrespective of formal recognition, as a matter of historical fact. But while innate cosmopolitanism operates according to a top-down model of collectivity, it nonetheless recognizes and incorporates smaller units of collectivity. As such, it holds especial relevance at a time when international legal doctrine looks beyond the preeminence of states, but continues to be bound to them in practice. Following innate cosmopolitanism, the international system incorporates all members equally when it takes into account the different material position of each member vis-à-vis the collective whole. The rights and responsibilities enjoyed by each, and their political situation within the community, will vary accordingly. This article will explore the innate cosmopolitan contribution to international law by reference to two current discourses, concerning ethical legitimacy and constitutional theory, as they grapple with justifications for and the doctrinal viability of an expanding public order globally. Additionally, examples drawn from the activation of the

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crime of aggression in the Rome Statute, and the *Kadi* case, will be considered for the critical light they throw on innate cosmopolitan theory.

Keywords Legal equality · Innate cosmopolitanism · World collectivity · Individualism · Constitutionalism · Legitimacy · Crime of aggression · *Kadi*

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8.1 Introduction

Kooijmans' inquiry into the doctrine of the legal equality of states is a reconstruction of fundamental international legal doctrine, in favour of a cosmopolitan argument for sovereign equality. The basic premise from which Kooijmans proceeds, concerning a deep and pre-legal unity in world relations, however, reflects neither the ethical doctrine of liberal cosmopolitanism, nor a formal aspiration to a cosmopolitan world constitution. Rather, his cosmopolitanism reflects what has been a central school of thought in international law throughout its history, but one that has been overlooked by comparison with these other schools of cosmopolitan thought. I refer to his brand of cosmopolitanism as innate cosmopolitanism, because it purports to recognize an underlying unity in the world that is innate to humanity as a whole.[1]

Viewed through the prism of cosmopolitanism, Kooijmans' treatment of the doctrine of the legal equality of states is a forerunner and example of what innate cosmopolitanism has to offer to current doctrinal controversies in international law. Those controversies include joined questions of ethical legitimacy and constitutional viability. In cosmopolitan terms, and particularly liberal cosmopolitan terms, ethical legitimacy has largely been understood according to normative individualism, demanding justifications of international norms and institutions according to their effects on individuals. Human rights, for example, have been comprehended under international law according to standards of individual rights

[1] Gordon 2013.

and responsibilities. Innate cosmopolitanism, by contrast, identifies legitimacy with a fuller appreciation of collectives generally. Though innate cosmopolitanism elevates the normative authority of the world collective, it also would preserve substantial room for regional and local agency within the international legal system. In this sense, the innate cosmopolitan argument supports the advances of regional organizations in international law, and dovetails with certain constitutional proposals that preserve a role for the sovereign state.

The dovetail reflects a point of relative commonality between innate cosmopolitanism and cosmopolitan constitutional theory in international law. Innate cosmopolitanism comprehends a sort of proto-constitutional condition, which Kooijmans reflects in terms of a doctrinal shift from equal sovereignty to sovereign equality. That shift is central to formal constitutional innovation in international law, but remains an elusive strategy: the achievement of constitutional community remains impeded by orthodox terms of sovereignty and voluntary positivism in the international system. Innate cosmopolitan theory, by contrast with formal constitutional theory, comprehends an international community that is already constituted in such a way that a formal constitutional achievement under law is manifestly feasible, even if the perceived fact of the world community means that the formal constitutional achievement is not necessarily urgent. Moreover, the innate cosmopolitan position leads as well to a critical follow-up distinction between equality before the law and equality in the law. States, together with regional collectives and still other actors, are comprehended as equal members in the legal cosmopolitan community: the rights and responsibilities that flow from that relationship will vary with historical circumstance.

Consider the recent activation of the crime of aggression into the Rome Statute (delay until 2017 notwithstanding). The achievement has been much discussed and dissected, but I raise it for a single purpose: as an example, for better or worse, of a step in an innate cosmopolitan project to establish public order for an inclusive world community, one founded on states as equal members. Many commentators have expressed scepticism regarding the role accorded to the Security Council following the terms of 15*bis* (and 15*ter*) as emblematic of contemporary power politics, and reflective of nothing more than the status quo – hardly typical of cosmopolitanism.[2] Certainly, 8*bis*, 15*bis* and 15*ter* together do not constitute a straightforwardly liberal cosmopolitan development, nor do they constitute a clear example of cosmopolitan constitutional development – but the activation of the crime of aggression can and should be understood according to the terms of innate cosmopolitanism. Putting to one side the delay in implementation, 8*bis*, 15*bis* and 15*ter* achieve all of the following, in accordance with the innate cosmopolitan project: they elevate a first principle of public order for any community to the level of criminal delict in international relations; in doing so, they extend the sanction to individuals; but at the same time, they incorporate states to a substantial degree for the interpretation of the delict, its application and sanction, and do so largely

[2] Van Braun and Micus 2012; Politi 2012, at 271-274; Ferencz 2010.

according to the historical situation of states reflected in the Charter regime generally, and the Security Council in particular, however imperfectly. The adoption of 8*bis*, 15*bis* and 15*ter* does not achieve a constitutional order, but reflects the assumption of a constituted community ultimately capable of expressing a norm applicable against individuals anywhere in the world, on the basis, as a criminal delict, of an offense against a unitary society. It bears noting, however, that the innate cosmopolitan dimension of the adoption of the definition of aggression does not overthrow the criticism of an operative scheme too much vested in the status quo. Rather, the criticism is applicable to the cosmopolitan scheme itself, addressing a curious and potentially compromising connection between innate cosmopolitanism and status quo conditions of international law and relations.

Below, I will look briefly but closely at Kooijmans' original text as an example of innate cosmopolitan scholarship. Thereafter, I will look at the application of the innate cosmopolitan argument for sovereign equality as it may be applied today to twinned questions of collective agency and constitutional possibility within the international system. I then conclude with another example of innate cosmopolitan development in international law, to bring out conflictual aspects of the innate cosmopolitan model, and offer some critical thoughts.

8.2 The Innate Cosmopolitan Tradition and Kooijmans

For his dissertation on the doctrine of the legal equality of states, Kooijmans adds the subtitle *An inquiry into the foundations of international law*. The interest in the foundations of international law belies his normative ambition to re-conceive the international legal order. In the course of his dissertation, Kooijmans makes clear his rejection of the then-traditional understanding of a subjective international legal order founded in consensual positive law among states, in favour of an objective cosmopolitan system of law founded in general principles that precede consensual rule-making.[3] His cosmopolitanism reflects the long tradition of innate cosmopolitan thought in international law, though that tradition has been only partially and imperfectly recognized. That tradition of innate cosmopolitan thought takes the temporal world – the whole of humankind at any given point in time – to be a unity, and from that unity draws the foundational authority for international law.

Cosmopolitanism is typically understood according to a liberal project founded in normative individualism, part of a Kantian tradition principally concerned with the equal dignity of the individual.[4] But Kooijmans sets his own cosmopolitan project against a reduction to individualism. Proceeding from theological premises, Kooijmans posits the irreducible unity of humanity as a whole at any given

[3] Kooijmans 1964, at 230.

[4] See, e.g., Tesón 1992.

point in time.[5] In so doing, he situates his own project among international legal theory that begins with Vitoria, includes Suárez, Gentili and Grotius, finds its antagonists in a line of thinkers including Hobbes, Vattel and Vattel's successors, and ultimately resolves into a distinct and nuanced position among contemporaries. By establishing this genealogy, Kooijmans repeats a procedure that may be observed in the history of innate cosmopolitan thought. Scholars and practitioners making innate cosmopolitan arguments – including figures such as James Brown Scott,[6] Hersch Lauterpacht,[7] Myers McDougal and the New Haven School scholars,[8] and successors such as Harold Koh,[9] among others – tend regularly to invoke a long and common history of innate cosmopolitan ideas, in each case largely as though for the first time. In part, that repetition reflects a curious failure among those 20th century scholars adopting innate cosmopolitan ideas to establish a self-aware discourse of innate cosmopolitanism, despite the long and commonly-cited history. Never achieving recognition as a discrete doctrine or discourse, the sum of innate cosmopolitan ideas and arguments instead consistently functions something like a heuristic device: a model to guide the development of the international system towards normative ends associated with the world as a whole at any given point in time.

In proceeding from theological premises, Kooijmans makes his innate cosmopolitan argument a relatively idiosyncratic one. Typically, innate cosmopolitan arguments are drawn from either of two sets of assertions, and often aspects of both together: empirical assertions of an interdependent social unity[10]; or assertions of a unity founded in common capacities, such as the capacity for communication.[11] The former tend to be largely sociological in nature, identifying normative authority with actual patterns of behaviour reflecting world interdependence; the latter tend to be roughly psychological in nature, invoked to 'subjectivize' the perceived unity of the world, thereby vesting the world as a whole with a will and interests of its own, capable of conveying normative authority. Kooijmans, however, rejects the unbridled empiricism typical of the sociological school in international law,[12] and instead of identifying the intrinsic unity of the world with a mind-state or the human capacity for communication, he identifies it with the Christian premise of 'one blood', unifying the whole of humankind in the image of the God, and in accordance with Christian faith.[13]

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[5] Kooijmans 1964, at 196.

[6] Scott 1934.

[7] Lauterpacht 1946.

[8] McDougal et al. 1987, at 812 ff.

[9] Koh 1997, at 2603-2613.

[10] Jenks 1959, at 87.

[11] Álvarez 1918, at 180-181; Bartelson 2009, at 221.

[12] Kooijmans 1964, at 154-162.

[13] Ibid., at 18.

The effect that Kooijmans intends, however, remains in keeping with the innate cosmopolitan project. In the first place, he intends to reconcile the sovereign state and an invigorated international order. He would displace the absolute, subjective prerogative of the sovereign state with an objective and universal normative authority, while at the same time preserving the political identity and a measure of authority vested in the state.[14] He would do so according to a top-down appreciation of the world as a social and political unity; that top-down model, predicated on a discrete understanding of the world as a whole, is definitive of innate cosmopolitanism. Moreover, Kooijmans refers to other innate cosmopolitan authors and ideas under the guise of modern natural law, which, following Kooijmans, provides at once for universal norms and varying historical expression.[15] Likewise, innate cosmopolitanism holds that the social and political expression of the unity underlying world relations can only be appreciated according to – and will vary with – historical circumstance.

Kooijmans' argument ultimately militates in favour of a more integrated international order, and bears notable resemblance to aspects of the more recent theory of Jens Bartelson, who lately has offered an innate cosmopolitan reconstruction of the history of international political theory. Kooijmans and Bartelson alike, by means of doctrinal reconstruction, would circumvent the tension between the sovereign state and the international order, but without disposing of either. Each takes the somewhat paradoxical maneuver of making the state and the international order independent of one another, while consolidating an appreciation of both. Bartelson, in his 2009 work *Visions of World Community*, describes the ambition as 'to reconcile some set of universal values with the actual plurality of values currently embodied in international society' such that 'there is no need to transcend the existing order of states in order to bring a world community into being.'[16] Kooijmans before him held that '[i]f we want to avoid the irreconcilability, the mutual exclusion of the national and the international community, however, we must keep in mind the intrinsic nature of these communities.'[17] By this understanding, equality becomes the proper appreciation of an innate commonality under historical conditions of diversity.

Bartelson, to make good on his agenda, proposes a 'concept of a world community [that] includes *all* human communities … and regards them as indispensable parts of the same overarching community', with the consequence that 'the different levels at which political rights could manifest themselves are actually *inseparable*.'[18] Kooijmans had already put it as follows:

> The sovereignty of the state is no longer a hindrance to the validity of international law, just as the sovereignty of the international legal order does not limit the independent

[14] Ibid., at 202-203.

[15] Ibid., at 215.

[16] Bartelson 2009, at 3, 11-12.

[17] Kooijmans 1964, at 197.

[18] Bartelson 2009, at 155 and 162 (emphasis in the original).

> significance of the state. Both are sovereign, but each according to its own structural principle, which do not exclude one another, but are in indissoluble coherence.[19]

Following the top-down logic of innate cosmopolitanism, both the state and the world as a whole are understood as units in themselves, not reducible to atomized individual constituents – but also not capable of existing without its constituent members. The collective is comprehended as an agent composed of agents, a relationship which by which the phenomenon of autonomous agency is enjoyed by both.

From the discrete communal character that each collectivity will enjoy, flow the structural principles (as Kooijmans calls them) that will establish legal order among equal members of the community. In legal terms, equality is expressed as the proper apportionment of legal rights and responsibilities.[20] Altogether, the legal argument serves to apportion duties as well as responsibilities on the basis of a measurement of historical differences exhibited by states within an integrated order maintained according to common objective principles. Thus, by an inquiry into the doctrine of legal equality of states, the innate cosmopolitan argument arrives at an apportionment of rights and responsibilities according to the differences among states. For Kooijmans, '[i]nequality springs from the same root and hence has the same dignity as equality'.[21] According to the top-down model of innate cosmopolitanism, equality and inequality are measured by the distinction of member units in their relation to the whole: the overarching commonality is what makes actual differentiation among members possible, and distinction is only meaningful within an objective frame of reference, or by a common measure. It is against and within the objective whole that historical distinctions among individual subjects may be measured.

Innate cosmopolitan theory typically identifies norms of the underlying cosmopolitan whole as general principles.[22] Kooijmans, too, draws on general principle, as part of what he calls modern international law.[23] But general principle, as the term has been used for innate cosmopolitan purposes, is not identical with general principles as the term is used in Art. 38(1) of the Statute of the World Court. Neither is Kooijmans' use of the term identical with Art. 38(1): he derives the general principles that order conduct in the world by reference to a fixed idea of what collectivity represents, as observed by him in Judeo-Christian lessons of the Creation. But in keeping with the innate cosmopolitan model, Kooijmans holds that the fixed idea of what collectivity represents must at the same time allow for historical variation in the manifestation of collectivities over time and place.[24] Accordingly, equality among members is an inherent aspect in the nature of

[19] Kooijmans 1964, at 202-203.

[20] Kooijmans 1964, at 41.

[21] Ibid., at 26 (citing Brunner).

[22] See, e.g., Schlesinger 1957.

[23] Kooijmans 1964, at 192-193.

[24] Ibid., at 215.

collectivity, but the actual measure or expression of equality remains to be worked out anew in each historical instance. Thus, general principles represent an appeal to bedrock norms discernible, despite historical variation in the precise terms of their expression, in any temporal community guided by law. In sum, general principles reflect essential aspects of law necessary to any legal community – but law itself, to avoid reduction to formalism, is conjoined to material values fundamental to the nature of community.[25]

Here, the innate cosmopolitan idea finds correspondence with the work of Lon Fuller, and, through Fuller, the contemporary work of Jutta Brunnée and Stephen Toope, and their interactional theory of international law. Elements necessary to law itself – or 'internal morality' in the language of Fuller and interactional theory – are joined to the contingent expression of historical values – an 'external morality', using the same vocabulary.[26] International law, as the ordering principle for a collective, must demonstrate conformance with necessary attributes of law generally – but at the same time the legal system itself must reflect the historical expression of values particular to any given legal community in time. Thus, fundamental rights, closely related to general principles, are 'the direct consequences of the elements that are of necessity inherent in a legal order'.[27] But, Kooijmans asks, 'does this mean that the resulting rights precede this order? Not at all, for they can only receive their concrete content from the whole of the [historical] legal relationships'.[28]

By this complicated interrelationship of essentialist reasoning and historical sensitivity, innate cosmopolitanism contemplates a factual predicate for the expression of universal norms. The innate cosmopolitanism affirmation of the world as a whole is typically founded on some claim of observational validity. Thus the innate cosmopolitan program is methodologically linked to sociological pretensions or some other observational science. The New Haven School is an example par excellence of legal inquiry joined to the observation of acts and expectations actually occurring in the world.[29] The New Haven School conceptions of configurative jurisprudence, world public order and a world constitutive process remain guiding examples of a world normative regime derived from a comprehensive appreciation of actual behaviour observed in the world.[30] Kooijmans, it bears noting, resisted reducing law to an empirical science, but was clear in his affirmation of the historically-contingent nature of legal systems:

> The acceptance of unchangeable legal rules, even within temporal reality, is nothing less than an under-estimation of historicity, of the value of man as culture-forming creature. This world is subject to continuous change; new social structures emerge; new views break

[25] Ibid., at 213.

[26] Brunnée and Toope 2000, at 59; Fuller 1957, at 644-648; Kooijmans 1964, at 234-235.

[27] Kooijmans 1964, at 217.

[28] Ibid., at 217.

[29] McDougal et al. 1987.

[30] See., e.g., McDougal et al. 1966, 1967, 1987.

> through. These new social structures demand new legal systems; the new views call for serious and continuous reflection on the part of those who are engaged in concretizing the legal norms.[31]

The mixed reliance on general principles and historical conditions, construed from a top-down perspective, leads to a roughly equitable understanding of the relations among constituent members in the innate cosmopolitan community. The formula that Kooijmans espouses – *suum cuique* – reflects sensitivity to the shifting historical manifestations of relations among members of a deep, cosmopolitan community to which they are intrinsically joined. The historical community is the objective baseline from which the norms that control relations among members may be derived, and against which the respective rights and obligations of community members may be measured. Consequently, equal membership in the community will result in a differentiated apportionment of rights and responsibilities.

At its core, *suum cuique* appeals to Kooijmans for the simple reason that, 'typical of the essence of the community is, that each fulfils its own function with corresponding responsibilities and rights.'[32] It is an idea that equality must be a function of law, not merely as a formal term of being equal before the law, but in a material sense of being equally vested in the legal order. Equal in this sense entails the measure of a meaningful relationship that is not reducible to formal identity or mathematical abstraction. Crucially, the nature of the measure of the relationship will vary with the nature of the legal community. This is the crux of the innate cosmopolitan proposal: that the nature of the relationship among members of the international order is determined by reference, both essentialist and historical, to the discrete nature of the unity of the world at any given point in time.

8.3 Equality, Individualism and Collective Agency

The adoption of the top-down perspective of the world as a whole goes hand in hand with a rejection of individualism. Kooijmans, for example, rejects individualism for reducing law to a personal ethical code. In making the argument, he reflects a take on doctrinal history common to innate cosmopolitan scholarship:

> Pufendorf, Wolff, Vattel and others all spoke of a *societas humana*, *société humaine*, but theirs differed greatly from the world-community of Vitoria, Suárez and Gentili. This *société* is a vague notion, a manifestation of some feeling of solidarity, but not a real fact giving specific and concrete directives for the law. The world-structure retains its individualistic character and the principle of absolute equality remains an obstacle for the realization of the world-community in terms of a legal order.[33]

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[31] Kooijmans 1964, at 14.

