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The International Legal Order

Benedict Kingsbury
New York University

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Program in the History and Theory of International Law

Directors: Benedict Kingsbury and Martti Koskenniemi

Institute for International Law and Justice

New York University School of Law

40 Washington Square South, VH 314

New York, NY 10012

Website: www.iilj.org

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THE INTERNATIONAL LEGAL ORDER

Benedict Kingsbury

Controversiae (disputes) is the first word in book I of Hugo Grotius' foundational text *De Jure Belli ac Pacis* (The Law of War and Peace, 1625). Much modern scholarship in international law has followed this strand of Grotius' thought in orienting the subject to the problem of managing disputes. Since the late nineteenth century, generations of leading scholar-practitioners have shaped a view of international law which emphasizes legal doctrines and materials related to disputes: the specific rules one party to a dispute may invoke against another, the sources (e.g. treaty, custom) to which an international court will look to identify international law rules, the general principles (e.g. acquiescence, abuse of rights) that international courts have borrowed from national legal systems to help deal with international cases, the foundational principles of international law (e.g. state responsibility) enunciated by courts, the precedential implications of a specific decision or a specific settlement agreement. This focus owes much to the sociological model of the successful international lawyer as it developed in the English and French traditions of international law over the past century: that of the academically respected practitioner, primarily the world-wise professor-counsel or the erudite lawyer-civil servant, whose career involved both scholarship and representing litigants in the management of disputes, and might eventually culminate in becoming a judge or arbitrator in an international tribunal and an author of learned general courses and essays. Naturally these scholar-practitioners are committed also to the enunciation of general norms and the assertion of community values. But the interwoven practice and scholarship of settlement of international disputes has tilted the subject toward specific questions of whether one state has become bound by a particular rule which the other state may invoke (the question of opposability of particular norms between the parties), and away from what might otherwise have been an overwhelming preoccupation with the construction of a global normative order. Similarly, a focus on dispute settlement gives higher priority to solving bilateral problems than to vindicating other kinds of community interest. It has tended also to encourage legal-positivist scholarship that emphasizes materials already generated by recognized sources of law (treaties, the custom-creating legal practice of relevant actors, judicial decisions, scholarly opinions, and so on), and strictly separates statements of the *lex lata* from suggestions for reform *de lege ferenda*.

The English-French dispute settlement-focused model and its accompanying practice-inspired positivist jurisprudence never took hold as strongly in the United States. Many imbued with Wilsonian or New Deal ideals invested themselves in constructing or writing about

international institutions as means not simply of dispute settlement but of problem-solving more generally (Kennedy, 1987). The jurisprudential ideas influencing these problem-solvers in the period between the Wilson and Truman administrations were above all those of American legal realism, emphasizing the role of policy in framing law and producing legal decisions. Upon this platform, Myres McDougal and others built the New Haven ‘policy science’ approach to international law, which repudiated the positivist notion of law as a body of rules and sought instead to systematize the different tasks of lawyers as decision-specialists in a process of authoritative decision aimed at clarifying and implementing the community interest in world public order. Abram Chayes and others sought to develop a less prescriptive account of international law as process. While the pragmatic problem solving agenda, with its interdisciplinary view of relevant materials and its more explicit engagement with policy and politics, has been widely influential, the distinctive jurisprudential theories underpinning it in the United States have not been broadly accepted elsewhere. The dominant jurisprudential approach to the global practice of international law continues to be positivist. But it is a positivism attenuated by the pragmatic needs to ameliorate disputes, ensure international institutions can operate effectively, and respond to demands of global governance. To adherents of this approach, the positivist state-centered system is increasingly stretched and strained, but neither in theory nor in practice has it been displaced by another. Its resilience has been greater than expected because in international law, practice continues to shape theory, and deeply embedded theory continues to shore up practice.