[32] Ibid., at 203.

[33] Ibid., at 89.

Opposing the innate cosmopolitan idea to the various strains of individualism in international law consolidates the innate cosmopolitan normative vision around the nature of the community. Thus Kooijmans argues that '[b]asing all communities, all community-law, upon the individual, upon human individual personality, leads to a much too one-sided conception of these communities, for then too little attention is paid to their specific nature.'[34] As a result, '[t]he community-character, in the sense of the intrinsic nature of the community, will be more or less ignored.'[35]

It bears noting that Kooijmans' rejection of individualism tracks the distinction of innate cosmopolitanism from the more established school of cosmopolitan thought, liberal cosmopolitanism. Take, for example, Kooijmans' criticism of Wilfried Schaumann:

> We are … of the opinion that Schaumann's train of thought has, in fact, an individualistic character. Proceeding from the smallest unit, the human individual, he builds up his social philosophy to the greatest, the international community, via the various communities formed by these individuals. It is thus no coincidence that he commences his views on equality with the individual. The value of the principle of equality is contained, not in the concept of law itself, but in the natural equality of men, a natural equality that he considers to be present in the individuality of man, in that which distinguishes him from all other creatures and finds expression in human dignity. It is doubtful, however, whether one can speak of natural equality at all, as it is an outcome of an evaluation, of an abstraction, which does not find its origin in nature.[36]

The method that Kooijmans associates with Schaumann is largely the method of liberal cosmopolitanism that may be observed in contemporary authors such as Thomas Pogge,[37] Simon Caney,[38] and Kok-Chor Tan,[39] to name just a few. The rejection of liberal cosmopolitanism establishes the historical methodological orientation of innate cosmopolitanism by dismissing the possibility of finding natural equality in an abstraction. Moreover, the argument is predicated on an idea that the innate cosmopolitan inquiry is the properly legal inquiry, as opposed to the individualistic inquiry of liberal cosmopolitanism, which is moral or ethical in nature:

> to obscure the borderline between ethics and law, reducing law to an 'ethical minimum', involves a disregard for the intrinsic nature of law. Ethics appeal in the first place to the individual human dignity and often overlook the functional differences. Law aims at regulation and regulation may not overlook functional characteristics.[40]

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[34] Ibid., at 234.

[35] Ibid., at 234.

[36] Ibid., at 233-234.

[37] Pogge 1992.

[38] Caney 2005.

[39] Tan 2004.

[40] Kooijmans 1964, at 28.

It is the idea of functional characteristics, which pertain to the dynamic relation of the individual to the historical community – and which must be understood *from the perspective of the community* – that provides the relevant frame of reference.

By contrast, liberal cosmopolitan norms, as ethical norms, are designed in the first place to achieve or encourage compliance with an ideal world that ought to exist – one in which individuals are the 'primary normative unit'[41] and the 'ultimate unit of concern'[42] – rather than any historical community as it is understood to exist. Accordingly, liberal cosmopolitan norms exhibit less attachment to historical conditions than is typical of legal norms and international legal norms. Liberal cosmopolitan norms are developed out of ethical premises, and typically demand justifications of institutions for variance from the way things ought to be.[43] Where norms of international law typically are oriented to rules of behavior that conform with some regime of public order in the world as it is understood to exist,[44] norms of liberal cosmopolitanism typically are oriented to rules of behavior that conform with an understanding of how the world ought to be.[45]

The emphasis on historicity in innate cosmopolitanism is intended to demonstrate that innate cosmopolitan norms flow from a source of authority that already exists, namely the world collective, and would produce norms that comply with the acts and expectations actually manifest in the world collective. Though innate cosmopolitanism is more or less radical for proposing to affirm legal norms on the basis of the world collective, innate cosmopolitanism remains nonetheless within the broader confines of legal discourse generally, insofar as it purports to identify a viable source of authority within the general structure of a historical social and political order in the world as it may be perceived to exist. The innate cosmopolitan source of authority does not overthrow international law; rather it supplements international law with a source of law that purports to be in some respects superior to the traditional sources of international law, but is not per se exclusive of them. Likewise, the innate cosmopolitan model does not purport to describe a different world, nor an ideal world, but the historical world of the present, as it may be observed. Innate cosmopolitanism posits a model of the international system founded on the purported reality of historical constraints, within a discourse by which law represents a means for sustaining (perhaps incrementally changing) an existing order. The reliance on historical conditions is intended to satisfy a legal mandate for public order in a way that individualism purportedly cannot.

In sum, by contrast with the mandate of normative individualism, the method of innate cosmopolitanism is intended to support both public order and possible

[41] Tesón 1992, at 53.

[42] Ibid., at 54; Pierik and Werner 2010, at 2.

[43] Beitz 2000, at 519.

[44] Brilmayer 1995, at 614.

[45] Pogge 2005, at 718.

doctrinal change from within historical conditions of the international system. Kooijmans captures the sentiment when he writes that '[i]f the law were to take over the function of ethics it would no longer be law, and legal order would turn into chaos.'[46] In the international system, the appreciation of historical constraints in the interests of public order means an affirmation of states and other particular normative regimes. Even as it identifies in the world a collective subsuming all other collectives, innate cosmopolitanism recognizes a discrete and ineradicable value of collectives generally, vested equally in all of them. Moreover, the innate cosmopolitan regime arises out of the same phenomena as other collectives, such as regional regimes and states: they are co-constitutive of one another, such that neither can exist without the reality of the other. Consider the New Haven School appraisal of international law: '[t]he specialized process of interaction commonly designated international law is part of larger world social process that comprehends all the interpenetrating and interstimulating communities on the planet.'[47]

As Bartelson writes,

> [w]hile all human beings are members of this universal community simply by virtue of sharing in common the essential capacities for intercourse, they are also members of particular communities by virtue of the fact that the use of these capacities results in different symbols and values being shared by different peoples in different places.[48]

Distinctions of individuals and communities flow from and reinforce commonality, rather than eradicate it. Appreciating the intertwined relationship at all levels is key to appreciating the integral role of regional organizations and states within the international system:

> mankind constitutes one single community by virtue of its members sharing the capacities for forming social bonds. Consequently, if belonging to a community is indeed an integral part of what it means to be a human being, there is no need to transcend the existing order of states in order to bring a world community into being. Such a world community is already immanent by virtue of the shared capacities for intercourse.[49]

Brunnée and Toope make a similar point, transposed into constructivist terms:

> structures constrain social action, but they also enable action, and in turn are affected and potentially altered by the friction of social action against the parameters of the structure. In other words, agents and structures are mutually constituting, and both are inherently social.[50]

Actors are socialized into the overarching structure from which international law and relations derive their normative force, but which has no existence without the actors it comprises.[51] The actor and the structure in which the actor operates

[46] Kooijmans 1964, at 28.

[47] McDougal et al. 1987, at 808.

[48] Bartelson 2009, at 11.

[49] Ibid., at 11-12.

[50] Brunnée and Toope 2008, at 10.

[51] Ibid., at 19.

contribute to the identity of one another, but represent distinct units nonetheless. Altogether, the same communicative phenomenon that drives the international structure also requires recognition of the independence of actors within that process.[52] The particular and universal are both affirmed and conjoined.

Following the affirmation of the particular and the universal, the world collective may be comprehended according to attributes of diversity supported by common norms of public order. Thus, ideally, 'the rule of law upholds and supports diversity in moral and political ends while at the same time helping to build a stronger global society, perhaps with pockets of deeper normative communities.'[53] Brunnée and Toope hold that the international legal system will enjoy legitimacy and effectiveness 'only to the extent that law supports autonomy while facilitating social interaction'.[54] As with structure and actor in constructivist theory, universal norms are conjoined to particular norms, such that while universal norms undergird the world collective, they are conditioned on diverse particular norms reflective of moral and political autonomy within that collective. Thus interactional law comes to take the form of universal norms that underlie and facilitate interaction across diverse expressions of community and particular norms in the world.

In sum, innate cosmopolitanism identifies a regime for public order with humanity as a whole at any given point in time, but only alongside the legitimate exercise of coordinate normative authority at the level of states and regional organizations, who participate as equal members – and in accordance with their different capacities and limitations – in the overarching community. All of these enjoy collectivities and organizations enjoy normative legitimacy capable of giving rise to different political and legal norms contributing to the international system as a whole: the universal regime appears responsible for the global coordination of public order capable of securing human concord, and states and regional regimes for the expression of particular and historical values nested within that order.

The individualism of liberal cosmopolitanism, by contrast, does not allow for a proper appreciation of political collectives generally as a matter of law. Equality for the liberal cosmopolitan reduces solely to the equal dignity of all individual human beings. As a matter of international legal doctrine, however, innate cosmopolitanism proposes to affirm an equal membership of political collectives in the international or world community. The consequence of equal membership is a roughly equitable distribution of rights and duties among members, the distribution effected in accordance with relevant distinctions among those members. What results must be an international legal community in which substantial room or agency will be preserved for particular and regional political collectives in the development and application of world norms.

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[52] Ibid.

[53] Ibid., at 22.

[54] Ibid., at 18.

8.4 Innate Cosmopolitanism and Cosmopolitan Constitutional Theory

As noted, the affirmation of the agency of states and regional organizations as a matter of the equality of state members in the international system dovetails with the interrelationship of innate cosmopolitan theory and cosmopolitan constitutional theory in international law. While innate cosmopolitanism posits the reality of a constituted political collective including everyone in the world at any point in time, cosmopolitan constitutional theories posit the possibility of a formal constitution under international law encompassing everyone in the world. As such, innate cosmopolitanism resembles proto-constitutional theory: the world collective is socially constituted and exhibits its own norms and normative authority, but that authority remains to be articulated in a comprehensive way adequate to effect a constitution formally controlling a system of law. Where constitutional cosmopolitanism proceeds according to the premise that a constitutional settlement will establish a world authority as a matter of law where none exists beforehand, innate cosmopolitanism posits a world authority to exist as a matter of law, independent of formal recognition. Innate cosmopolitanism identifies a community independent of and prior to formal juridical expression, whereas constitutional cosmopolitanism identifies the community with its formally-cognizable juridical expression. Accordingly, innate cosmopolitanism, though operating within the bounds of recognizable legal discourse, looks outside of the formal limitations of international law for the source of cosmopolitan legal authority, whereas constitutional cosmopolitanism would in the first instance develop that authority from within the formal limitations of the international legal system, though the formal argument might be a creative one.

One of the central difficulties with the constitutional thesis, however, is how to elevate a convention or treaty above conventional treaties in a manner beyond even what Art. 103 of the UN Charter purports to achieve. Bardo Fassbender's treatment of the UN Charter as a world constitution is instructive in this sense. To identify the Charter as a constitution, he relies on Art. 2(1), which, in articulating the basic principle achieved by the Charter, inverts the expression of equal sovereignty into an expression of sovereign equality. Fassbender refers to the move to sovereign equality as the 'important innovation' of Article 2(1) of the Charter, the foundation of the Charter organization: 'The Organization is based on the principle of the sovereign equality of all its Members.'[55] As Fassbender describes it, what was a system of relations predicated on equal sovereignty becomes, under the Charter, a system of sovereign equality.[56] In an order founded on relations of equal sovereignty, law is concerned to maintain the juridical sovereignty of each constituent equally; in an order founded on sovereign equality, the law is concerned to

[55] Fassbender 1998, at 582; 1945 Charter of the United Nations, 1 UNTS XVI, Art. 2(1).

[56] Fassbender 1998, at 582.

maintain the juridical equality of each sovereign constituent. In the former, sovereignty is the paramount term, and each state is equally sovereign, or equally its own master at law: the law exists between states, according to their consent, reinforcing their individualism. In the latter, under conditions of sovereign equality, equality is the paramount term, such that each state is equally its own master under the law, preserving individuation but subordinating subjects to the demands of equality under law. Fassbender explains the significance as follows:

> [Article 2(1)] emphasizes the interdependence of sovereignty and equality and, what is more, gives the idea of equality precedence over that of sovereignty by relegating the latter to the position of an attributive adjective which merely modifies the non 'equality.' It is 'sovereign equality,' not 'equal sovereignty' the Charter speaks of. … Sovereignty, as a concept excluding legal superiority of any one state over another, is not at odds with a greater role of the international community vis-à-vis *all* its members. All that states can ask is to be treated equally in and before the law.[57]

Notably, the logic behind the appeal to Art. 2(1) is not limited to Fassbender's reading of the Charter. Take, separately, two other examples of international constitutional theory, articulated respectively by Jürgen Habermas and Anne Peters. Habermas posits a multi-level scheme of a constitutional international system, which he has posited similarly at both the global and regional levels, and in which the sovereign state retains a fundamental role as the primary well-spring and incubator of democratic legitimacy, even as the sovereign state is subjugated to the constitutional order.[58] Habermas's international constitutional order, in its essentials, involves some executive capacity together with a deliberative body with two chambers, one representing all individuals collectively, and one representing states. Persons would be citizens of states and the supernational collective. Despite the dual citizenship, the democratic process remains most closely identified with the state in the first instance.[59] For this reason, sustaining the viability of the state while subjugating it to a constitutional authority is a critical maneuver as a matter of law, corresponding with the innate cosmopolitan affirmation of states alongside the world collective.

Peters posits a hierarchy of norms that may be recognized in the terms of international law. Though it appears that the sovereign state will be a more diminished entity under Peters' perceived constitution than the constitutions articulated by Fassbender and Habermas, her theory of an international constitution and the processes by which she observes the development of a constitutional hierarchy of norms still flows at its source from the law-making capacity vested in states. Her constitutional argument is founded in what she observes to be at least four real developments in international law, or 'embryonic hierarchical elements'.[60] The four developments are: 'the erosion of the consent requirement';[61]

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[57] Ibid., at 582 (emphasis in original).

[58] See, Habermas 2008, at 444; Habermas 2012, at 335.

[59] Habermas 2008, at 447; Habermas 2012, at 344-345.

[60] Peters 2005, at 46.

[61] Ibid., at 51.

'the creation of World Order Treaties';[62] 'changes in the concept of statehood and a legal evolution regarding the recognition of states and governments';[63] and 'the growing participation of non-state actors, such as Non-Governmental Organizations (NGOs), transnational corporations and individuals in international law-making and law-enforcement'.[64] Each of these is measured in clear developments within the corpus of international law. Moreover, Peters' constitutional model is designed in part to support the formal terms of international law. By her own words, Peters' 'constitutionalist approach to international law helps to prevent uncontrolled "deformalization" of international law.'[65]

Thus Peters is faced with the same dilemma as Fassbender and Habermas: how to elevate the conventional achievements of states to a level beyond the constraints of conventional international law. The solution of sovereign equality is appealing, even without reference to Art. 2(1): the states party to the international constitution (all of them) must exist in a relation to one another that may be reducible to a collective authority, rather than in a relation to one another that ultimately reduces to individualism. As a matter of legal doctrine, however, the question remains how to achieve a common authority against an orthodoxy that equates sovereignty with individualism. The innate cosmopolitan argument addresses the matter in two fundamental ways, and does so in a single stroke. Kooijmans, for example, in reconstructing the doctrine of sovereign equality, would establish that equal sovereignty was mere error to begin with; that states always and naturally existed – and continue to exist – in a state of sovereign equality. As states by their nature exist in a state of sovereign equality, the constitutional act is always feasible: states are of necessity a part of a larger community; they can always adopt a formal constitution to guide it as a matter of law.

Moreover, the same thing that establishes equality among states also supports their sovereignty. The innate cosmopolitan affirmation of the collective phenomenon at all levels – including the one global collective, regional collectives and particular states – is particularly useful to Habermas' vision of international constitutionalism, which he has articulated in similar terms for international law and the European Union.[66] In each case, as noted, the sovereign state enjoys a primary role as both fundamental well-spring and protector of democratic legitimacy.[67] Though the state is subjugated to the constitutional order, it nonetheless enjoys a basic and irreducible importance as an independent collective and political actor within that order.[68] Thus, the innate cosmopolitan reconstruction of the equality of states offers a doctrinal template within the terms of international

[62] Ibid., at 52.

[63] Ibid., at 53.

[64] Ibid., at 53-54.

[65] Peters 2009, at 409.

[66] Habermas 2008, 2012.

[67] Habermas 2008, at 447; Habermas 2012, at 344-345.

[68] Habermas 2008, at 447; Habermas 2012, at 344-345.

law for comprehending the role of states under Habermas' constitution. The state, among other actors, retains a fundamental value under innate cosmopolitanism that supports the constitutional scheme envisioned by Habermas.

Moreover, in explicating the validity of states under the innate cosmopolitan regime, the innate cosmopolitan argument suggests that sovereign equality is not mere equality before the law, though this is a question that Fassbender and others leave open.[69] Equality before the law is a formal condition that does not reflect the actual unity from which, according to innate cosmopolitanism, the collective phenomenon springs; rather, the proper relationship is one of equality in the law.[70] As such, the formalism of equality before the law does not meet the demands of public order, insofar as those demands are comprehended according to historical constraints and observed social phenomenon, as opposed to abstractions and formal relationships. Thus a cosmopolitan constitutional system founded on formal equality before the law represents a failure to appreciate the real normative basis upon which the community – and the law of the community – must be founded.

By contrast, the innate cosmopolitan regime elevates equality in the law, according to a just apportionment of rights and responsibilities under law – or a roughly equitable treatment of parties according to those distinctions valid with respect to any given community norm. Likewise, the communal scheme will reflect an appreciation of distinctions among members: not all parties will be equally or identically responsible for its maintenance. The apportionment of rights and duties for community purposes exists as a political matter that cannot be determined independent of the reality of historical circumstance. It bears noting, in keeping with the interplay of innate cosmopolitanism and constitutional theory, that Fassbender and Habermas alike implicitly endorse the idea of equality in the law. Each does so by retaining the Security Council, albeit according to certain reforms.[71] For both, the institution serves as an example of how select nations will retain distinct authorities and responsibilities according to a frank acknowledgment of their distinct status in world affairs. The reason is relatively clear: their proposed constitutional schemes share with innate cosmopolitanism a purported appreciation of historical conditions, such that the community as a whole, and equal membership in it, as measured in rights in obligations, together reflect (or are sensitive to) constraints of historical circumstance.

8.5 Conclusion

Kooijmans' inquiry into the doctrine of the legal equality of states and, with it, the foundations of international law, reflects a peculiar brand of cosmopolitan thought, namely innate cosmopolitanism. Though under-recognized, innate

[69] Fassbender 1998, at 582.

[70] Kooijmans 1964, at 113.

[71] Habermas 2008, at 451; Fassbender 1998, at 529.

cosmopolitanism plays a central role in the discourses of international law. It is an argument for re-conceiving the modern international legal order according to a deep unity underlying the whole of human relations. At the same time, the innate cosmopolitan argument also recognizes and incorporates smaller units of collectivity. As such, it holds especial relevance at a time when international legal doctrine looks beyond the preeminence of states, but continues to be bound to them in practice. This article has explored the innate cosmopolitan contribution to international law by reference to two current discourses, concerning ethical legitimacy and constitutional theory in an increasingly comprehensive international legal system. It demonstrates the significance of innate cosmopolitan theory to contemporary discourses that grapple with justifications for and the doctrinal viability of an expanding public order globally.

The innate cosmopolitan argument, represented here first by reference to Kooijmans' work, envisions a comprehensive communal order, one that reflects the constraints of historical circumstance. The order as a whole must be founded on certain universal norms, or general principles, but those principles remain to receive positive expression reflecting the lived reality of the historical community. Accordingly, there is no system of abstraction or formalism that can adequately sustain public order in the world community; rather, the effective unity of the system is made contingent on the appreciation of diversity. The community incorporates all members equally when it takes into account the different position of each member vis-à-vis the collective whole. The rights and responsibilities enjoyed by each, and their political situation within the community, will vary accordingly.

There remains a grounds for critique, perhaps counterintuitive, arising out of the emphasis on historicity, namely that innate cosmopolitanism is too much invested in the status quo. The critique may be counterintuitive because, as noted, innate cosmopolitan theory defies limitations of international law traditionally conceived, and is typically associated with progressive ambitions for international law. But even as it defies the constraints of traditional international law, innate cosmopolitanism is uniquely contingent on – and thereby ultimately supportive of – historical conditions. It is correspondence with historical phenomena that defines the norms appropriate to the world as a whole under innate cosmopolitanism.

The goal of international lawyers and legal scholars relying on the innate cosmopolitan model, from Vitoria forward, has been to create a more perfect system of law by reference to a historical reality – short of world government – capable of sustaining an objective normative authority above the prerogatives of subjective constituents. The ambition is similar to what Nicholas Onuf observes, in the idea of the international legal order, concerning an intended reconciliation of the sociological jurisprudence of Myers McDougal with the pure theory of Hans Kelsen: 'the order is treated by its makers and benefactors as historical reality and formal entity at one and the same time.'[72] In identifying the proper expression of

[72] Onuf 1979, at 256.

universal norms with the historical reality of the world, the innate cosmopolitan model aspires to a more adequate grounding for international law as a matter of theory and historical reality. And in achieving more adequate grounding, the innate cosmopolitan model defies the constraints of international law, traditionally conceived, even as it would perfect it. But the progressive ambition to which the innate cosmopolitan model has been harnessed, against subjective terms of orthodox international law, does not diminish the reliance on status quo conditions. As noted, where liberal cosmopolitanism expressly situates its normative authority outside of the status quo, to enable an ethical critique of the institutions of international law, innate cosmopolitanism expressly associates its normative authority with the perceived historical reality of the world. The positive expression of innate cosmopolitan norms is supposed to represent the world as it is – and to represent the world as it is, is to represent the status quo. Thereby the innate cosmopolitan model adopts a posture deeply tied to historical circumstance.

The fundamental embrace of status quo conditions may, in its effects, undercut the progressive ambitions by which the innate cosmopolitan model is typically comprehended. Take the example considered at the outset, of the activation of the crime of aggression in the Rome Statute. The role provided for the Security Council under 15*bis* and 15*ter* reinforces status quo elements of the Charter regime that are typically considered regressive, rather than progressive. But they are nonetheless in keeping with an innate cosmopolitan perspective on public order for a world community.

There are additional dilemmas for innate cosmopolitanism. Principal among them, there is no single authority on historical fact, nor on the corresponding shape of the world community. Consider in this light another example, which reveals different and conflicting potentialities of innate cosmopolitan theory: namely, the *Kadi* case.[73] Even more so than the activation of the crime of aggression under the Rome Statute, the *Kadi* case has been inordinately treated. Innate cosmopolitanism cannot claim pride of place among the many competing theories for its interpretation. Nonetheless, aspects of the *Kadi* decision can meaningfully be understood according to innate cosmopolitan tenets, and I briefly raise the case here to serve the limited purpose of a concluding example.

At its heart, as is well known, the case stands for the European Court of Justice's rejection of the implementation of Security Council Resolution 1267, and its blacklist regime.[74] Much has been made of the Court's pluralist logic, which also professed not to reject outright the underlying Security Council resolution.[75] Whatever else may be said and has been said about it, the Court's reasoning can be seen to be compelling and coherent under the innate cosmopolitan model. Recall Kooijmans' language of the 'indissoluble coherence' of the cosmopolitan legal

[73] Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council and Commission* [2008] ECR I-6351.

[74] UNSC Res. 1267, 15 October 1999.

[75] Cardwell et al. 2009, at 233-240.

order and the state: because the European Community represents a valid political collectivity of its own, and an equal member in the innate cosmopolitan community, its legitimate norms cannot properly come into conflict with other international norms legitimately promulgated on behalf of the world collective. The ECJ was, in its own right, entitled to review the norm at issue, and in the absence of a clear rejection of the norm represented by the Security Council resolution, conflict between the resolution and its application in the European Union must have been a matter of error – or implementation – but not contradictory norms.

Kadi and the activation of the crime of aggression in the Rome Statute bring out separate, conflictual sides of the innate cosmopolitan coin. The activation of the crime of aggression appears regressive for its reliance on the authority of the Security Council. *Kadi* goes in an opposite, progressive direction, in accordance with a different historical mandate, but in so doing risks conflict in the expression of authority internationally.[76] The discrepancy between the two examples underscores the indeterminacy of a theory of international law in the service of a unified and autonomous world community, when that community defies any formal or definitive expression. As demonstrated, however, despite weaknesses, innate cosmopolitan theory continues to make a dynamic contribution to contemporary discourses and developments in international law.

References

Álvarez A (1918) New conception and new bases of legal philosophy. Ill Law Rev 13:167–182
Bartelson J (2009) Visions of world community. Cambridge University Press, Cambridge
Beitz C (2000) Social and cosmopolitan liberalism. Int Aff 75:515–529
Brilmayer L (1995) International justice and international law. West Va Law Rev 98:611–657
Brunnée J, Toope S (2000) International law and constructivism: elements of an interactional theory of international law. Columbia J Trans Law 39:19–74
Brunnée J, Toope S (2008) An interactional theory of international legal obligation. Legal Studies Research Series, No. 08-16. http://ssrn.com/abstract=1162882. Accessed 29 January 2013
Caney S (2005) Justice beyond borders. Oxford University Press, Oxford
Cardwell P, James D, White N (2009) Decisions of international courts and tribunals. Int Comp Law Q 58:229–240
de Búrca G (2010) The European Court of Justice and the international legal order after Kadi. Harv Int Law J 51:1–49
Fassbender B (1998) The United Nations Charter as constitution of the international community. Columbia J Trans Law 36:529–619
Ferencz DM (2010) The crime of aggression: some personal reflections on Kampala. Leiden J Int Law 23:905–908
Fuller L (1957) Positivism and fidelity to law—a reply to Professor Hart. Harv Law Rev 71:630–672
Gordon G (2013) Innate cosmopolitanism: mapping a latent theory of world norms. Ph.D dissertation, Vrije Universiteit, Amsterdam

[76] de Búrca 2010.

Habermas J (2008) The constitutionalization of international law and the legitimation problems of a constitution for world society. Constellations 15:444–455
Habermas J (2012) The crisis of the European Union in the light of a constitutionalization of international law. EJIL 23:335–348
Jenks CW (1959) The challenge of universality. Am Soc Int Law Proc 53:85–98
Koh H (1997) Why do nations obey international law. Yale Law J 106:2599–2659
Kooijmans PH (1964) The doctrine of the legal equality of states: an inquiry into the foundations of international law. A.W. Sythoff, Leiden
Lauterpacht H (1946) The Grotian tradition in international law. Br Yearbook Int Law 23:1–53
McDougal MS, Lasswell HD, Reisman WM (1966) The world constitutive process of authoritative decision. J Legal Educ 19:253–300
McDougal MS, Lasswell HD, Reisman WM (1967) Theories about international law: prologue to a configurative jurisprudence. Va J Int Law 8:188–299
McDougal MS, Reisman WM, Willard AR (1987) The world community: a planetary social process. Univ Calif Davis Law Rev 21:807–972
Onuf N (1979) International legal order as an idea. Am J Int Law 73:244–266
Peters A (2005) Global constitutionalism revisited. Int Legal Theory 11:39–68
Peters A (2009) The merits of global constitutionalism. Indiana J Global Leg Stud 16:397–411
Pierik R, Werner W (2010) Cosmopolitanism in context. Cambridge University Press, Cambridge
Pogge T (1992) Cosmopolitanism and sovereignty. Ethics 103:48–75
Pogge T (2005) Recognized and violated by international law: the human rights of the global poof. Leiden J Int Law 18:717–745
Politi M (2012) The ICC and the crime of aggression: a dream that came through and the reality ahead. J Int Crim Just 10:267–288
Schlesinger R (1957) Research on the general principles of law recognized by civilized nations. Outline of a new project. Am J Int Law 51:734−753
Scott JB (2000) The Spanish origin of international law: Francisco de Vitoria and his Law of Nations [Oxford: Clarendon Press, 1934] The Lawbook Exchange Limited, Union, NJ
Tan KC (2004) Justice without borders. Cambridge University Press, Cambridge
Tesón F (1992) The Kantian theory of international law. Columbia Law Rev 92:53–102
van Braun L, Micus A (2012) Judicial independence at risk. J Int Crim Just 10:111–132

Chapter 9
Analogy at War: Proportionality, Equality and the Law of Targeting

Gregor Noll

Abstract This text is an inquiry into how the international community is understood in and through international law. My prism for this inquiry shall be the principle of proportionality in international humanitarian law, relating expected civilian losses to anticipated military advantage. To properly understand proportionality, I have to revert to the structure of analogical thinking in the thomistic tradition. Proportionality presupposes a third element to which civilian losses and military advantage can be related. In a first reading, I develop how this tradition of thought might explain the difficulties contemporary IHL doctrine has in understanding proportionality. If military commanders misconceive the third element as the sovereignty of their own state, they will invariably apply the proportionality principle in a paternalistic manner. This would obviate the most rudimentary idea of equality among states and do away with the common of an international community. In a second reading, I shall explore whether this third element could instead be thought of as a demos, while retaining the existing framework of analogical thinking. My argument is that this secularizing replacement is possible. Practically, its consequence would be a radical change in the task of the responsible military commander determining proportionality. That commander would

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now need to rethink civilians endangered by an attack as a demos whose potentiality must be preserved.

Keywords *Analogia entis* · Analogy · Collateral damage · *Demos* · International community · International humanitarian law · Proportionality · Erich Przywara · Jacques Rancière · Targeting · War

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9.1 Introduction

With this text, I want to inquire into the way the international community is imagined in and through international law.

I have chosen the principle of proportionality to work my way backwards into an idea of the common. The common is about that which is shared. Just as a comparison of two weights requires a scale, proportionality and equality presuppose something that enables comparison and equitable sharing. This is what we call *the third*, because it is indispensable for the two elements to be shared in a proportionate or equitable way (the Latin term of art being *tertium comparationis*). To bring out the idea of the common, I have chosen to resort to the extreme case of armed conflict. *Jus in bello*, or, international humanitarian law (IHL) presupposes the belief that a third element ensures the equal sharing of the common even across the divide that sets warring enemies apart. Therefore, I believe that IHL provides a suitable vantage point for inquiring into the way this third element is thought.

As a prism, I have chosen proportionality assessments in IHL, in which anticipated military advantage is related to anticipated civilian losses to determine the legality of an attack. Proportionality assessments allow me to ask how parties to an armed conflict are thought to be equal beyond all differences in resources, status or other. Since the third element is the only element parties have in common in the extremity of armed conflict, it is what ultimately guarantees the possibility of an international community.

Pieter Hendrik Kooijmans' *The Doctrine of the Legal Equality of States* provides me with a practical illustration on how an international community is always contingent on a third. Kooijmans 'intends to show the close relationship between the notions concerning the problem of equality in international law and the views

that are held with regard to the foundations of this international law'.[1] What, then, is the third element on which his version of equality pivots? An adherent to 'modern natural law', Kooijmans casts the third as God. 'The idea of a community', he writes, 'is inherent in the fact that Man was created after God's Image and of one blood', a 'fact' that he submits to be 'decisive for all inter-human relationships'.[2] With this, he re-establishes tropes of thought that have followed Western thinking since it became indebted to Christianity: a categorical difference between the Creator and man as his creature, a categorical equality between one human being and another human being in their relatedness to that superior Creator, and the staging of any relationship within this tripartite structure of gradual divine revelation in world and time. This point of departure brings Kooijmans to prefer material 'equality in international law' based on valuation of concrete situations over formalist ideas of 'equality of states'. 'The idea of the law', he writes elsewhere, 'is a manifestation, with respect to the life of law, of the insight into the divine principles of order for this temporal reality and their relevance for a particular phase of culture'.[3] In that, Kooijmans' God reveals Himself in the practice of a law worthy of its name. Closing Kooijmans' 1964 monograph, I remain struck by the perseverance, over time, of the Christian form of thought in international law. While his text does not aspire to theological sophistication, his narrative of equality comes across as so much more robustly structured than that of many contemporary international constitutionalists who offer faux-secular versions of these structures.

What to make of this? Is it at all possible to think of international law outside the structures that a long-dominant Christian theology has inherited to us?[4] What path then to choose, if I, unlike Kooijmans, do not think it adequate to embrace these structures with personal faith?

In earlier research, I have suggested that proportionality reasoning is part of a chain of equivalence legitimizing military necessity and creating the space for a sacrificial logic.[5] In the current contribution I want to consider whether it is possible to think beyond a sacrificial logic.

To this end, I shall develop two different readings of the third element enabling an international community. In the first of these two, I shall introduce a form of thinking proportionality that I see underpinning international humanitarian law. This form invites us to think of proportionality as a particular mode of an analogy. To explain how this form of thought emerged, I draw on philosophical and

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[1] Kooijmans 1964, at 238.

[2] Ibid., at 196.

[3] Ibid., at 213.

[4] What enables me to ask this question is the work of contemporary international lawyers seeking to understand their discipline through its lingering theological roots or residuals. I felt Orford 2005, and Beard 2007, to be particularly compelling in this growing body of literature.

[5] Noll 2008, at 101-112. To apply Walter Benjamin's terminology developed in his *Critique of Violence*, my 2008 text is an effort to link proportionality to mythical violence, while the present text asks whether a particular form of proportionality assessment focused on the demos might end up in a contemplation of what Benjamin terms 'divine violence'.

theological literatures, and in particular on the work of Erich Przywara. The second reading is my attempt to think proportionality through the idea of the *demos*. In that, I will emphasize the role of aesthetics in analogical thinking. A text by Jacques Rancière proved to be helpful in doing that.

With the first reading, I work myself backwards into earlier articulations of a form of thought that predetermines our possibilities of thinking equality and proportionality today. While IHL scholarship is cloaked in a secular language, it invariably affirms and reproduces a Christian form of thought in international law. With the second reading, I want to probe whether a secularized way of thinking equality and proportionality is conceivable. While the first reading explains how the analogical form of thinking the common assumes a Christian God, the second seeks to move the *demos* to the level of the third while remaining within the analogical form. My argument is that this replacement is possible. Its consequence would be a radical change in the task of the responsible military commander determining proportionality. That commander would now need to rethink civilians endangered by an attack in relation to a *demos* whose potentiality must be preserved.

9.2 International Humanitarian Law and Proportionality in Targeting

In this article, I shall focus on what has been described as a 'fundamental' text of the laws of war: a norm prohibiting an attack that is expected to cause incidental civilian loss excessive to its anticipated military advantage. This norm is often referred to as the 'principle of proportionality', although its textual rendering pivots on a relationship of excess rather than proportion. Jean-Marie Henckaerts and Louise Doswald-Beck's study on *Customary International Humanitarian Law*, conducted under the auspices of the ICRC, found that the following formulation captured its content in general international law:

> [l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.[6]

[6] Henckaerts and Doswald-Beck 2005 (hereinafter CIHL), Rule 14, at 46. This particular expression of the norm as customary law is preceded by a treaty law formulation in article 51.5.b of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter API), which proscribes as indiscriminate an 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. The obligation to take precautions in article 57.2.a.iii API also reflects that norm. The qualification of the proportionality principle as 'fundamental' is Schmitt's. Schmitt 2007, at 156. The *Manual on International Law Applicable to Air and Missile Warfare* offers another textual rendition of the proportionality principle: 'An attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is

According to the study, this norm would be applicable in international as well as non-international armed conflicts. As international armed conflicts have dominated in the development of IHL, my discussion will mostly focus on this type of conflict to achieve the greatest possible clarity.

We know from another norm of IHL that attacks 'may only be directed against combatants' and that they 'must not be directed against civilians'.[7] This norm is usually referred to as the principle of distinction. It provides the two major categories through which warfare is understood, determining that one is targetable and the other is not. The principle of proportionality, though, would seem to relate the military to the civilian in a more fine-grained way. It suggests the permissibility of unintended civilian loss, but only to a degree. Some form of interplay between the military and civilian is implied in it: where distinction severs, proportionality joins. If distinction provides the parts, proportionality makes them into a whole. So proportionality is *inter partes* as much as *erga omnes*.

The spatial and temporal reach of armed conflict has been growing together with the spatial and temporal reach of the parties to it. The military and the civilian appear as being ever more closely intertwined in that growth. With that, the principle of proportionality provides a major, or indeed, *the* major demarcation between lawful and unlawful conduct of warfare.

Or does it? Many participants in the discourse on applied IHL stress the importance of the norm only to openly avow the impossibility to explain its precise content. I will provide five examples from recent works on issues of targeting.[8] First is a comment by Michael N. Schmitt, Professor of International Law and Chairman of the International Law Department at the United States Naval War College. Schmitt is one of the most prolific writers on IHL issues and enjoys a dominant position in contemporary discourse. Addressing the law of targeting as cast in the Rules of the CIHL Study, he remarks on the way the proportionality

(Footnote 6 continued)
prohibited.' Program on Humanitarian Policy and Conflict Research at Harvard University *Manual on International Law Applicable to Air and Missile Warfare*, (2009), at 10 (hereinafter HPCR Manual).

[7] Rule 1 CIHL. The formulations in treaty law provisions (arts. 48 and 51.2 API) are slightly different.