The task of this paper is to assess major themes and approaches in the recent scholarship of international law, and to identify likely future directions and problems. It proceeds from the starting-point that the Anglo-French focus on dispute settlement and litigation, and the US focus on managerial problem-solving, are manifestations of a recurrent feature of international law writing since two of its founding scholar practitioners, Alberico Gentili (1552-1608) and Grotius (1583-1645). This feature is the nexus between the aspirations of scholarship to engage closely with practice, and of practitioners to work within the frameworks transmitted through scholarship.

The problem of how to contribute at once to practice and theory has been central in defining both the scholarly discipline of international law and some of the main lines of debate within it. The work of Martin Wight, Hedley Bull, and other leaders of the ‘English School’ of international relations theory (Butterfield and Wight, 1966) distinguishes Hobbesian realism, Grotian rationalism, and Kantian cosmopolitanism as three distinctive approaches whose interplay captures much of the history of Western ideas about international politics. The three

approaches elucidated by the ‘English school’ can be mapped to three different views of the relations between theoretical inquiry in international law and the legal practice of relevant actors. A realist approach emphasizes consistency with practice as the criterion for assessing good theory, and in developing theory seeks to approximate the understandings or behavior of relevant decision-makers. A Grotian approach seeks to temper theory with practice, and practice with theory. As Wight put it, Grotian international law ‘sings a kind of descant over against the movement of diplomacy’ (Butterfield and Wight, 1966: 29). A normative cosmopolitan approach holds out the possibility of remaking the world through theory: in a sense, theory is practice (Allott, 2001).

It will be argued that the specific focus on disputes and on third-party settlement, with its associated positivist theory, has dovetailed with broader problem-solving approaches in encouraging the development of several useful legal concepts (Sect. 1), but that the dominant positivist theoretical structure that has held international legal practice together now encounters so many internal critiques and external challenges (Sect. 2) that its viability is seriously in question, unless it can be deepened and renovated (Sect. 3). A proposal for rethinking the concept of international law will be outlined in summary fashion (Sect. 4). It will be argued that the Grotian integration of theory and practice is a valuable and distinctive feature of international law, that there are ethical arguments for the predominant positivist positions which this problem-solving engagement with practice has fostered, that problems such as moral injustice and lack of legitimacy now require a richer approach to international law rules and process in an era of deepening international governance, and that a Grotian conception of international law which integrates sources-based and content-based criteria provides a promising way forward.

1. Scope of Pragmatic International Law Scholarship: Recent Conceptual Developments

The question ‘What is international law?’ does not have anything approaching an agreed theoretical answer (for further discussion see the final section of this paper). Yet a large cadre of scholars and practitioners around the world share the identification of a set of treaties, customary rules, international judicial decisions, formal institutions, and practices of reasoning and argument that together constitute the nucleus of international law. This core is reflected in the remarkable degree of commonality of structure and method among the most influential textbooks in different languages, a structure and method that was already largely in place by the beginning of the twentieth century in the work of textbook writers such as Franz von Liszt and Lassa Oppenheim. The degree of agreement reflects the centrality for these text writers of a body of practice that is for them both constitutive of international law and the principal source of meaning in the field. International law is thus a field of legal study unified by the gravitational pull of a core set of materials and commitments that holds together a diverse group of participants whose individual subject-matter interests, interdisciplinary borrowings, theoretical inclinations, and political orientations may not be well reflected in this core. In so far as this core set of materials is structured by a generally recognized theory, that theory is a legal positivism that bases international legal obligation on some form of state consent. Most participants recognize that, in practice, international legal rules are frequently formed, applied, and changed without such developments being the will of all the states concerned. The processes and institutions of international law cannot be comprehensively and convincingly explained simply in positivist terms.