[8] The purpose of my five examples is to illustrate dominating patterns within the IHL literature. The majority of IHL authors affirm the existence and usefulness of the principle while being unable to detail its content. Occasionally, single writers voice scepticism on the content of the principle. A recent and questionable example is Estreicher, claiming that this principle merely proscribes the excessive use of military force and does not require complex balancing. According to Estreicher, the standard of non-excessiveness requires that the military use no more force than necessary to accomplish concrete, direct military objectives. Estreicher 2012, at 143-157. 'No complex, metaphysical "exchange value", no "comparison between things that [are] not comparable" is required.' Estreicher 2012 at 156-157 (footnote omitted). To my understanding, his formulation of the standard justifies any amount of force and any number of civilian losses if only its necessity in achieving a concrete, direct military objective can be rationally argued.

principle is expressed in Rule 14 CIHL (which I quoted at the beginning of this section).

In the first sentence of the section commenting on Rule 14, he describes it as 'the rule which warfighters find most difficulty to apply in practice, because it involves the consideration of dissimilar values in relation to each other through application of a highly subjective standard, excessiveness.'[9] The incommensurability argument is certainly not Schmitt's alone; it can be traced back to the positions taken by Poland and Syria during the negotiations resulting in Additional Protocol 1.[10] The absence of a common measure for the two values might be a defect weighty enough to make any further comment on the proper application of the rule superfluous. Neither Schmitt nor other application-oriented international humanitarian lawyers seem to see it that way, though. After the quoted passage, he continues with elaborate comments (on questions such as whether force protection may be counted in under the category of military advantage or whether reverberating effects must be counted in among civilian damages and losses). The 'consideration of dissimilar values' and the use of a 'highly subjective standard' under the proportionality principle obviously does not seem altogether futile to him. Had it been, he would hardly have spent his and our time on further details of its application. This move first expresses agnosticism on the functioning of the norm to then perform continued allegiance to it.

The pattern I see in Schmitt's text seems to permeate the targeting literature in IHL at large.[11] My second example is Yoram Dinstein's standard textbook on the conduct of hostilities.[12] Dinstein first states that 'proportionality is the true guarantee of robust civilian protection from the effects of attacks in wartime',[13] to then list 'the main difficulties'[14] in applying the principle of proportionality and to conclude with a number of examples of excessive and non-excessive attacks.

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[9] Schmitt 2007, note 6, at 156. Interestingly, the Commentary on the HPCR Manual suggests that '[t]he standard is objective in that expectations must be reasonable.' I am not sure that this is much of a contradiction: the Commentary's concept of an 'objective standard' is apparently a rather thin one. If anything, it illustrates that the use of terms as 'subjective' and 'objective' do not rely on a common understanding across the IHL literature. Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, (2010), at 91, para. 6 (hereinafter HPCR Commentary).

[10] See the positions taken by Poland and Syria at the Diplomatic Conference, in CIHL Database, Practice on Rule 14, available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14. Accessed 20 September 2012.

[11] The most recent monograph of relevance to this issue is Boothby 2012. The analysis of proportionality runs over four of the book's 603 pages and basically reiterates the problems of incommensurability and subjectivity. I cannot see, however, that Boothby's text expresses a more fundamental doubt on the operability of article 51.5.b API.

[12] Dinstein 2010, at 128-138.

[13] Ibid., at 130.

[14] Ibid.

Yet I simply do not understand the principle governing why some of these examples are within and others outside the confinements of proportionality.

Joseph Holland is another writer who performs the move from agnosticism to allegiance, providing me with my third example. At the time when the article I quote below was published, he was posted as a Legal Officer with the Office of the Legal Advisor, Supreme Headquarters Allied Powers Europe (SHAPE), Casteau, Belgium. Holland first explicitly denies that proportionality assessments are useless. Here is his argument:

> How, then, is this difficult, highly charged concept [of proportionality] to be applied? Is it so inherently flawed that is [sic!] cannot usefully be employed? Not at all. Obviously and despite the mathematical terms used earlier, there is no mathematical formula to balance expected incidental civilian losses and anticipated military advantage. Even less will there be a 'proportionometer' to assist commanders and others tasked with these difficult decisions. The military member (and it will be military personnel along with the occasional politician who inserts him or herself in the targeting process) will have to make a good faith, honest and competent decision as a 'reasonable military commander'. As has been pointed out, such judgments by experienced combat commanders are not likely to be the same as those made by human rights lawyers. Nor should they be. The combat commander has a wide range of responsibilities including, but not limited to, the successful execution of his mission and adherence to the law of armed conflict. So subjective are proportionality decisions that different reasonable experienced combat commanders are likely to differ on occasion. This subjectivity is widely recognised.[15]

In his rendering, the usefulness of proportionality assessments lies in the power it vests in the profession of the reasonable and faithful military commander. The main function of the principle of proportionality seems to be the way in which it conditions the thinking of the military commander, frisking out improper motives.

My fourth example of a move from agnosticism to allegiance is Ian Henderson's 2009 monograph on *The Contemporary Law of Targeting*, based on his doctoral dissertation.[16] Henderson was a senior legal officer and Wing Commander with the Royal Australian Air Force in the 2003 coalition operations against Iraq, as the foreword written by his military superior intimates. Chapter 8 of his book bears the heading 'Proportionality'. After an introductory section, Henderson first devotes one section to the scope of military advantage and another to the scope of collateral damage. Section 8.4 then deals with the question 'What is meant by excessive?', and it is written with the military decision-taker as an imagined reader. Already in the second paragraph of this section, Henderson gives expression to his agnosticism, inter alia by stating that '[u]nfortunately, and perhaps unavoidably, article 57 API provides no guidance on what is proportional (i.e., not excessive) in this balancing test.'[17] But why is this absence of guidance 'unavoidable'? Surely, the proportionality norm in articles 51 and 57 are, as the

[15] Holland 2004, at 48-49 (footnotes omitted).

[16] Henderson 2009.

[17] Ibid., at 221. In a section on 'Further research', Henderson writes that 'the fundamental issue remains that it is difficult to determine exactly what is excessive in any given case', suggesting a comparative study of similar issues across legal regimes. Ibid., at 247.

travaux show,[18] an agreement to disagree. Yet, I see no quarrels about the correct interpretation of the norm. This suggests that the 'unavoidable' mystery of its precise procedural demands must have other reasons.

Reproducing a standard pattern from the IHL literature on targeting, Henderson asks how many civilian deaths would be excessive in attacking a munitions factory. I can almost see him throwing up his hands at this question. From there on, he assumes the role of an advisor to a commander tasked to apply article 57.2.a.iii API; he points out that the judgment on expected civilian casualties and military advantage is that of a 'reasonable person', reminds that the value given to a human life may vary contextually and that unalike values of loss and advantage are compared and underscores that extensive collateral damage is not necessarily tantamount to excessive collateral damage. In doing that, he seems to suggest that our limited understanding of the provision in no way hinders our duty to perform its application in some way.

My fifth, and final, example is the 2010 *Commentary on the HPCR Manual on the International Law Applicable to Air and Missile Warfare*, which is the most recent attempt to restate the law in that field, drafted by a group of predominantly Western experts.[19] The forward-looking character of assessing harm to civilians in relation to military advantage is once more underscored and views are offered on what is in- and excluded under each of the two categories of civilian loss and military advantage. Beyond that, the Commentary stands out in that it provides a negative as well as a positive determination of excessiveness.

> The term 'excessive' is often misinterpreted. It is not a matter of counting civilian casualties and comparing them to the number of enemy combatants that have been put out of action. It applies when there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other.[20]

The authors of the quoted text recast the term 'excessive' as a 'significant imbalance'. While this adds no further precision, it leaves me with the expedient question what exactly this imbalance has to signify in order to render an attack unlawful.

But why this terse disqualification of concrete body counts? If the problem of proportionality would be resolvable by counting bodies and operating

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[18] See the positions taken by Poland and Syria at the Diplomatic Conference, in CIHL Database, Practice on Rule 14, available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14. Accessed 20 September 2012. During the negotiations leading up to the adoption of API, the Soviet Union and other Warsaw Pact Members were negatively disposed toward the proportionality principle, while the West was supportive.

[19] The HPCR Manual as well as the HPCR Commentary were elaborated by a 'core group of experts' of which 20 were affiliated to Western institutions, two to the ICRC, one to a Chinese university. Further involved was a group of government experts representing seven Western states and a group of occasional participants of which four were affiliated to Western institutions, one to the ICRC and one to a military in Sub-Saharan Africa. See HPCR Commentary, at 8-11.

[20] HPCR Commentary, at 92.

algorithms,[21] no mystery would inhabit targeting law. As they confess themselves to black-letter law, the authors of the HPCR Manual should appreciate this.[22]

The question imposes itself with some weight because we have evidence that military commanders do use casualty estimates in their efforts to understand the implications of the proportionality principle. David Reisner, then commander of the International Law Department (ILD) at the Israel Defense Forces, has described a 2002 meeting on the laws of war in situations of targeted killings.[23] ILD staff present at the meeting was asked to write down the number of 'Palestinian bachelors' in the age span of 18 to 45 who had to die so as to avert a terrorist attack from a 'Palestinian male bachelor' that was certain to kill one Israeli male aged between 18 and 45.[24] Answers ranged from zero to 'as many as needed' and the journalists reporting Reisner's account added that

> [m]aybe it is not surprising that the outcome generated by the question was an irrational number.
>
> Reisner relates that his response was two people. If you formulate the question differently and ask whether I agree to sacrifice an Israeli man for three Palestinians, the answer might be different, but eight, for example, doesn't seem right to me. I learned a few things from that exercise: that young people tend toward higher numbers than older people, that people with families tend to give higher numbers than bachelors, that a correlation exists between political outlook and the number given. In the Shin Bet security service, by the way, there are those who say zero. I don't know what the right answer is, but I know that the question has to be asked before an attack. If the commander asked the question and answered it based on a test of reasonableness; the task of the legal expert has been fully carried out.[25]

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[21] I am aware of only one IHL scholar proposing a 'mathematical' expression of proportionality. Javier Guisández Gómez suggests a proportionality index (PI) relating military advantage (MA) to collateral damage (CD) as follows: PI = MA/CD. He refrains from any indication of how to put numbers on MA and CD. For this reason already, his text is unfit to underpin any quantitative proportionality modeling. Guisández Gómez 2007, at 197-243.

[22] The HPCR Commentary explains the content of the HPCR Manual. The HPCR Manual's rules are designated as 'Black-letter rules' (HPCR Manual, at iv). Given the almost total dominance of Western experts in the process, I would think that a more modest term would have been called for, especially if account is taken of article 38.1.d of the ICJ Statute.

[23] Yotam Feldman and Uri Blau, 'Consent and Advise', *Haaretz*, 29 January 2009 (no longer available on the *Haaretz* website).

[24] The reduction of the case to Palestinian males of a certain age span reflects that the numerical approach needs to discard all complicating contextual factors. Considering the sacrifice women, children, elderly or infirm persons, or any constellation of them together with males of optimal age for military service, might have made the 2002 exercise more realistic – and altogether impossible. I simply cannot imagine ILD staff individually drawing up different columns for different categories – men, women, children, elderly persons, infirm persons and so on, subdivided into age cohorts – to then fill them with all conceivable number combinations for sacrificable individuals across these categories. Taking the numerical approach seriously instils a sense of its blasphemous character. As Anne Orford stated, '[t]he decisions and scholarly articles and books and treaty provisions expressing their faith in arithmetic and risk assessment and the possibility of evaluating and exchanging things that are substitutable one for the other are communicated through language. Language exceeds calculation, and reaches out to that which is singular and unique even in the calls for measurement.' Orford 2005, at 213.

[25] Feldman and Blau, see n. 23 above

As Reisner describes the process, no colleague or external observer can test the reasonableness of the commander's answer to the numerical question. It would therefore be a test of the commander's intuitive reason only, as opposed to reason built on the reflexivity that human interaction provides. So the operation of the proportionality principle would seem to be wholly internalized into the mind of the military commander. The quantitative testing Reisner relates is best understood as a conditioning of the responsible commander's *mens rea*. She or he may then argue that their decision was based on legal advice that fully applied the proportionality principle. As far as I understand it, this application of the proportionality principle is tantamount to a prayer. For a formalist inquiry into proportionality in IHL, the quantitative approach mirrored in this particular ILD practice is not helpful at all.

Another conceivable explanation for the averseness to quantitative approaches to proportionality in IHL doctrine is rooted in the difficulties in measuring not so much the estimated civilian harm, but the anticipated military advantage. Surely, quantities and algorithms play a prominent role in attempts to identify the enemy in the Afghan counterinsurgency, which the U.S. Army tracks *inter alia* by means of social networking analysis.[26] Yet on the overarching question whether a military operation is achieving its overall objectives ('are we winning the war?'), my initial assumption that advanced militaries are operating advanced assessment methods, was plainly wrong. Indeed, quantitative approaches to assess military operations are used, and attempts are made to aggregate them into an overall picture of the success or failure of the campaign as it stands. But we have scholarly testimony from inside the U.S. military that these so-called 'operations assessments' are woefully defective as to their metrics, mathematics and reliability. In two articles published in the Autumn 2011 issue of the *Naval War College Review*, Dr. Jonathan Schroden and professor Stephen Downes-Martin analyse operations assessment practices based on their first-hand experience and observations during current U.S. military operations in Afghanistan.[27] Both articles suggest that one of the most advanced militaries is simply unable to understand what its operations on the Afghan battlefield are achieving. Downes-Martin lists 'overoptimism', 'promiscuous metrics collection', 'junk arithmetic', 'simplistic color coding' in graphical presentations of achievements and 'logic failures' amongst the factors leading to the overall fiasco of operations assessments.[28] Problems will multiply as the volume of data collected by a broad variety of sensors grows exponentially.[29]

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[26] One example is the use of computer software by the U.S. Army to speed up the identification of important persons in Afghan insurgents' social networks. See http://www.army.mil/article/38497/Social_Networking_The_Silent_Counterinsurgent. Accessed 24 September 2012.

[27] Schroden 2011, at 89-102 and Downes-Martin 2011, at 103-126. The public domain literature on operations assessment is rather limited. I have been unable to find texts taking issue with Schroden's and Downes-Martin's arguments.

[28] Downes-Martin 2011, at 107-112.

[29] On 29 March 2012, the U.S. Defense Advanced Research Projects Agency (DARPA) issued a call for the mathematics, computer and data visualization communities to put forward proposals that allow the Department of Defense to meet the challenges of massive increase in data to be

All this would seem to raise serious questions about the U.S. military's capability to assess 'military advantage' under the proportionality norm in IHL. As military advantage is understood, in IHL doctrine, to relate to the campaign in its entirety, and not only to single attacks, it would appear indispensable to have an idea of what does, and what does not further the achievement of the campaign objectives. Without functioning operations assessments, the military commander cannot relate expected civilian losses to assumed military advantage under IHL, simply because the military advantage of a specific attack is unknown to her or him.[30]

So one explanation for the reluctance of IHL scholars to endorse 'mathematical models' or quantitative approaches would be that current militaries remain practically unfit to implement such models. I doubt whether this is a satisfactory explanation in its own right. Rather, I think that the intuitive rejection of mathematical proportionality calculations by IHL writers points us towards the very roots of the concept of proportionality. I find it indicative that the IHL writers I referred to reject a quantitative approach yet fail to point out alternative methods of determining excess. In doing so, they are invariably writing in the tradition of negative theology; a tradition that assumes the unknowability of the Creator to human beings. IHL scholars maintain their allegiance to the norm on proportionality, I think, because they consciously or unconsciously hold that its discontents (such as incommensurability of values and the subjectivity of judgment) are sublated by a normative content underlying the texts of IHL law. If that is correct, the proportionality principle is not just another tool to shift power over life and death to the military commander by *fiat* of the law. Rather, it is the norm in IHL perhaps closest to and most revelatory of the metaphysical presuppositions of IHL. It should be studied rather than denounced.

Silent enim leges inter arma[31] is commonly misunderstood as stating that the law is mute when arms are raised, its muteness signifying that violence is not regulated by the law at all. Yet the law is not mute, but silent. It holds its full powers to intervene and exercises them through silence. To understand the silence of IHL in determining what is excessive violence is my task in the following.

(Footnote 29 continued)
transformed into 'actionable information'. Available at http://www.darpa.mil/NewsEvents/Releases/2012/03/29.aspx. Accessed 1 October 2012.

[30] Somewhat surprisingly, state obligations under IHL turn out to be an argument for radically improving operations assessment methods and practices in the U.S. military. It illustrates how well IHL converges with the logic of military planning, but also how much the reality of military planning is lagging behind its own logic.

[31] Cicero 1991, Section 11. Cicero's defense speech for Milo, accused for murdering Clodius, is generally taken as the source for the phrase. From the wording of Section 11 in *Pro Milone*, it is entirely clear that Cicero did not make the point that Milo's presumed self-defence fell outside the law, but rather that the law's silence amounted to an outright permission to defend oneself against a plotter.

9.3 The First Reading: on Proportionality

Let me briefly recapitulate some observations made in the previous section.

- The targeting process, of which the proportionality assessment forms part, is circular and iterative.
- The proportionality assessment is forward-looking. It is about potentiality.
- The proportionality assessment is for the reasonable military commander acting in good faith.
- Apart from identifying what belongs to the categories of civilian losses and of military advantage, IHL scholarship does not explain how proportionality assessments are to be proceduralized.
- Some IHL scholars claim that the proportionality assessment is subjective.
- Some IHL scholars claim that the targeting assessment seeks to relate incommensurable values to each other.
- Neither of the latter two claims nor a general agnosticism on the way in which proportionality is assessed keeps IHL scholars from expressing continued allegiance to the proportionality principle.

In the following, I will take seriously suggestions that the norm expressed in Rule 14 CIHL and in correspondent treaty law is indeed a norm on proportionality. In contemporary legal discourse, proportionality reasoning is often understood as a balancing of two competing principles endorsing typecast interests. That approach is reductive. It emphasises the principles, and tones down what makes them relate to each other. It foregrounds the parts, and backgrounds the totality in which and through which they interact. It is horizontal and omits consideration of the vertical that is presupposed in weighing. The IHL scholars I referred to follow this pattern. Much text is devoted to what counts as collateral damage and as military advantage, while passages on the act of balancing itself and its presuppositions are short, trivial or both.

Maybe there are good reasons for this avoidance. In affirming the incommensurability of civilian loss and military advantage, the IHL scholars I quoted suggest that they find no common measure applicable to both. On this understanding, civilian loss and military advantage lack a third element to which and through which they can be related. In the end, one must be chosen over the other.[32]

The lexical root of 'proportionality' is the Latin noun *proportio*, which, in turn, is a translation of the Greek noun *analogia* (ἀναλογία).[33] To deal with something *ana logos* means to deal with it according to a due *logos*, and it merits emphasis

[32] In the Greek language, this would be an *antalogia*, not an *analogia* (the prefix 'ant-' signifying 'instead'). I am indebted to Luca Bonadiman for explaining this to me. Keeping within the tradition of proportionality perforce implies that the weight of one of two countervailing principles never can be zero.

[33] Entry on 'proportion', Georges 1913.

that the Greek *ana* literally means 'up to',[34] implying a vertical relationship. The ά in ἀναλογία (*analogia*) indicates the 'first', the *entem*, the pure essence, while the ν (n) indicates that the two entities ontologically share a common origin.[35] Traditionally, lawyers use the terms 'analogy' when reasoning on relevant commonalities of two cases,[36] while they use 'proportionality' when reasoning on the relative weight of conflicting principles.[37] Yet in doing so, they invariably draw on one and the same conceptual tradition, in which the whole is represented through its parts.

> In the original Greek sense, analogy involved a comparison of two proportions or relations. Thus 'principle' was said to be an analogical term when said of a point and a spring of water, because a point is related to a line as a spring is related to a river. This type of analogy came to be called the analogy of proportionality.[38]

Reading this brings me back to the incommensurability of civilian loss and military advantage that IHL scholars have given voice to. Is it not possible that these worries stem from an error in imagining their relation? It could be simply wrong to imagine civilian loss and military advantage to be directly related to each other. The analogy of proportionality is but the relation of a relation. Rather, drawing on the original Greek analogy of proportionality, it might be that civilian loss is related to a certain element just in the same way as military advantage is related to a certain element.

Does this help? It does in that it might do away with the concern of incommensurability in the IHL proportionality assessment. It also incites me to imagine the *relata* of civilian loss and of military advantage. And what term will take the place of the 'principle' in the example quoted above? How shall I properly understand and denote that which is analogous in a proportional sense?

The latter two questions emphasize the point where all relations ultimately converge. They invite me to add another form of analogy to this text.[39] The analogy of participation is about a relation of likeness between creator and creation. This form of analogy remains a *topos* for theologians contemplating the relation between God and God's creation. When introducing the analogy of participation, I would like to retain the possibility of alternating between an outspoken theological approach (from which I hope to glean systematicity at the very least) and a quasi-secular one, in which international relations are assumed to be a key factor in shaping reality (which is obviously closest to my empirical material of warfare and IHL). By operating the analogy of proportionality and the analogy of

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[34] Entry on 'analogon', Oxford English Dictionary, 2nd edition.

[35] I am indebted to Luca Bonadiman for pointing this out to me.

[36] The issues related to this important aspect of analogy are dealt with in Reidhav 2007.

[37] The standard reference is Alexy 1994.

[38] Ashford 2009.

[39] For the record, a frequently discussed type of analogy omitted here is the analogy of attribution, which relates two things to each other when a primary thing contributes to or causes a secondary thing.

participation alongside each other in this text, I hope to integrate horizontal as well as vertical aspects of the issue of proportionality in IHL.

At the point where the relation between civilian loss and military advantage is assessed as proportionality, we are given over to our assumptions on being at large. Here are three choices. The being of beings can be cast as totally different, merely converging on the use of one and the same word. This is called *aequivocatis entis* – voicing the word 'being' on something similar, but ultimately different. In law, this understanding is present in the postmodern belabouring of law's indeterminacy. Or indeed, in the other extreme, beings converge substantially in being. This is *univocatis entis* – voicing the word 'being' indeed denotes something identical to us all. The universality of human rights as cast in advocacy discourses is perhaps the most straightforward example here, but some might think of 'humanity' outright.[40] A middle way between total difference and total identity is to understand my own being as analogous to that of other beings. What I then have in common with others is a relation, and this relation is the third that we have in common. This choice is termed the analogy of being – *analogia entis*.

Do military commanders and civilians have something in common? In order to make sense of the proportionality principles in IHL, I have to assume that they are capable of establishing a common *logos*. Provided I assume that, the *due logos* of the relation between the military and the civilian will always be an *onto-logos*, a *logos* of being at large. There is no proportionality assessment without its implied ontology.

First, I found it difficult to relate the *analogia entis* to international armed conflict, until I allowed myself to think of the creator, of being and of sovereignty as operating on the same level, albeit each in their respective disciplines of theology, ontology and international law. Put differently, a creator may figure as a sovereign as much as the divine, the former in the realm of international legal scholarship, and the latter in the realm of theology. Sovereignty is distributed relationally in a certain understanding of international law, as is the divine in certain forms of theology or as is being in certain forms of ontology. *Analogia entis* is the structure common to all three, working vertically (*erga omnes*, as international lawyers would say) as well as horizontally (*inter partes*).

Why is *analogia entis* helpful in the IHL context? Targeting considerations are about the relation of the potential with the actual. In the moment of targeting, I encounter two conflicting parties before an attack takes place, that is, in a moment

[40] In her intriguing 2009 *EJIL* article, Professor Anne Peters has superimposed humanity over sovereignty to argue for an international law centred on the individual (and for outlawing the vetoing of 'proportionate humanitarian action to prevent or combat genocide or massive and widespread crimes against humanity'). Peters 2009. I must concede that I have difficulties with this argument. The reference to proportionality and the idea of steady progress in 'humanizing' international law make me think that this type of argument stealthily assumes 'humanity' to be structured as Trinitarian divinity, bringing us ever closer towards a full revelation of what is human – indeed the second coming of Christ.

before a potential actualizes. This potential is kinetic as much as political.[41] It can bring down buildings and hurt humans as much as it can alter articulations of political will. An attack affecting civilian life or property is interacting with the articulation of political will of the attacked party in a special way. The *topos* of morale bombing is only the crudest form of this line of thought, which may also be cast in the form of democratic process or of *volonté générale*. For the moment, it is not important which of these I choose.

The same goes for the attacking party. Under IHL, an attack is performed in pursuit of military necessity, that is, a necessity flowing from the attacking party seeking to actualize the potentiality of its will. So on the sides of both parties an attack creates relations between will and reality, between potentiality and actuality. As warfare is an iteration of attacks, this process is iterative, which emerges not least from cyclical depictions of the targeting cycle in military doctrine. This dynamic is important, as I will argue later on.

I shall go a step further. Here is my tentative formulation of the structure of proportionality in IHL targeting norms:

On the side of the attacking party, there is a relationship between sovereign potentiality and sovereign actuality that is analogous to the relationship between sovereign potentiality and sovereign actuality on the side of the attacked party. Maintaining an attack and, in particular, its effects on civilian life, within that analogous relationship preserves the relation between sovereign potentiality and sovereign actuality with the attacked. An attack that moves beyond this analogy is disproportional, because it looses touch with the relation of potentiality and actuality of the attacked party's will-formation.

Let me briefly exemplify with the use of nuclear weapons in defence of the existence of a state as the embodiment of the sovereign. Drawing on the structure of *analogia entis*, it appears arguable that an attack on a state so large that it would lead to its annihilation (whether militarily conventional, nuclear or other) derails completely the relation between potentiality and actuality in the sovereign will-formation of the threatened party. This could be the reason why the Advisory Opinion of the ICJ controversially left room for this particular use of nuclear weapons in self-defence. I emphasize the subjunctive here: my point is to present *analogia entis* as a relevant form of thought, not to legitimize this particular position of the ICJ.

At this point, I want to introduce the writings of the German Jesuit theologian Erich Przywara. His main work, *Analogia Entis*,[42] lives off his ability to foreground and detail the rhythmical, dynamical structure of the analogy of being, which he roots in the traditions of Thomism and negative theology. Przywara's philosophical credentials are quickly sketched: his thought was shaped by

[41] And it is ultimately springing forth from the demos, as I will argue in Sect. 9.4 below.

[42] Przywara 1932. A revised and expanded version was published as Przywara 1962. A translation into English by John R. Betz and David Bentley Hart is forthcoming.

phenomenology and he engaged in personal exchanges with Edmund Husserl and his circle, with Martin Heidegger and with Edith Stein.

Why move Przywara's work into IHL? In my tentative formulation above, there is a dynamic in the will of the parties, yet the analogy I make comes across as static, as if frozen into a photograph. What is beneficial in Przywara's thought is his capability to explain the analogy in a way that makes me grasp its drivers and motions, its rhythmic dynamism.

The key to Przywara's analogy is the idea of the creator being *in-and-beyond* his or her creatures. To be extremely clear on this point, creation is no on off affair, in which the creator does his or her job to then withdraw and let creatures sort out life by themselves. In that sense, creation is going on, actualizing, through creaturely life. And, I should add, so is revelation.

The central element with Przywara's thought is a thomistic differentiation between essence (*essentia*) and existence (*esse*).[43] Both are separated in creatures, but coincide in God. If I then recall another thomistic teaching to the effect that potency is pushing towards actuality, the drama in Przywara's explication becomes apparent: the analogy of being starts to move and keeps itself within an incessant cyclical movement towards the actualization of potency. Negation is the true driver, a negation that is ultimately due to the unknowability of God. While essence and existence constitute a unity, it is one characterised by their tension.[44] It is because essence and existence only coincide in God that this movement will go on and on incessantly in time.

Creation and revelation are simultaneously driven and limited by analogy, or, as Przywara puts it:

> Das Erkennen des Seins geschieht nur analog: die Aussagekraft der Erkenntnisse wird relativiert durch ihre Nichtaussagekraft, wie es in der Formel des IV. Laterankonzils von 1215 heißt: 'inter creatorem et creaturam non potest tanta similitudo notari, quin inter eos maior sit dissimilitudo notanda'.[45]

Actually, we are faced with a double analogy in the relational space of the in-and-beyond: the essence of creatures is in-and-beyond their existence just as God is in-and-beyond creation.[46] John. R. Betz explains the differences and similarities between the creator and human beings as creatures:

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[43] Aquino 1997.

[44] Przywara's term for this phenomenon is '*Spannungseinheit*', translated by Betz as 'unity-in-tension'.

[45] 'The cognition of being happens only analogously: the power of significance of findings is relativized by their power of non-significance, as is stated in the formula of the Fourth Lateran Council of 1215: "inter creatorem et creaturam non potest tanta similitudo notari, quin inter eos maior sit dissimilitudo notanda".' (My translation.) The Latin excerpt from the Fourth Lateran Council's Second Canon reads as follows in English: 'between the Creator and the creature there cannot be a likeness so great that the unlikeness is not greater.' The Canons of the Fourth Lateran Council, 1215, available at http://www.fordham.edu/halsall/basis/lateran4.asp. Accessed 9 August 2012.

[46] Betz 2004, at 29.

> To be sure, creaturely being is *similar* to God by virtue of its participation in God's Being; otherwise it would not 'be' at all. But it remains fundamentally *more dissimilar* given not only that its being is *given*, but that God 'Is' who he is (Exod. 3:14), whereas creatures are forever *becoming* who they 'are'. Thus, following Aquinas, Przywara emphasizes that any participation of creaturely being in God's Being is ultimately not according to a direct proportion (*analogia proportionis*), whereby the creature's essence participates directly in the essence of God (in the manner, say, that 1 is related to 2), but according to an indirect relation of proportionality (*analogia proportionalitatis*), whereby the *relation* of essence and existence in creatures is analogous to the *relation* (or rather *identity*) of essence and existence in God (in the manner, say, that 6 is indirectly related to 4, *viz.*, as, respectively, 2×3 and 2×2).[47]

There are a number of things to note. First, with Betz, I observe how Przywara operates the analogy of proportionality *within* the analogy of participation in his structure. It is noteworthy that the legal discipline speaks not of a 'principle of proportion' when balancing principles, but of a 'principle of proportionality'. This terminology turns out to be adequate once a thomistic perspective is adopted. Second, Betz' remark that 'God "Is" who he is … while his creatures are forever *becoming* who they "are" became more poignant when I understood that the 'be' is associated with God, the 'being' with the human and the 'becoming' with the Holy Spirit.[48]

This brief consideration of Przywara's work leads me to a question to international law. Is there an unacknowledged thomistic debt in the form that the international law of proportionality has taken? Could it still be the case that secular international law reproduces this fundamentally Roman-Catholic form of thought?[49] In my tentative formulation above, I have used the term 'sovereignty' as an indeterminate third. The question is now whether it not only operates on the same *level* as God in Przywara's *Analogia entis,* but according to the same *pattern*.

Let me consider a military conflict from the perspective of the attacking party. Warfare is 'ein Akt der Gewalt, um den Gegner zur Erfüllung unseres Willens zu zwingen.'[50] We see the 'act of violence' originating in 'our will', which attains a considerable, and considerably dangerous, theological significance if the state is directly related to the divine will of the creator. This existential act of violence is negated by the attacked party; indeed, negated repeatedly. This, in turn, entails the

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[47] Betz 2004, at 29. Brackets and emphasis in the original.

[48] At this bewildering intersection, thanks are again due to Luca Bonadiman, who translates God's pronouncement '*ἐγω εἰμὶ ὁ ων*' in Exod. 3:14 as 'I am the one-be'.

[49] The Catholic Church has invested itself heavily into thomism in general and the *analogia entis* in particular. Pope Pius X has declared the capital teachings of Thomas ab Aquino to be 'the foundations upon which the whole science of natural and divine things is based' and therewith beyond debate (Encyclical *Doctoris Angelici*, 29 June 1914), while Pope Benedict emphasizes that the Church has always insisted on an analogical relation between God and human beings in his Regensburg address of 12 September 2006 (see paragraph accompanying note 10 in the Regensburg address at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. Accessed 16 January 2013).

[50] Clausewitz 1832. In J.J. Graham's 1873 translation, this is adequately rendered as '[w]ar therefore is an act of violence to compel our opponent to fulfil our will.' Clausewitz 1873.

cyclical movement of 'the targeting circle'; consisting of targeting, attacking, assessing effects and renewed targeting.[51] This circle is concurrently a movement from the potentiality of sovereign will towards its actualization in a sovereign act of violence. I like to think that it is this particular instance of 'in-and-beyond' and the dynamics it unfolds that makes sovereignty such an 'unavoidable' concept in international law. The unknowability of the precise workings of proportionality in IHL participates in the unknowability of sovereignty, which, in turn is grounded in the unknowability of the creator. So the agnosticism of the IHL authors I adduced is, after all, explainable, and the perplexity on the incommensurate relationship between military advantage and harm to civilians is dissolved. Either the will of the attacker is seen as a purely human disposition, in which case it is purely existential, thereby cutting all relations with the essence of the creaturely civilian. Or the will of the attacker is seen as a manifestation of divine will, in which case it is not part of the creation in the same way as the creaturely civilian. Indeed, the incommensurability critique emerges in a sharper light in the politico-theological dimension.

To be sure, any military commander who reflects on the thomistic roots of proportionality will realize that a divinely rooted sovereignty cannot be thought as something residing merely in the nation state which he or she happens to serve. Then again, I have to admit that the widespread agnosticism on the procedure to use in proportionality assessments in IHL doctrine might combine fatally with a culture of obedience and loyalty to that state. If a commander identifies sovereignty as residing solely within her or his own state for the purposes of analogical thinking, this will result in a paternalistic treatment of expected civilian casualties in the most proper and terrifying sense of the word. In a Trinitarian mode, the state would be absurdly elevated to the level of God the creator, the people of that state, including its military, would assume the role of the Holy Spirit, and the remainder of the world's population that of man to whom truth is gradually revealed.

It goes without saying that this interpretation would be a fatal misunderstanding of analogical thinking. It would do away with the horizontal dimension entirely, in which human is equal to human. With that, it would obviate any idea of an international community in which IHL might still be implemented.

9.4 The Second Reading: Demos and Polis

As soon as I permit myself to put sovereignty in the place of the creator, and therewith assume the place of *one* common third, things get to be interesting. The state's essence is *in-and-beyond* its existence, and sovereignty is *in-and-beyond*

[51] In military contexts, targeting is usually depicted as a circle of events, with the commander's objectives being placed at the top. Targeting circles always move cyclically from objectives over targeting and actual infliction of violence on to the assessment of results, which then serve to inform the commander's objectives.

the state. Or, in another key, sovereignty is intra-statal and para-statal at the same time. This destabilizes and mobilizes the concept of sovereignty.

The decision on targeting is said to be for the 'reasonable military commander', required to act, as it were, 'in good faith'. What, then, is the proportionality principle obliging that commander? It is an obligation to preserve the attacking party's conduct within the *analogia entis*. What does that mean? The attack must not have such consequences so as to arrest the relationship between essence and existence played out through the other party. Why is this important? If we accept that sovereignty is distributed, there is no fully unilateral sovereign act. The actualizing of sovereignty is never that of one party to the conflict alone. To deny the actualizing of the opposed party's sovereignty, is to foil the actualizing of one's own sovereignty. The attacking party's sovereign potentiality can only actualize in the world through negation. The attacked counterpart is one source of such negation. Therefore, it is needed for sovereignty to actualize through the conflict as much as is the attacking party.

What is the particular form of reason required of the 'reasonable military commander'? Proportionality determination in IHL assumes two related capabilities: that of sensing and that of making sense. *Sensing* means to open up towards and perceiving all givens that relate to prospective civilian loss and military advantage. At a certain point, this shifts into *making sense* of all these givens as to whether or not they suggest an excess of civilian loss. The Greek term *aesthesis* denotes these two: sensing and making sense. In relating these to each other, three choices open up. In the first, the faculty of making sense – that is, knowledge – dominates the faculty of sensation – that is, desire. By way of example, if we know that military necessity is the end of IHL, we will subordinate sensations of compassion, repulsion or disgust to that knowledge. In the second, the faculty of sensation dominates the faculty of making sense. By way of example, a sensation of empathy might make us forgo an action that we know to be permitted by the law.

As Jacques Rancière points out, drawing on Kant's Critique of Judgment, there is a third choice, in which a phenomenon is seen and appreciated

> neither as an object of knowledge nor as an object of desire. In this case, neither faculty rules over the other; the either/or no longer works. The two faculties agree with each other without any kind of subordination. … What is at stake here is the specificity of a distribution of the sensible that escapes the hierarchical relationship between a high faculty and a low faculty, that is, escapes in the form of a *positive* neither/nor.[52]

And Rancière goes on to add that '[t]his rejection of the hierarchical relation between the faculties that make sense involves a certain neutralization of the social hierarchy'.[53] The power to negate the pre-existing hierarchical ordering of the sensitive is central, as it is in Przywara's *analogia entis*.

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[52] Rancière 2009, at 1-2.

[53] Ibid.