But many useful international law concepts have been constructed and to some extent made operational within this positivist gravitational field. These include several basic concepts: subjects (legal persons) in international law, sovereignty, equality, consent, custom, jurisdiction, state responsibility, recognition, the common interest, regionalism, good faith, freedom of the seas, and self-defense (see the useful survey in Macdonald and Johnston, 1983). They include also conceptual structures relating to such matters as: the relations of international and municipal law; the nature and process of legal development; the impact of international organizations; majoritarianism and consensus in law-making; the international constitutional role of the UN Charter; the efficacy and morality of sanctions; universality and particularism in human rights (each covered in Macdonald and Johnston, 1983). The post-Cold War Western policy agenda has brought to prominence other notions which, through the dynamics of practice, have in a

pragmatic if not highly coherent way become legal ideas, including terrorism, narcotics traffic, trafficking in people, money-laundering, corruption, protection of particular notions of intellectual property. The interrelated post-Cold War security and humanitarian agendas have given new life to such older legal notions as: intervention for humanitarian purposes; international governance of territory, as in Kosovo after 1999 or in East Timor prior to its 2002 independence; the decisional and legitimizing powers of the UN Security Council and regional organizations; the interplay in military contexts of international human rights and international humanitarian laws of war; and verification and mandatory inspection in arms control. This section focuses on five more systemic concepts that have emerged in recent years and are shaped by, and shaping, practice.

1.1 The Decline of the ‘Third World’ and of Distributive Justice, and the Rise of Sustainable Development

The decline of the ‘Third World’ as a legal concept owes much to differences in interests that became manifest after the common projects of European decolonization and Cold War ‘non-alignment’ lost salience. This decline was also promoted by Western policies and by broad acquiescence in neo-liberal economic arrangements. This decline has been accompanied by a precipitate diminution in normative international legal scholarship directed specifically toward global distributive justice or curbing global inequality (Pogge, 2002). This reflects a loss of confidence in the ability of international law to address fundamental issues such as poverty and social violence. The decline of the Third World as an operational concept has played out in many areas of international legal practice and scholarship. Information and innovation policy provides one illustration. In the 1970s, a significant struggle was that of developing countries to change the Western-dominated structure of the global media and establish greater control over a new information order, an effort that foundered against the principle of press freedom. By the 1990s, the dominant struggles were those of the West to globalize intellectual property rights and to promote privatization and foreign corporate involvement in information services. Developing countries have achieved solidarity in resistance on specific issues such as manufacture of low-cost AIDS drugs, but have been unable to marshal a comprehensive programmatic alternative to the Western agenda. The success of the Internet, with accompanying problems of criminality, legitimate content control and governance, would in earlier decades have been addressed partly as a North–South issue, but in the current era the debate has been framed in terms of a Western agenda of blending and controlling state and non-state regulation and market forces. Beyond the agenda-setting group of prosperous Organization for Economic Cooperation and Development

(OECD) countries, some individual states, most notably China, have been able to preserve appreciable policy autonomy. But these and many other areas of international law are generally characterized by a marked imbalance in favor of Western influence, heightened by the relative paucity of expert scholars, practitioners, regulators, and leading corporations based outside the OECD.

If the Third World designation has diminished as a practical concept, it has survived in a network of mainly US-based migrant scholars pursuing 'Third World Approaches to International Law' (Anghie, 1999). This consortium is unified by vestigial solidarity rather than a single research program, but the movement shares a general skepticism about neo-liberal dimensions of globalization. One iteration of this is a renewal of the long-standing developing country critique of the imposition of an 'international minimum standard' of protection for foreign investors. The critique is now applied to efforts to protect foreign investors and intellectual property rights holders through the Trade-Related Aspects of Intellectual Property (TRIPS) agreement of the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), the lattice of over two thousand mainly North-South bilateral investment treaties, and the draft Multilateral Agreement on Investment (MAI) that failed in the OECD but laid the ground for related work in the WTO. The Third World critiques of transnational regimes for foreign investment continue to focus on traditional themes of inequity and the injustices of transnational alliances with comprador elites. They have begun also to highlight the adverse consequences, for the rule of law and for local investors in developing countries, of ignoring the need to develop ordinary national legal processes and simply bypassing these to provide special direct remedies for aggrieved foreign interests.

As the concept of the Third World has declined, along with its specific legal claims relating to colonial wrongs and distributive justice, the concept of sustainable development has risen. While lacking in precision, it has become almost ubiquitous in global policy platforms since the 1992 Rio Conference on Environment and Development. It has had a shaping effect on the formation of new legal regimes, such as those addressing climate change and desertification. It has influenced interpretation of existing legal rules, as in the 1997 International Court of Justice (ICJ) decision in the Hungary/Slovakia case on the post-communist future of communist-era dam projects in the Danube river (Boyle and Freestone, 1999). It draws from the more technical field of international environmental law, a field which increasingly brings regulation and markets together through such mechanisms as tradable permits and liability insurance, and which now has highly detailed rules on matters ranging from oil tanker design and air and water quality measurement, through to environmental impact assessment and access to official

information. Whereas much of the impetus for the elaboration of international environmental law comes from the OECD countries, international development law has not had the same Western political or academic support. Its academic decline is in part the continuing result of a loss of confidence within the 1960s law and development movement, buttressed by skepticism about liberal triumphalism and about evasion of rich-state responsibilities in the revival of that movement since the 1990s. Insufficient theorization of this important field of practice has left the theory of sustainable development more oriented to environment than development, and more of a moderate statement of global values than a basis for justice claims and for serious international legal obligations for transborder poverty alleviation.

1.2 International Criminal Responsibility

The concept of international criminal responsibility, long established for military personnel in the laws of war, was broadened in the Nuremberg and Tokyo tribunals and related proceedings. Since the 1990s a newly influential cadre of scholar-practitioners has been created by its sudden operationalization and extension through the International Criminal Court (the ICC, fully constituted in 2003), tribunals created by the UN Security Council for former Yugoslavia (in 1993) and Rwanda (in 1994), proceedings in foreign courts such as the *Pinochet* proceedings in Spain and the UK, as well as a wide array of national criminal trials, courts martial, truth commissions, and the controversial military commissions authorized after terrorist attacks on the United States in 2001. (See generally Chapter 36 of the *Oxford Handbook of Legal Studies*, and the defense of military commissions in Bradley and Goldsmith, 2003.) Scholars have of necessity endeavored to strike balances within a series of tensions that are not comprehensively resolvable: between criminal responsibility and the political strategy of amnesty in ending brutal regimes or civil wars, between legally upright but remote international trials and troubling but perhaps reparative local engagement, between prosecution of small numbers of malefactors and notions of collective responsibility for mass atrocities, between righteous pursuit of justice and the realities of military action in very nasty contexts. A feature of the scholarship and of the practice has been the separation of individual responsibility from requirements of state action and from defenses of act of state. This separation, while in some respects promoted by the United States, has also heightened US concern about the potential of the ICC to reach actions by US service personnel.

1.3 Transnational Civil Responsibility

Epitomized by the 1980 decision of the US Second Circuit Court of Appeals in *Filartiga*, in which plaintiffs were awarded damages against a Paraguayan police inspector for the torture and killing of their Paraguayan son in Paraguay, the concept of transnational civil responsibility has animated hundreds of cases brought in US courts against alleged individual abusers of basic civil rights in other countries. Only in unusual situations, such as the US suits by Filipino victims against the estate and family of former President Ferdinand Marcos, have the plaintiffs in such cases had much prospect of actually receiving payment of damages. Such litigation may aim to give voice to victims of injustices, and to establish the submerged facts of atrocities (Koh, 1991). But while such litigation has multiple agendas, the animating concept that gives it form and purpose is transnational civil responsibility. US courts have also made massive damages awards to victims of state terrorism, under highly selective 1996 amendments to the Foreign Sovereign Immunities Act that limit recovery to actions by American plaintiffs or victims against specified states to which the United States is hostile. These tort precedents have generally not been followed elsewhere, although English courts have begun to consider the possibilities, holding for example that South African victims of asbestos poisoning could sue in UK courts in the absence of an adequate legal aid system for them in South Africa. More national courts have, however, been willing to uphold or even to impose substantial direct or indirect civil costs on states responsible for contract breaches and other commercial losses arising from unlawful war-like acts. This strategic use of transnational civil responsibility to raise the cost of illegal action has been augmented by the creation of international bodies, such as the UN Compensation Commission dealing with claims against Iraq after the 1990-91 conflict, with the power to issue binding awards enforceable in national courts.