> What I call the aesthetic dimension is this: the count of a supplement to the parts that cannot be described as a part itself. It is another kind of relation between sense and sense, a supplement that both reveals and neutralizes the division at the heart of the sensible. Let us call it a *dissensus*. A dissensus is not a conflict; it is a perturbation of the normal relation between sense and sense.[54]

For sure, the dissensus is *in-and-beyond*. Here is where Rancière's aesthetics and those of the *analogia entis* appear as structurally identical in that they rest on a third, perform negation and revelation, and always reach beyond that which is known about the sensible. Rancière emphasises that the neutralization is 'not at all tantamount to a pacification', rather, it brings about 'a more radical way of seeing the conflict'.[55] He contrasts the aesthetical dimension to that of the ethical, commonly associated with the humanitarian ethos of IHL. It is helpful to recall, with Rancière, that ethos 'first meant *abode* before it meant the way of being that suits an abode.'[56] An ethics of humanitarianism cannot avoid localization in one particular community. In the case of the proportionality principle in IHL, it will invariably be the community of the deciding military commander.

The proportionality principle accords hierarchical supremacy neither to perception nor to knowledge. If perception were to rule, there would be no 'reason' at work in the commander, and if knowledge were to rule, we could expect to have more detailed and explicit rules on how to determine proportionality. I think that what I have described as 'agnosticism' in the IHL literature is, in the best scenario, a sign of a rejection of a hierarchical relation between sensibility and knowledge. IHL scholars emphasise this suspension when they write that the commander must be reasonable (thus drawing on her faculty of knowledge) *and* in good faith (thus giving herself over to a particular form of impassioned sensibility).

Analogia entis as a form of thought is staged in aesthetics. On its thomistic roots, Davies writes: 'Proportionality secures the structure of interaction and participation, in which one element reveals another and the whole comes into view in its parts (the very essence of aesthetic perception).'[57] The suspension inherent in the *analogia entis* 'can be said to transmit or mediate the light of transcendence', and grounded in a notion of being as the beauty or likeness of God.[58] Its aesthetics would be 'dissensual' in that it accords hierarchy neither to perception nor to knowledge. This is not to suggest that Rancière and Przywara are in agreement on aesthetics. Yet their differences are less important for the moment. The point is that both help me transgress a perspective on sovereign violence that can only take account of sovereignty (or humanity, or any law of the *ethos*) as that of one state, or one conflicting party, at a time.

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[54] Rancière 2009, at 2-3.

[55] Ibid., at 3.

[56] Ibid.

[57] Davies 1998, at 11.

[58] Ibid. It is worth recalling that man being created 'in the image of God' was precisely the point of departure for Kooijmans reconstruction of equality in international law. See text accompanying Kooijmans 1964, at 196.

Concluding on Przywara and Rancière so far, the reasonable military commander acting in good faith is suspended between knowledge and passion, between potentiality and actuality, between being and non-being. Structurally, she negates the separation of both parties to the conflict in the dimension of the analogical and dissensual. In performing such a proportionality assessment, she is no longer fully subsumable as a representative of the attacking party, i.e. the nation state to which she has sworn allegiance.

Without empirical research on the performance of targeting and proportionality assessments, I cannot know whether the structure of analogy and dissensus actually informs military commanders. It cannot be excluded that what comes across as the agnosticism of IHL doctrine dominates and sets free an unreflected decisionism. This decisionism will invariably draw on ethics as a law of the abode. It will maximize the sovereign interests of the attacking party, because it can only relate to sovereignty as being that of one particular state. Yet the converse is true, too. Without empirical research, I cannot positively claim that targeting is structurally unrelated to *analogia entis* and dissensus, or is but their perversion.

To relate essence and existence to each other in the context of armed conflicts also means to relate the demos as the source of sovereignty to the particular state-form it has taken. If the proportionality principle prohibits the disruption of the relationship between sovereign potentiality and sovereign actuality, it will invariably prohibit the disruption of the relationship between the potentiality of the *demos* and its actuality.

I want to intersperse three empirical observations here. First, I recall that international law, since the inception of natural law, has needed the enemy *demos* in in order to terminate wars in Europe. Pufendorf, casting the enemy as a *justa hostis*, a just enemy, suggests that wars against it will be brought to end by a peace treaty or by conquest rather than by annihilation.[59] Both forms of termination pivot on the preservation of the enemy's will power. In the latter case, termination presupposes that enemy subjects swear an oath of fidelity to the conqueror. This is perhaps the most apt illustration of how the *corpus mysticum* of sovereignty is preserved even in the most existentially threatening situations, where the *corpus naturale* of the state is consumed.[60]

Here is my second observation. In IHL, civilians appear as *unqualified* civilians. The proportionality rule relates not to 'enemy civilians', but to civilians *at large*, regardless of nationality or political allegiance. From a literal reading of article 51.5.b API, this would already be evident, at least since the text of that Protocol

[59] On the question of conquest, Pufendorf writes: 'Empire also or Government comes to be acquired by War, not only over the particular or single Persons conquered, but entire States. To render this lawful, and binding upon the Consciences of the Subjects, it is necessary, That on the one Side the Subjects swear Fidelity to the Conqueror; and on the other, that the Conqueror cast off the State and Disposition of an Enemy towards them.' Pufendorf 2003, at 243 (footnotes omitted).

[60] Ernst Kantorowicz famously introduced the argument that the theological conception of the Church as a *corpus mysticum* migrated first into the King and then into the secular state. Kantorowicz 1957, in particular Chapter V.

was opened for signature in 1977 (two years, I note, after the termination of a conflict for the 'hearts and minds' in Vietnam). Currently, IHL experts tend to emphasize this issue, very likely due to a mainstreaming of asymmetrical warfare, where the civilian on an embattled territory is no longer necessarily an enemy civilian, but rather a person for whose heart and mind the battle is fought.[61]

Third, it strikes me how challenging the issue of civilian staff working at military installations is for contemporary IHL commentators. One group proposes to omit this group of civilians from proportionality balancing,[62] which would *expand* the category of permissible attacks under IHL.[63] As military tasks have been increasingly privatised in the West over the past decade, Western states could be expected to push for the inclusion of civilian staff in proportionality balancing as civilians. It is significant that this interest does not seem to reverberate through IHL scholarship.

The second observation suggests that the protected *demos* is a heterogeneous group of civilians rather than a *polis* organized qua citizenry.[64] On the other side of the spectrum, the civilian serving a private military contractor is strongly institutionalized into the *oikos* (i.e. a community whose members may be excluded from the polis, although they remain included into the economy), even though she might not hold the citizenship of the state using the contractor's services. As the *oikos* has been increasingly targeted in contemporary armed conflicts (dual-use infrastructure attacked with kinetic means or within the framework of a cyber attack being a case in point), it is not surprising if civilian employees were to be leaving the domain of protection.

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[61] That said, the U.S. counterinsurgency doctrine appears to reverse the IHL assumption that persons lacking combatant characteristics are to be taken as civilian. The counterinsurgency logic is one where humans need to qualify as civilians, rather than to be assumed as being civilians in the absence of further qualifications. Amin Parsa's work on counterinsurgency and IHL has alerted me to these issues. On the transformation of war and of the civilian-combatant dichotomy, Berman remains instructive. Berman 2004-2005, at 1-72.

[62] 'Opinions in the Group of Experts were divided as to whether civilians who are physically within a military objective (e.g., civilian employees working in a munitions factory) count for the purposes of the application of the principle of proportionality. Three views were expressed. Some experts were of the opinion that such civilians do not count because they have chosen to be there and have thereby voluntarily assumed the risk of an attack by the enemy. The majority of the Group of Experts felt that the principle of proportionality applies to such civilians as in all other cases. However, some experts — while belonging to that majority — pointed out that the application of the principle of proportionality will not make a material difference when the target is a high-value asset (such as a munitions factory), referring to the fact that extensive casualties do not necessarily amount to excessive collateral damage.' HPCR Commentary, at 93-94.

[63] I will mention below that the *oikos* is increasingly targeted in contemporary military campaigns. One could argue that coherence requires that the level of protection for persons working for military subcontractors would decrease even in other areas as the assessment of proportionality.

[64] Often, *polis* is understood as a community organized in a state. For the sake of simplicity, I shall us the term *polis* in that sense in the following. Let it be said that a *polis* can very well take another form than a state, and my observations would apply to it *mutatis mutandis*.

So the unqualified are important to preserve, whereas the qualified in the *oikos* and the *polis*[65] become increasingly exposed to violence that is cast as legitimate. Recalling Clausewitz' dictum that wars are fought to compel the enemy to fulfil our will, the question is why. One instrumental understanding of this dictum would suggest that the politically qualified, the elites, need to be spared, because they are institutionally most capable of fulfilling the victor's will. Those outside the elite could be sacrificed. This instrumental view would privilege the institutionalized and socially hierarchized *polis* over the *demos* of the unqualified. It would ignore the fact that the proportionality norm in IHL protects civilians without any further differentiation, which is already a sufficient ground to reject it.

To understand Clausewitz' dictum properly, I think we need to leave the actuality of the *polis* and move to the potentiality of the *demos*. Rancière describes the political as consisting of 'two antagonistic logics': one is the rule of oligarchic institutions (which he terms the 'rule of the police'), supplemented by a logic suggesting that 'the rulers rule on the ultimate ground that there is no reason why they should rule'.[66] While the qualified do actually rule, they do so on the ground that *anyone* could rule. This is the democratic supplement. Rancière goes on to explain:

> The power of the demos is the power of whoever. It is the principle of infinite substitutability or indifference to difference, of the denial of any principle of dissymmetry as the ground of the community. The demos is the subject of politics inasmuch as it is heterogeneous to the count of the parts of a society. It is a *heteron*, but a *heteron* of a specific kind since its heterogeneity is tantamount to substitutability. Its specific difference is the indifference to difference, the indifference to the multiplicity of differences – which means inequalities – that make up a social order.[67]

Quite obviously, this indifference to difference also comprises an indifference to citizenship. The *demos* is potentially negating its ties to the enemy state, which makes it reasonable to address it as a group of unqualified 'civilians' rather than of qualified 'enemy civilians'. Harming the unqualified *demos* in an attack means to harm as much the enemy *demos* as one's own *demos*. Also, it is the *demos* that has the potential to negate in every moment the will-formation of the qualified oligarchy of the polis. It is the unqualified, substitutable *demos*.

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[65] Do civilians choosing to place themselves in the vicinity of military objectives (so-called 'voluntary human shields') count in the proportionality analysis? The expert group behind the HCPR Commentary was divided on the matter: '[t]here were three divergent views within the Group of Experts about the status of "voluntary human shields". One view was that voluntary human shields are not counted in the calculation of collateral damage because they are directly participating in hostilities. A second view held that voluntary human shields do not qualify as civilians directly participating in hostilities. Hence, they remain protected civilians who count fully under the proportionality analysis. … Finally, the third view agreed with the second view as to the status of voluntary human shields, but asserted that the principle of proportionality will apply to them in a modified (more relaxed) way, since they have deliberately put themselves in harm's way in order to affect military operations.' HCPR Commentary, at 144 (footnote omitted).

[66] Rancière 2009, at 11.

[67] Ibid., at 10.

I have earlier argued that a proportionality assessment in targeting needs to preserve the relation between essence and existence, between potentiality and actuality. I would like to add now that it needs to preserve the particular supplementary and negating relationship between *demos* and *polis*, with the *demos* understood to be 'the uncountable count of the anyone'.[68]

This transcendent move comes at the price of a movement towards immanence. The transcendent move can only be performed by a decision-taker who makes the tension between *demos* and *polis* into her own. The analogy of proportionality can only be performed if the decision maker understands the relation between the *demos* and polis of her own state as much as she understands the relation between *demos* and *polis* of the opposed party.

Yet, the negating power of the *demos* does not stop at the border of nation-states, and neither does it stop at the doors of military institutions.[69] In the structure that has emerged in my third reading, sovereignty is always distributed through the *demos*. If *demos* is taken to mean that anyone could rule, and that no one is unequal, the relation between the potentiality of the *demos* and its actuality in a presumed *polis* is disrupted already with the first civilian casualty. It continues to surprise me that IHL, for all its faults, contains an obligation on military commanders to contemplate exactly this.

9.5 Negative Equality

What I have done now is, I think, the utmost possible with an international humanitarian law that disavows its Christian substance, but remains Christian in form. Substituting God and the nation-statist sovereign for the *demos* might just make IHL less divine and more worldly. Central to this shift would be a reasonable military commander contemplating the unqualified *demos*. I think that any effort of this kind may mitigate the agnosticism and concomitant nation-statism of IHL.

That said, I would grant that the very same substitution might just make the *demos* less worldly and more divine.[70] I find it striking that Jacques Rancière's analogy of the *demos* is structurally all but identical with Erich Przywara's analogy of being.[71] This is an indicator as good as any that analogical thought outside the

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[68] Ibid., at 11.

[69] It is a wholly different question whether the requisite immanence is at all possible in a form of warfare where much of the sensing is delegated to technology and much of the making of sense to algorithms.

[70] I am grateful to Daniel Steuer for alerting me to the possibility that Rancière's *demos* might introduce a 'negative absolute identity'. And, I should add, to the consequences that might entail for any attempt to think targeting analogically.

[71] Considering Rancière's explanation of the power of the *demos* accompanying footnote 67 above, it's is easy to see that Rancière's dichotomy of indifference and difference restages the role played by Przywara's essence and existence. The indifference to difference of the *demos* is

Thomist form is not readily available to us here and now. Two things follow. First, a radically secular way of thinking targeting with Rancière's *demos* might just be as good – or as bad – as a radically Catholic way of thinking it with Przywara. However, any of the two are invariably better than what the current *stasis* of agnosticism and allegiance in IHL might bring about. What makes them better, and this is my second and last point, is that they open up those making decisions about targeting as 'reasonable military commanders' or international humanitarian lawyers at large towards an apophatic contemplation. Any third – creator, sovereign, demos or other – will always be so unknowable as to deny me justification of my proportionality judgment under the law.

References

Alexy R (1994) Theorie der Grundrechte. Suhrkamp, Frankfurt am Main, Frankfurt
Aquino T (1997) On being and essence [De ente et essentia], [ca. 1255] (trans: Miller RT). http://www.fordham.edu/halsall/basis/aquinas-esse.asp#f1. Accessed 17 Dec 2012
Ashford EJ (2009) Medieval theories of analogy. Stanford Encyclopedia of philosophy. http://www.science.uva.nl/~seop/entries/analogy-medieval. Accessed 17 Dec 2012
Beard J (2007) The political economy of desire. International law, Development and the Nation State. Routledge-Cavendish, New York
Berman N (2004–2005) Privileging combat? Contemporary conflict and the legal construction of war. Columbia J Transnatl Law 43:1–72
Betz JR (2004) Beyond the sublime: the aesthetics of the analogy of being (Part One). Mod Theol 21:1–50
Boothby WH (2012) The law of targeting. Oxford University Press, Oxford
Cicero (1991) Pro milone (edited by Colson FH). Bristol Classical Press, London
Clausewitz C (1832) Vom Kriege. Dümmlers Verlag, Berlin
Clausewitz C (1873) On war (trans: Graham JJ). N. Trübner & Co., London
Davies O (1998) Von Balthasar and the problem of being. New Blackfriars 79:11–17
Dinstein Y (2010) The conduct of hostilities under the law of international armed conflict, 2nd edn. Cambridge University Press, Cambridge
Downes-Martin S (2011) Operations assessments in Afghanistan is broken. What is to be done? Naval War Coll Rev 64:103–126
Estreicher S (2012) Privileging asymmetric warfare (Part II)? The "proportionality" principle under international humanitarian law. Chic J Int Law 8:143–157
Georges KE (1913) Ausführliches lateinisch-deutsches Handwörterbuch. Hahnsche Buchhandlung, Hannover
Guisández Gómez J (2007) El principio de la proporcionalidad y los daños colaterales, un enfoque pragmático. In: Prieto Sanjuán R (ed) Conduccion de hostilidades y derecho

(Footnote 71 continued)
analogous with the identity of essence and existence in Przywara's Creator. Rancière's *heteron* is characterised by substitutability, which is another way of God's being 'in-and-beyond' in Przywara's text. The *heteron* is an unknowable third that is *semper major* just as Przywara's Creator. Perhaps Rancière's contribution is best encapsulated if we adjust the formula stipulated by the Fourth Lateran Council to read: 'between *demos* and *polis* there cannot be a likeness so great that the unlikeness is not greater'.

internacional humanitario: A propósito del centenario de las Convenciones de la Haya de 1907, Pontificia Universidad Javeriana/CEDI/Biblioteca Juridica, Bogotá, pp 223–238
Henderson I (2009) The contemporary law of targeting. Military objectives, proportionality and precautions in attack under Additional Protocol I. Martinus Nijhoff Publishers, Leiden
Henckaerts J-M, Doswald-Beck L (2005) Customary international humanitarian law. Cambridge University Press, Cambridge
Holland J (2004) Military objective and collateral damage: their relationship and dynamics. Yearb Int Humanit Law 7:35–78
Kantorowicz E (1957) The king's two bodies. A study in medieval political theology. Princeton University Press, Princeton
Kooijmans PH (1964) The doctrine of the legal equality of states. A.W Sijthoff, Leiden
Noll G (2008) Sacrificial violence and targeting in international humanitarian law. In: Engdahl O, Wrange P (eds) Law at war: The law as it was and the law as it should be. Liber Amicorum Ove Bring. Martinus Nijhoff Publishers, Leiden, pp 207–218
Orford A (2005) Trade, human rights and the economy of sacrifice. Leiden J Int Law 18:179–213
[Program on] Humanitarian Policy and Conflict Research at Harvard University (2009) Manual on international law applicable to air and missile warfare
[Program on] Humanitarian Policy and Conflict Research at Harvard University (2010) Commentary on the HPCR manual on international law applicable to air and missile warfare
Peters A (2009) Humanity as the A and Ω of sovereignty. EJIL 20:513–544
Pufendorf S (2003) The whole duty of man. Liberty Fund, Indianapolis
Przywara E (1932) Analogia entis. Metaphysik. Prinzip, volume 1. J. Kösel and F. Pustet, München
Przywara E (1962) Analogia entis. Metaphysik. Ur-Struktur und All-Rhythmus. Johannes-Verlag, Einsiedeln
Rancière J (2009) The aesthetic dimension: aesthetics, politics, knowledge. Crit Inq 36:1–19
Reidhav D (2007) Reasoning by analogy—a study on analogy-based arguments in Law. Faculty of Law, Lund University, Lund. http://en.scientificcommons.org/21998869. Accessed 1 Oct 2012
Schmitt MN (2007) The law of targeting. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC Study on Customary International Humanitarian Law. Cambridge University Press, Cambridge, pp 131–168
Schroden J (2011) Why operations assessments fail. It's not just the metrics. Naval War Coll Rev 64:89–102

Part II
Dutch Practice in International Law

Chapter 10
Dutch Courts and Srebrenica: Ascribing Responsibilities and Defining Legally Relevant Relationships

Aleksandar Momirov

Abstract This contribution addresses the legal developments leading up to two judgments rendered by the Dutch Supreme Court and the Court of Appeal in The Hague in two parallel litigations related to the tragic events in Srebrenica. Throughout these two proceedings, the Dutch judiciary has gradually been framing, in terms of law, the relationship between the Dutch UN battalion and the events in Srebrenica. In so doing, the proceedings before the Dutch courts add to the broader debate concerning the responsibilities – and the appropriate allocation thereof – of UN peacekeeping forces and contributing states. Owing to the underlying claims and the nature of the respondents, the courts in both cases have addressed two distinct legal issues. In *Mustafić/Nuhanović,* acts of Dutch soldiers operating under UN flag were attributed to the Netherlands, albeit on very narrow grounds, thereby limiting the possible spin-off of the judgment with respect to other proceedings. In the last stage of the *Mothers of Srebrenica* litigation where the UN was alleged to be responsible for failing to prevent genocide, immunity was upheld in its most absolute form by the Dutch Supreme Court. This contribution provides an overview of the procedural history of both cases and reflects on the main reasoning of the courts and the possible ramifications thereof.

Keywords Srebrenica · International organizations · Dutchbat · United Nations · Peacekeeping · Immunity · Attribution

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10.1 Introduction

July 2012 marked the 17th anniversary of the tragic events surrounding the Bosnian town of Srebrenica, which the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have qualified as genocide.[1] Various proceedings related to the events have been initiated before Dutch courts. In 2012, the Dutch judiciary adopted two judgments pertaining to the events in Srebrenica and the involvement of the Netherlands, i.e. the relationship between the Dutch UN Battalion (Dutchbat) and the fall of the enclave.[2] Throughout the two underlying proceedings, the Dutch judiciary has gradually been framing, in terms of law, the relationship between the Dutch UN battalion and the events in Srebrenica. Owing to the nature of the claims and the respondents, the courts in both cases have addressed two distinct legal issues. In *Mustafić/Nuhanović,* acts of Dutch soldiers operating under UN flag were attributed to the Netherlands, albeit on very narrow grounds, thereby limiting the possible spin-off of the judgment with respect to other proceedings. In the last instalment of the *Mothers of Srebrenica* litigation where the UN was alleged to be responsible for failing to prevent genocide, immunity was upheld in its most absolute form by the Dutch Supreme Court.

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[1] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007 (*Genocide Case*) and, amongst others, *Prosecutor v. Krstić,* Appeals Chamber, Judgment, Case No. IT-98-33, 19 April 2004 (*Krstić*).

[2] Supreme Court of the Netherlands, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* (10/04437, LJN: BW1999), First Division, Judgment, 13 April 2012 (*Mothers of Srebrenica cassation*), English translation available at http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf. Court of Appeal in The Hague, *M. c.s. v. the Netherlands,* (200.020.173/01, LJN: BW9014), Civil Law Section, Judgment, 26 June 2012 (*Mustafić incidental*).

This brief contribution addresses the manner in which domestic courts in the Netherlands have been dealing with the events in Srebrenica in the two above-mentioned parallel proceedings. First, the contours and procedural chronology of both proceedings are provided. Subsequently, several thorny legal issues – most importantly the issues of attribution and immunity – which meander throughout the proceedings are highlighted in the main part of this contribution. Finally, some concluding remarks are provided as to the ramifications of the way the Dutch judiciary has thus far been constructing a legally relevant relationship between the Netherlands and the events in Srebrenica.

10.2 Mapping the Proceedings

The shared factual backdrop to the two cases has been summarized by the ICTY:

> Srebrenica is a town in eastern Bosnia, which during most of the 1992-95 conflict was an enclave under the control of Bosnian Army, housing thousands of Bosnian Muslims from surrounding areas. Over a period of years, Bosnia Serbs besieged the enclave, frequently shelling it, while Bosnian forces operating from the enclave attacked surrounding Serb villages. … Srebrenica was declared a 'safe area' in 1993, a demilitarised zone under the protection UNPROFOR. In July 1995 Srebrenica was overrun by Serb forces. In the days following the take-over, members of Bosnian Serb Army and Police implemented a plan to kill more than 7,000 men and boys and expel the women and children from the enclave. The Tribunal found that the mass executions of Bosnian Muslim men and boys from Srebrenica constituted genocide.[3]

Within this setting, Dutchbat was deployed to demilitarize and protect the 'safe area'. In July 1995, when the situation on the ground escalated and the enclave was ran over by the Bosnian Serb Army, Dutchbat withdrew to its compound in Potočari at the outskirts of Srebrenica. A large number of the inhabitants of Srebrenica fled to the compound, some of them being allowed into the premises for shelter.

10.2.1 Nuhanović and Mustafić v. the Netherlands

The first string of judicial decisions belongs to two separate cases, which for all intents and purposes are the same and will be considered as one. The cases *Nuhanović* and *Mustafić* against the Netherlands relate to the death of three individuals, Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović. At the time, Mustafić was employed as an electrician by Dutchbat, while Ibro and Muhamed Nuhanović were respectively the father and brother of Hasan Nuhanović,

[3] ICTY, http://www.icty.org/sid/10913. (All websites last accessed 23 November 2012, unless stated otherwise).

a Dutchbat employed interpreter. Together with a selected group of people, these three individuals were allowed into the premises of the Dutch compound in Potočari when Srebrenica was taken over by the Bosnian Serb Army. Once the situation became unmanageable, it was decided to evacuate the compound. Under slightly different circumstances, Dutchbat compelled the three individuals to leave the compound which resulted in their subsequent deportation and death. Surviving relatives brought claims against the Netherlands, arguing that the state committed a wrongful act by compelling the individuals to leave the compound and that therefore the state should be held liable for their ensuing death.

In 2008, the District Court in The Hague denied these claims in first instance on the ground that the acts of Dutchbat are attributable to the UN rather than to the state of the Netherlands.[4] In 2011, the Court of Appeal in The Hague quashed both judgments. In the watershed appeals judgments, the Court of Appeal attributed the actions of Dutchbat to the Netherlands and found that they were wrongful under Bosnian law.[5] These judgments were not final as an incidental procedure was ongoing in which the appellants claimed that their fair trial rights were breached by the replacement of a District Court judge.[6] In 2012, the Court of Appeal in The Hague rendered its final judgment.[7] It dismissed the claims relating to the alleged breach of fair trial rights and ruled that the state is liable for the damages resulting from the established wrongful acts. The 2012 judgment finalized this stage of the proceedings and opened the door for the state to institute an appeal in cassation with the Dutch Supreme Court. In June 2012, the Dutch Ministry of Defense confirmed that it will be filing for appeal in cassation, arguing that Dutchbat was part of the UN Forces in Bosnia (UNPROFOR) and that the acts of Dutchbat should be attributed to the UN.[8]

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[4] District Court in The Hague, *H.N. v. the Netherlands*, (265615/HA ZA 06-1671, LJN: BF0181), Civil Law Section, Judgment, 10 September 2008 (*Nuhanović*); District Court in The Hague, *M.M.-M., D.M. and A.M. v. the Netherlands,* (265618/HA ZA 06-1672, LJN: BF0182), Civil Law Section, Judgment, 10 September 2008 (*Mustafić*). English translations available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0181 and http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0182 respectively.

[5] Court of Appeal in The Hague, *Hasan Nuhanović v. the Netherlands,* (200.020.174/01, LJN: BR5388), Civil Law Section, Judgment, 5 July 2011 (*Nuhanović appeal*) and Court of Appeal in The Hague, *Mehida Mustafić-Mujić, Damir Mustafić and Alma Mustafić v. the Netherlands,* (200.020.173/01, LJN: BR5386), Civil Law Section, Judgment, 5 July 2011 (*Mustafić appeal*). English translations available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388 and http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386 respectively.

[6] *Nuhanović appeal*, paras. 8.1-8.5.

[7] *Mustafić incidental*.

[8] NRC, *Staat in cassatie tegen uitspraak Srebrenica-zaak* (State appeals in cassation against Srebrenica-case judgment), 26 June 2012, at http://www.nrc.nl/nieuws/2012/06/26/staat-in-cassatie-tegen-uitspraak-srebrenica-zaak/.

10.2.2 *Mothers of Srebrenica Association et al. v. the Netherlands and the United Nations*

In the second case, the association 'Mothers of Srebrenica' and ten individuals brought a claim against the Netherlands and the UN. Compared to the *Mustafić/Nuhanović* proceedings, this claim is broader as it alleges responsibility on the side of the Netherlands *and* the United Nations – jointly and severally – and as it relates to the overall mandate of Dutchbat and the failure to prevent genocide rather than the relationship between Dutchbat and particular individuals.

In 2008, the District Court in The Hague rejected the claims against the UN finding that it lacked jurisdiction.[9] The Court of Appeal upheld the judgment of the District Court.[10] In 2012, the Supreme Court of the Netherlands dismissed the appeal in cassation, and restated that in the current proceedings the Dutch judiciary has no jurisdiction *vis-à-vis* the UN.[11] At the time of writing, a first instance judgment regarding the claims against the Netherlands was still pending.

10.3 Two Srebrenica Proceedings: Points of Overlap and Divergence

The two parallel Srebrenica proceedings are jointly part of at least three distinct endeavours. First, from a Dutch politico-historical perspective, the proceedings play a crucial role in completing what is generally considered a stain on contemporary Dutch history. Political responsibility was accepted in 2002 when the Dutch government resigned[12] following the publication of a government commissioned report (NIOD Report) partially blaming the Dutch government for the fate of the Srebrenica 'safe area'.[13] However, as is illustrated by the refusal of two cabinet ministers to offer apologies after the *Mustafić/Nuhanović* appeals judgment

[9] District Court in The Hague, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*, (2995247/HA ZA 07-2973, LJN: BD6796), Civil Law Section, Judgment in the incidental proceedings, 10 July 2008 (*Mothers of Srebrenica*). English translation available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BD6796.

[10] Court of Appeal in The Hague, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* (200.022.151/01, LJN: BL8979), Commerce Section, Judgment, 30 March 2010 (*Mothers of Srebrenica appeal).* English translation available at http://www.asser.nl/upload/documents/20120420T023804-Decision%20Court%20of%20Appeal%2030%20March%202010%20%28English%29.pdf.

[11] *Mothers of Srebrenica cassation.*

[12] The Guardian, *Dutch cabinet resigns over Srebrenica massacre*, 17 April 2002, at http://www.guardian.co.uk/world/2002/apr/17/warcrimes.andrewosborn.

[13] Netherlands Institute for War Documentation, *Srebrenica, a 'safe' area – Reconstruction, background, consequences and analyses of the fall of a safe area,* Report, 10 April 2002, at http://www.srebrenica.nl/Pages/OOR/23/379.bGFuZz1OTA.html.

as long as the matter continues to be subject of ongoing legal proceedings, there is a need for further legal qualification of the relationship between Dutchbat and the Srebrenica events.[14] Second, the two Dutch cases are amongst the numerous legal proceedings before international and domestic legal bodies through which justice is sought for the Srebrenica victims. Serbian and Bosnian courts and the ICTY have, in terms of criminal law, rendered various judgments through which they have individualized criminal responsibility for the massacres in Bosnia, while the ICJ considered the responsibilities of neighboring Serbia and Montenegro.[15] Finally, the Srebrenica proceedings illustrate the debate on and further the development of several international legal issues. These issues include the overall question of accountability of international organizations, especially in a conflict-related context, the allocation of responsibilities between international organizations and states and the friction between human rights and immunities enjoyed by international organizations.[16]

These abstract issues translate into the following two questions in terms of the Srebrenica cases: can the acts of Dutchbat be attributed to the Netherlands, the UN or both, and what is the extent of the immunities enjoyed by the UN before Dutch courts? The former question is central to the *Mustafić/Nuhanović* litigation, while the latter is tackled in the *Mothers of Srebrenica* proceedings. The following sections revisit the main considerations by the Dutch lower instance courts and look at the significance of the 2012 judgments rendered by the Court of Appeal and the Supreme Court in The Hague.

10.3.1 Attribution

In 2012, the Court of Appeal confirmed that under the circumstances of the *Mustafić/Nuhanović* case, certain acts of Dutchbat were wrongful and attributable to the Netherlands.[17] The 2012 judgment as such does not provide any new insights into the matter; its significance is more of a procedural nature as it opened the door for cassation. The judgment upholds the reasoning of the 2011 Court of Appeal judgments, which some authors have labeled as potentially 'ground-breaking rulings'.[18] Overall, however, the upheld reasoning rests on certain case-

[14] NRC, *Staat in cassatie tegen uitspraak Srebrenica-zaak* (State appeals in cassation against Srebrenica-case judgment), 26 June 2012, at http://www.nrc.nl/nieuws/2012/06/26/staat-in-cassatie-tegen-uitspraak-srebrenica-zaak/.

[15] For an overview of several proceedings before Serbian and Bosnian courts relating to Srebrenica, see for example http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956. See further ICJ, *Genocide case*.

[16] See Momirov 2011; Zwanenburg 2005.

[17] *Mustafić incidental*, para. 2.1.

[18] Nollkaemper 2011, at 1144. For a discussion on the *Mustafić/Nuhanović* proceedings, see also Bouting 2012.

specific factors, limiting the possible application of this reasoning to other cases, most notably the second leg of the *Mothers of Srebrenica* litigation which concerns the Netherlands, where the question of attribution is bound to resurface.

First, the claims underlying *Mustafić/Nuhanović* relate to the very specific relationship which existed between Dutchbat and the individuals who were compelled to leave the premises of Dutchbat. This relationship emanates from acts of Dutchbat by which the individuals were essentially handed over to the Bosnian Serb Army.[19] In fact, the Court explicitly clarified that it 'does not need to give an opinion on the position of the refugees that were staying outside the compound or the other refugees inside the compound'.[20] These conditions allowed the Court to avoid an assessment of the overall extent of responsibilities of Dutchbat as a peacekeeping mission *vis-à-vis* Srebrenica and its population.[21]

Secondly, the specific claims enabled the Court to consider the fundamentally changed nature of Dutchbat's mission once Srebrenica had fallen. As of the moment the enclave was taken over, the main purpose of the peacekeeping mission's mandate had become obsolete and Dutchbat's main task shifted to evacuation.[22] As the Court pointed out, it 'attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate'.[23] The distinction made by the Court also limits the possible implications of this judgment with respect to any other proceedings dealing with a 'situation in which troops placed under the command of the UN normally operate'.[24]

Finally, the allegations of the plaintiffs were based on international and domestic law.[25] The Court held that 'it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina.'[26] Consequently, the Court primarily looked at the Act

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[19] *Nuhanović appeal*, para. 3.1: '(i) the State (Franken) refused to place Muhamed Nuhanovic on the list of local personnel, (ii) the State sent Muhamed Nuhanovic and consequently Ibro Nuhanovic away from the compound'.

[20] Ibid., para. 6.11.

[21] Ibid., paras. 6.1. and 6.3.

[22] Ibid., paras. 5.11-5.18. See also Nollkaemper 2011, at 1150.

[23] *Nuhanović appeal*, para. 5.11.

[24] Ibid.

[25] Ibid., para. 6.2. 'According to Nuhanovic, the State acted contrary to the following standards: articles 154, 173, 157 and 182 Act on Obligations of Bosnia and Herzegovina; articles 2, 3 and 8 ECHR and (as the Court understands: in particular) articles 6 and 7 of the ICCPR; art. 1 Genocide Convention; – common article 1 of the Geneva Conventions; the specific instruction by General Gobillard to Dutchbat [to] "take all reasonable measures to protect refugees and civilians in your care"; – the Resolution of the Security Council that ordered Dutchbat "to deter by presence"(the Court assumes this refers to: Resolution 836) and Standing Operating Procedure 206 and 208.'

[26] Ibid., para. 6.3, related to the relevant Dutch law, namely 'Wet van 11 april 2001 houdende regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad' (Bill on Conflicts of Law in Tort), Stb 2001, 190, Art. 3(1).

on Obligations of Bosnia and Herzegovina in determining the wrongfulness of the acts and in establishing the liability 'for immaterial damage which Nuhanovic has suffered consequently and will possibly yet suffer'.[27] Furthermore, the Court held that based on Article 3 of the Constitution of Bosnia and Herzegovina, the International Covenant on Civil and Political Rights (ICCPR) has direct effect.[28] In so doing, it did not have to address the complexities of applying these international legal instruments to UN peacekeeping missions where no such direct effect is envisaged, or to tackle legal hurdles such as extraterritorial application of human rights norms.

Recalling these specific circumstances, the Court of Appeal held that 'effective control' should be the criterion on the basis of which attribution should be decided. The Court invoked the International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO), in particular Article 6 (current Article 7) thereof, as the basis of its judgment.[29] The Court thereby dismissed the 'command and control' standard as applied by the District Court, and concluded that

> Dutchbat was placed under the command of the United Nations. Whether this also implies that 'command and control' had been transferred to the UN, and what this actually means, can remain an open question because, as will appear hereafter, Nuhanovic is right in asserting that the decisive criterion for attribution is not who exercised 'command and control', but who actually was in possession of 'effective control'.[30]

The Court went on to establish that under the given conditions, based on various 'decisions and instructions' of the Dutch Government, the Netherlands indeed had effective control.[31] In interpreting the range of the 'effective control' standard, the Court added that significance should not only

> be given to the question whether [particular] conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned.[32]

Thus, the Court engages in allocating the appropriate responsibility to the appropriate entity. In so doing, it places an emphasis on the actual conduct of an

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[27] *Nuhanović appeal*, para. 6.20.

[28] Ibid., para. 6.4. The Court also looked at the European Convention on Human Rights (ECHR) and the ICCPR on the basis of their customary law status. For a commentary on the implications thereof, see Dannenbaum 2011.

[29] International Law Commission, Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission on the Work of its Sixty-third Session, UN Doc. A/66/10, 26 April-3 June and 4 July-12 August 2011.

[30] *Nuhanović appeal*, paras. 5.7-5.8.

[31] Ibid., paras. 5.19-5.20.