The development of transnational civil responsibility has been so intertwined with the US judicial system and US lawyering as to appear to many to be a unilateralist imposition of US interests and of a litigious US culture. The engagement of the US system with other countries' courts and with international tribunals is uneven. This has meant that some meritorious suits that could not proceed anywhere else have been dismissed on *forum non conveniens* grounds. Conversely, US courts might disrupt legitimate arrangements reached in other jurisdictions, although well-briefed judges will be reluctant to do so. For example, it is theoretically possible that US civil proceedings might be taken against someone who had received an amnesty abroad as part of a genuine political settlement, such as the kinds of amnesty-for-confession arrangements that enabled the South African Truth and Reconciliation Commission to obtain conclusive evidence of many apartheid-era atrocities.

Aspects of the transnational civil responsibility agenda are opposed by some US civil

procedure experts concerned about extra-jurisdictional overreaching or judicial overload, by some isolationists on ideological grounds, and by business interests vulnerable to suit. Various branches of the US government are likely to react with hostility if comparable proceedings against US interests are successful elsewhere. Much concern was expressed in Washington at the (ultimately unrealized) prospect that the NAFTA tribunal in the *Loewen* case might order the US government to compensate a Canadian company allegedly subjected to a gross injustice as a foreign defendant in a Mississippi tort suit brought by a private plaintiff. The US Supreme Court has deliberately chosen not yet to rule on the *Filartiga* line of cases, nor has it considered the constitutionality of US submission to NAFTA tribunals.

Without the momentum supplied by the US legal system, pressure for stronger civil accountability for major breaches of international law would be much weaker. The transnational human rights movement, and increasingly activist judiciaries and lawyers in other countries, make likely the transplantation of this agenda, even if it eventually encounters checks in the United States. (For advocacy of a transnational tort responsibility agenda in other common law jurisdictions see Scott, 2001.)

1.4 The Decline and Possible Revival of Claims to Exclusive Domestic Jurisdiction

The decline of exclusivity of domestic jurisdiction as a ground for limiting the reach of international law has been anticipated, promoted, and applauded by many international lawyers since 1945. Most see this decline as inevitable in the context of globalization, with no sign of any revival. Like the related concept of sovereignty, however, which for over a century has seemed to be at once an obstacle to progress in international law and a source of the potential of the international legal order (Kennedy, 1987), exclusive domestic jurisdiction has proven much more polyvalent and enduring than its poor prognoses suggested. Ironically, some of the old Third World ideas of exclusive jurisdiction that were deployed as legal counters to European and US interventionism, while now repudiated for neo-liberal reasons in their regions of origin, are currently being asserted by the United States. An example is the ‘Calvo clause’, devised in the late nineteenth century by Argentina and long incorporated in many Latin American constitutions, which requires that agreements by the state with foreign investors provide for jurisdiction only in the country’s own courts and exclude foreign courts and international arbitral tribunals. The Calvo clause has almost no currency in contemporary Latin American practice. But, concerned by claims in NAFTA tribunals by foreign investors seeking compensation for environmental restrictions imposed by national or local governments, an increasing number of US scholars have argued that the United States should confine jurisdiction over such matters to

US courts. A second example is the intense late-nineteenth century opposition in Asian and Mediterranean countries to ‘consular’ courts, in which European and US officials stationed overseas adjudicated disputes involving their own nationals. This opposition led in the following decades to grudging Western agreement to abolish consular courts and to accept the principles of territorial sovereignty and jurisdictional equality. Contemporary US objections to the exercise by the International Criminal Court of jurisdiction over US nationals for crimes committed outside the United States revive that earlier consular-era US preference for exclusive jurisdiction over US nationals. But in favoring trials *in situ* or in the United States, they also echo the old developing-country skepticism about delocalized judicial power.

International law scholarship has been a vehicle of an internationalist morality, expressing ideas of shared responsibility for human rights, for basic human needs, and for the realization of environmental values. To give such a morality legal purchase through international law has involved crafting concepts that justify and make necessary the erosion of exclusive jurisdiction for each state in determining how to legislate and how to act on such matters. Efforts to find justifications for external involvement beyond formal consent refer increasingly to a ‘common interest’ or to matters being of ‘common concern’. Such justifications are invoked to press some states to adopt or follow values held by others, and to authorize pressure on smaller or weaker states not to allow their territories to be used to undermine a favored international policy. Further studies are required to determine why some such efforts succeed and others do not, and what the roles of specific legal considerations are in shaping outcomes. ‘Anecdotal’ suggest that very large states are more insistent than most other states on retaining their own jurisdictional primacy, and more hesitant to authorize systematically binding jurisdiction for international tribunals over internal matters (other than matters related to trade). For example, of the ten most populous states, China, India, the United States, Indonesia, Brazil, Pakistan, Russia, Bangladesh, Nigeria, and Japan, none has accepted the jurisdiction of the UN Human Rights Committee over individual cases against them, and only Brazil and Russia have accepted the competence of a regional human rights court, and this only in the late 1990s. The European Union itself, albeit a special case, has not been made subject to the jurisdiction of the European Court of Human Rights. By contrast, the majority of smaller states are within one or other of these human rights institutional structures.

The reluctance to accept international jurisdiction is a statement of opposition to the prospect of international integration leading eventually to international rule-of law federalism. Federations such as the United States and the EU have been premised on the loss for most purposes of the exclusive domestic jurisdiction of the member states of the federation, and the

establishment of supremacy of federal or EU law. As demands for multi-level governance and transfers of competence grow, so do demands for overlapping or nesting of jurisdiction. The insistence on exclusive domestic jurisdiction, or failing that on the primacy of domestic jurisdiction, is not simply a living fossil that survives from the old order, it is a statement of intent about the future international legal order (see Sect. 3.2 below).

1.5 The Expanding but Precarious Concept of the International Legal System

The questions whether there exists, or should exist, a unified international legal system have been posed with new intensity by the dramatic increase in the number as well as the workload of international courts and tribunals. In the 1970s it seemed reasonably clear to most international lawyers that an international legal system could be identified in terms of H. L. A. Hart's union of primary and secondary rules. All participants acknowledged a large number of primary rules of state conduct. Enough agreement on sources of international law existed to satisfy in at least a rudimentary way Hart's requirement of a rule of recognition. The system struggled with a theory of legal change but was at least able to consolidate and memorialize change through global conferences or authoritative decisions. A reasonably orderly structure of adjudication had emerged centered on the ICJ and complemented by some arbitral jurisprudence and by a few specialist regional adjudicatory bodies.

As the volume and scope of the practice falling within the domain of international law have grown, however, the complacent assumption that it all forms part of a single system has seemed increasingly precarious. In particular, any group of states is generally free to establish a new adjudicative body, with almost any jurisdiction and any composition the parties involved specify, without it being placed in a hierarchical relationship with any existing body. A few formal hierarchies exist, arising, for instance, from the special status of the UN Charter and the binding powers of the Security Council, or in the EU from the supremacy of EU law and of the European Court of Justice, but for the most part international law is horizontal.