[32] Ibid., para. 5.9.

entity in a given situation – in this case, the state – rather than the existence of a legal basis upon which a certain entity could possibly act.[33] The Court points out, 'it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.'[34] This possibility of dual (and mutually independent) attribution is in sharp contrast to the dismissed reasoning of the District Court, where it was held that '[a]ttribution of acts and omissions by Dutchbat to the United Nations … *excludes* attribution of the same conduct to the State.'[35]

As a matter of comparison, the issue of attribution was left untouched *in toto* under similar circumstances in the 2004 UK landmark case *Bici v. Ministry of Defence*.[36] In this case, a British Court was asked to decide on civil claims concerning the conduct of UK military personnel serving in Kosovo under UN flag. The claims were made by Mohamet and Skender Bici, one of whom suffered physical injury, while the other suffered psychiatric illness as a consequence of the events. It was the first time that claims for compensation had been made with regard to British peacekeepers. On the basis of Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, the parties had agreed that

[33] See also Nollkaemper 2011, at 1149 and 1152. A similar reasoning was applied recently by the European Court of Human Rights (ECtHR) in *Nada v. Switzerland* where the question was whether certain acts of Switzerland pursuant to a UN Security Council Resolution should be attributed to the state or the UN, see *Nada v. Switzerland,* ECtHR, No. 10593/08, 12 September 2012 (*Nada*). For a sharp analysis of the attribution-related issues that the Strasbourg Court faced in *Nada*, see Sarvarian 2012.

[34] *Nuhanović appeal,* para. 5.9. 'The question whether the State had "effective control" over the conduct of Dutchbat which Nuhanovic considers to be the basis for his claim, must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned. Moreover, the Court adopts as a starting point that the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised "effective control" over the alleged conduct and will not answer the question whether the UN also had "effective control". When it comes to shared responsibilities amongst states and the issue of attribution, see for example European Commission on Human Rights, *Ilse Hess v. United Kingdom*, No. 6231/73, Decision on Admissibility, 28 May 1975. The illustrative case concerns the detention of former "deputy Führer" Rudolf Hess in the jointly administered Allied Military Prison in Berlin. A claim was filed against the United Kingdom alleging a violation of Articles 3 and 8 European Convention on Human Rights. In this particular case it was concluded, on page 74, that the administration of the prison was "*at all times quadripartite*". Ultimately, the Commission held that "*the United Kingdom acts only as a partner in the joint responsibility*" and that "the joint authority cannot be divided into four separate jurisdictions".' (Emphasis added).

[35] *Nuhanović*, para. 4.13 (emphasis added). With respect to 'dual attribution', see Nollkaemper 2011, para. C.

[36] The United Kingdom, Court of Appeal – Queen's Bench Division, *Bici & Anor v. Ministry of Defence*, [2004] EWHC 786 (QB), 7 April 2004.

English law should be applied to determine liability. As the judgment explicitly stated, 'the defendant … conceded that it is vicariously liable for any wrongs committed by any of the soldiers. The Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N.'[37] Instead of invoking the attribution-argument, the UK presented 'combat immunity' as the primary defense. The Court dismissed that argument and found that the British Ministry of Defence was liable for negligence and trespass after British soldiers shot and killed two men while injuring two other persons.

In sum, in 2012 the Court of Appeal in The Hague upheld a groundbreaking, yet very context-determined judgment in the *Mustafić/Nuhanović* proceedings by which acts of Dutchbat soldiers were at least attributable to the Netherlands. Dutchbat was found to have acted wrongfully under Bosnian civil law, and the Netherlands was found liable for immaterial damage.[38] By attributing at least some acts to the Netherlands, the Dutch Court indirectly pierced the veil of immunity which generally coats activities of UN peacekeeping troops, and which proved to be crucial in the *Mothers of Srebrenica* case as discussed below.

10.3.2 Immunity of the UN

The second issue central to the Srebrenica proceedings relates to the immunity of the UN, one of the respondents in the *Mothers of Srebrenica* case. In this two-tiered case, the Dutch Supreme Court rendered its judgment in 2012 with respect to the UN, whereas a first instance judgment concerning the second respondent, the Netherlands, remains pending. The Supreme Court reaffirmed the UN's immunity before Dutch courts by applying a reasoning which goes beyond the dismissed Appeal Court ruling. This section considers, chronologically, the way in which the Dutch judiciary has interpreted the extent of UN immunity through the *Mothers of Srebrenica* case. The 2012 judgment does not reverse in any significant manner the appeal judgment; all relevant judgments uphold the immunity of the UN, albeit for different reasons.

At the core of the litigation lies the discussion whether, and if so under which conditions, UN immunity before national courts is subject to limitations. This immunity is in principle governed by the Convention on Privileges and Immunities of the United Nations (General Convention), which builds on the immunity provided to the UN by Article 105 of the Charter. Article II, Section 2 of the General Convention grants the UN 'immunity from every form of legal process'.[39]

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[37] Ibid., para. 2.

[38] *Nuhanović appeal*, para. 6.20.

[39] 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15 (General Convention) Article II, Section 2. Article 105 of the UN Charter states in pertinent part that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.'

The rationale behind UN immunity rests on the need for an indispensable shield against 'unilateral interference by individual governments'.[40] Although this jurisdictional immunity is grounded in functional necessity, that is granting the organization 'such privileges and immunities as are necessary for the fulfillment of its purposes', the provisions in the General Convention are generally interpreted widely so as to confer absolute immunity on the UN and its subsidiary bodies.[41] The General Convention does provide for immunity to be waived under certain conditions[42] and, when waiver is not granted by the Secretary-General, calls in Section 29 for alternative dispute settlement mechanisms to be established.[43]

In 2008, the District Court ruled that it lacks jurisdiction to hear the claims against the UN. The Court pointed out that the UN, through a letter sent to the Dutch permanent representative to the UN, explicitly invoked immunity in this case and that Article 105 of the UN Charter leaves no space for domestic courts to restrict this immunity.[44] The Court also dismissed the plaintiffs' argument that, as no alternative mechanisms pursuant to Section 29 of the General Convention have been established, such an all-encompassing understanding of immunity would be incompatible with the right to an effective remedy, as part of the broader family of fair trial rights protected by the ICCPR (Art. 14) as well as regional documents such as the American Convention on Human Rights (Art. 8) and the ECHR (Art. 6).[45] The Court acknowledged that such a human rights-based approach has incidentally resulted in the limitation of immunities of international organizations by international courts, as for example by the ECtHR in *Waite and Kennedy v. Germany,* but ruled that this test did not apply in case of the UN.[46]

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[40] *Waite and Kennedy v. Germany*, ECtHR No. 26083/94, 18 February 1999, para. 63 (*Waite and Kennedy*).

[41] General Convention, preamble. See also Reinisch and Weber 2004, at 60, footnote 5.

[42] Ibid., Article II, Section 2. The decision on whether immunity should be waived is taken, on a case-by-case basis, by the Secretary-General who has the 'right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice', see General Convention, Article V, Sections 20 and 23.

[43] General Convention, Article VIII, Section 29. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion, 29 April 1999, paras. 50-61 (*Cumaraswamy*).

[44] *Mothers of Srebrenica*, para. 5.14 and 5.16.

[45] The right to access to court is implied in these documents and has been recognized by the ECtHR as implicit to Art. 6 ECHR in *Waite and Kennedy*, para. 50, upholding the court's previous case law. Although ECtHR case law recognizes that these rights can be restricted by immunity, this restriction needs to pursue a legitimate aim and has to be proportionate. See, *Al-Adsani v. the United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, paras. 52-67 (*Al-Adsani*).

[46] *Mothers of Srebrenica*, para. 23. The ECtHR in *Waite and Kennedy* ruled in para. 68 that 'a material factor in determining whether granting [the European Space Agency] immunity from German jurisdiction is permissible under the [ECHR] is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'. In two other decisions, the ECtHR and the European Court of Justice, respectively, embraced similar lines of reasoning. See, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v.*

The Court of Appeal in 2010 upheld the judgment, and restated its basic tenet, namely that 'article 105 of the Charter, does not allow any other interpretation than that the UN has been granted the most far-reaching immunity'.[47] However, the Court of Appeal dismissed the District Court's reasoning that criteria such as the ones established in *Waite and Kennedy* – for immunity to be permissible it should serve a legitimate goal, be proportionate and that adversely affected parties should have access to reasonable alternative mechanisms – do not apply in relation to the UN. Rather, 'the Court of Appeal believes that article 103 of the Charter does *not* preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR.'[48] The Court went on to apply these standards and found that in this particular context, immunity 'is closely connected to the public interest pertaining to keeping peace and safety in the world [and] that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.'[49] The Court found that the failure to prevent genocide – the pertinent claim in this respect – is 'insufficient in principle to waive [immunity] from prosecution.'[50] In allowing, at least in principle, for the *Waite and Kennedy* criteria to be applied to the immunity of the UN, the Court of Appeal expanded the reach of these criteria to the UN; an expansion of the criteria which the Supreme Court would later dismiss.

With respect to the last factor, namely whether or not alternative mechanisms exist, the Court somewhat unconvincingly argued that numerous alternatives are at the disposal of the plaintiffs. It pointed out that the Mothers of Srebrenica have access to courts with respect to 'what happened in Srebrenica', but only in relation to entities other than the UN, namely the state and the perpetrators of genocide.[51] This reasoning only partially holds water. It suggests that, for example, the criminal legal proceedings against individual perpetrators before a domestic court could in some way inform the decision on whether or not to uphold or limit the immunity of the UN in a particular case relating to the same events. It disregards the fact that the General Convention links the privileges and immunities of the UN with an obligation for the UN itself to establish alternative mechanisms, which would address the possible wrongdoings of the UN, rather than any other actors. A similar sentiment was reflected in the Advocate General's advisory opinion in the subsequent cassation proceedings. Here the Advocate General, in relation to Section 29 of the General Convention, referred to several mechanisms established by the UN and *vis-à-vis* the UN in the context of peacekeeping, while leaving out

(Footnote 46 continued)
Ireland, ECtHR, No. 45036/98, 30 June 2005 and Joined Cases C-402 and 415/05P, *Kadi & Al Barakaat International Found. v. Council of the European Union & Commission of the European Communities* [2008], ECR I-6351.

47 *Mothers of Srebrenica appeal*, para. 4.2.

48 Ibid., para. 5.2-5.5 (emphasis added).

49 Ibid., para. 5.7.

50 Ibid., para. 5.10.

51 Ibid., para. 5.11-5.13.

all other possible avenues of recourse which the Court of Appeal seemed to rely on.[52] *En passant*, the Court did add that 'it regrets' the UN itself has not provided for alternative mechanisms in accordance with the obligations set forth in Section 29 of the General Convention.[53] Ultimately, the Court upheld the first instance ruling in terms of the final outcome, but based on its own reasoning as to the issue of immunity, which includes the application of the criteria as developed by the ECtHR.[54]

In 2012, the Dutch Supreme Court did not only uphold the immunity of the UN, it seemingly reinforced the quasi-absolute nature of the immunity by dismissing the Appeal Court's reasoning as described above. Owing to the special nature of the UN, the prevalence of UN Charter-based obligations pursuant to Article 103 of the UN Charter and referring to the *Behrami* decision of the ECtHR, the Supreme Court dismissed the notion that UN immunity should be subjected to the *Waite and Kennedy* test by holding unequivocally that UN 'immunity is absolute'.[55] In so doing, the Court opted not to engage in the increasingly accepted balancing act in which upholding immunity of an international organization is made dependent on certain human rights factors, in particular on the right to access to court.[56] The gravity of the underlying claims is also dismissed as a possible limitation to immunity. Here, the Court first generously cites the Mothers of Srebrenica's writ of summons in cassation.

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[52] Advocate General's advisory opinion, para. 2.12-2.16.

[53] *Mothers of Srebrenica appeal*, para. 5.11-5.13. At the UN level, various options have been considered in order to establish an organization-wide alternative mechanism, amongst others the establishment of a UN Ombudsperson.

[54] See also Brockman-Hawe 2010 and Henquet 2010.

[55] *Mothers of Srebrenica cassation*, paras. 4.3.4-4.3.6. See also, *Behrami and Behrami v. France,* ECtHR, No. 71412/02, 2 May 2007.

[56] The existence of alternative mechanisms – or lack thereof – has been the driving force behind a developing line of reasoning used by courts and tribunals to deal with the immunity of international organizations. According to this approach, courts have jurisdiction over international organizations in the field of human rights protection as long as these organizations do not provide for a level of human rights protection equivalent to that of the legal order within which the court dealing with the case operates. This means that the validity of the immunity-defense will depend on the availability of alternative mechanisms through which disputes can be resolved i.e. human rights can be protected, see e.g. Germany, Federal Constitutional Court, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 37 BVerfGE 271, 29 May 1974 in 2 *Common Market Law Review* 540 (*Solange I*); *Re application of Wünsche Handelsgesellschaft*, 73 BVerfGE 339, 22 October 1986 in 3 *Common Market Law Review 225* (*Solange II*) and *Brunner et al. v. The European Union Treaty*, 89 BVerfGE 155, 12 October 1993 in 1 *Common Market Law Review* 57 (*Solange III*). See also Belgium, Brussels Court of Appeal, *Lutchmaya v. Secrétariat général du Groupe des États d'Afrique, des Caraïbes et du Pacifique*, Journal des Tribunaux 2003, 684, 4 March 2003. This line of argument was subsequently mirrored by *e.g.* Switzerland, Federal Supreme Court, *Consortium X v. Switzerland*, BGE 130 I 312, 2 July 2004 and France, Court of Cassation, *La Banque Africaine de Développement v. Mr X*, 04-41012, 25 January 2005.

> There is no higher norm in international law than the prohibition of genocide. This norm in any event takes precedence over the other norms at issue in this legal dispute. The enforcement of this norm is one of the main reasons for the existence of international law and for the most important international organisation, the UN. This means that in cases of failure to prevent genocide, international organisations are not entitled to immunity, or in any event the prohibition should prevail over such immunity. The view that the UN's immunity weighs more heavily in this instance would mean de facto that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by the appeal court is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights.[57]

By referring to *Al-Adsani* where the claims underlying the case related to a violation of the prohibition of torture, also a norm of *ius cogens,* the Court dismissed this ground of appeal.[58] Also, the Supreme Court judgment is probably amongst the first to embrace the 2012 ICJ judgment in *Jurisdictional Immunities of the State* in this respect. As referred to by the Supreme Court, the ICJ considered the breach of *ius cogens* norms and reasoned that

> there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[59]

Thus, in accepting this dichotomy between the two categories of norms, the Dutch Supreme Court endorsed the outcome of the appealed judgment while reversing the reasoning behind it.

10.4 Concluding Remarks

In 2012, the Dutch Supreme Court embraced an absolute understanding of the scope of immunity enjoyed by the UN, thereby definitively dismissing the claims of the Mothers of Srebrenica association against the UN before Dutch courts. In a parallel proceeding, the Court of Appeal ruled that certain acts of Dutchbat, wrongful under Bosnian law, were attributable to the Netherlands. Whereas the unequivocal Supreme Court judgment brought an end to the longstanding *Mothers of Srebrenica* litigation, the Court of Appeal judgment opened the door for the final stage of the *Mustafić/Nuhanović* proceedings.

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[57] Ibid., para. 4.3.7.

[58] Ibid., paras. 4.3.8-4.3.9.

[59] *Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening), ICJ, Judgment of 3 February 2012, para. 93 (*Jurisdictional immunities*).

Both proceedings deal with the tragic events in Srebrenica. In terms of law, they reflect the legal complexities surrounding the attempts of Srebrenica-survivors to legally frame the relationship between what happened in Srebrenica and the acts and omissions of the Dutch UN battalion. From the perspective of holding the UN and/or the Netherlands accountable, the proceedings fit the broader debate on how and to what extent notions related to the rule of law are applicable to activities of the UN. The courts address the usual hurdles in this respect, pertaining to the issues of attribution and immunities. In terms of effect, the ramifications of both judgments are limited at best. In the *Mothers of Srebrenica* proceedings, the Supreme Court seems to be loyal to a fault to a rigid understanding of immunity by dismissing the possibility which was left open by the second instance judgment by which the immunity of the UN could be curbed under very specific circumstances. The Supreme Court judgment proved that the Court of Appeal overreached when it argued for the limitation of UN immunity. Considering this judgment, and with little to no alternative mechanisms at hand, it can be argued that the accountability system surrounding the UN remains troublesome – especially in the light of the relevant provisions of the General Convention which mandate the establishment of mechanisms for recourse and redress. In *Mustafić/Nuhanović*, the attribution of Dutchbat acts to the Netherlands, unless overruled on appeal in cassation, may be considered a groundbreaking development, the effects of which, however, are not likely to spread far due to the extremely narrow context-determined reasoning underlying the judgment.[60] At the same time, accepting the possibility that attribution to one entity does not necessarily exclude attribution of the same acts to another entity might prove to be a window of opportunity for subsequent cases dealing with multiple actors exercising public powers at the international level.

References

Bouting B (2012) Responsibility of the Netherlands for the acts of Dutchbat in Nuhanović and Mustafić: the continuous quest for a tangible meaning for 'effective control' in the context of peacekeeping. Leiden J Int Law 25:521–535

Brockman-Hawe B (2010) Questioning the UN's immunity in the Dutch courts: unresolved issues in the Mothers of Srebrenica litigation. Wash Univ Glob Stud Law Rev 10:727–748

Dannenbaum T (2011) The Hague Court of Appeal on Dutchbat at Srebrenica part 1: a narrow finding on the responsibilities of peacekeepers. http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-1-a-narrow-finding-on-the-responsibilities-of-peacekeepers/. Accessed 23 Oct 2012

[60] Already with respect to the remaining leg of the Mothers of Srebrenica litigation, where the possible liability of the Netherlands is still to be determined in first instance, the Mustafić/Nuhanović reasoning will not be applicable due to the differing nature of the claims. However, the possibility of prosecuting Thom Karremans, Dutchbat commander in 1995, by the Dutch Prosecution Service has been announced as a possible adjunct effect of the ruling, *see* ANP, *Vervolging Karremans dichterbij* (Prosecution Karremans closer), 9 May 2012.

Henquet T (2010) International organisations in the Netherlands: immunity from the jurisdiction of the Dutch courts. Neth Int Law Rev 52:267–301

Momirov A (2011) Accountability of international territorial administrations: A public law approach. Eleven International Publishing, The Hague

Nollkaemper A (2011) Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica. J Int Crim Justice 9:1143–1157

Reinisch A, Weber UA (2004) In the shadow of *Waite and Kennedy*. The jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement. Int Organ Law Rev 1:59–110

Sarvarian A (2012) *Nada v. Switzerland:* the continuing problem of attribution of conduct taken pursuant to Security Council resolutions. http://www.ejiltalk.org/nada-v-switzerland-the-continuing-problem-of-attribution-of-conduct-taken-pursuant-to-security-council-resolutions/#more-5687. Accessed 23 Oct 2012

Zwanenburg M (2005) Accountability of peace support operations. Nijhoff, Leiden

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