The proliferation of tribunals carries a prospect of fragmentation of international law, with different courts reaching conflicting interpretations, and no hierarchical mechanism of judicial control. So far this has not materialized as a serious problem. Divergences of doctrine have occurred—for instance, human rights tribunals have been more expansive than the ICJ in utilizing teleological approaches to treaty interpretation, in reading down territorial limits incorporated by a state into its acceptance of an international court's jurisdiction, and in imposing state responsibility for failure to take active measures to prevent international law violations. But these examples reflect the distinctive nature of human rights issues and the

special responsibilities felt by human rights tribunals, rather than deep divergence or interjudicial competition (Charney, 1998). Some institutional rivalry between different courts and tribunals may be expected as they compete for business. This may help stimulate reforms. For example, the rapid procedures now available in the WTO Dispute Settlement Body or in the UN Law of the Sea Tribunal may have spurred other institutions to accelerate. The ICJ's decision in the *LaGrand* case (*Germany v USA*, 2001), resolving in the affirmative the long-avoided question whether its pre-judgment provisional measures orders create binding obligations, was rendered all the more necessary and palatable by the experience of other tribunals, such as the Law of the Sea Tribunal, which have binding provisional measures powers.

In standard positivist theory, the unity of the legal system depends on the capacity of states to create legal obligations by acts of willing. But this does not provide an answer where a state assumes irreconcilable obligations toward different groups of other states, or where two tribunals issue irreconcilable binding decisions. An alternative theory would unify the legal system by reading the UN Charter as a constitution, and seeking there answers to problems of hierarchy or norm conflict. But for the time being, this provides at most a partial answer, because so much of international law is in theory and in practice prior to or autonomous from the United Nations. Others have argued in anti-foundationalist terms that there can be no legal system, just a lot of activities by people who share the identity of international lawyers; and that in any event the pursuit of a system will introduce a ponderous structure that cuts off many flourishing and valuable initiatives and excludes marginal voices. But in practice, states have remained unitary enough in their legal policy to avoid egregious conflicts of obligations, the members of international tribunals have shown a commitment to systemic coherence and to comity, and the sense of a unified legal system connected with a unified international political order has generally been preserved.

In sum, pragmatic problem-solving has been used to prevent any system-threatening crisis of fragmentation—but the theoretical problems can be expected eventually to unsettle this temporizing practical resolution.

2. Challenges to Prevailing Positivist Concepts and Assumptions

If a core set of practical materials and concepts exerts a unifying gravitational pull, such an attraction is no longer exerted so strongly by the loose positivist theory that is still most commonly used to order this set of materials. The changing sociology of international lawyers, shifts in prevalent academic ideas, and changes in the circumstances and needs of international

society have made long-standing theoretical challenges to this traditional positivism more and more acute. Some of the most important current critiques are considered in this section.

2.1 Internal Critiques of Positivist Concepts: Statism, National Interest, and Instrumental Rationality

Approaches to international law are embedded in theories or intuitions about the nature of international politics. The English school places international lawyers in a middle Grotian strand, rejecting on the one side a realist world-view of states in the posture of gladiators governed not by laws but by survival and maximization of relative power (Hobbes), and on the other side an emancipatory cosmopolitanism centered on the ethics and self-realization of individuals and societies in a league of republican states or even a universal state (Kant). Under this conception the Grotian *via media* is a very wide middle way, prompting the English School writers further to subdivide Grotian views of international politics into pluralist and solidarist positions (Butterfield and Wight, 1966). Pluralist Grotians (often diplomats or others directly engaged in governmental affairs) tend toward realism and to caution against extending international law beyond what the power configuration of inter-state politics will support. Solidarist Grotians, who see in international law possibilities to realize more expansive agendas of justice and social change, tend toward cosmopolitanism and the construction of a new world through ideas. These enduring patterns are overlain by the specific context of politics and ideas in any particular period, the immediacy of which provides the energizing imperative for much international legal scholarship.

The specific context of recent scholarship includes the consequences of the collapse of the USSR and command economy policies, struggles in an era of markets and privatization over the roles of the state and inter-state institutions, the wider politics of globalization, and specific demands for intervention or other action against conduct ranging from ethnically motivated killing to anthropogenic climate change. This context has given a distinctive cast to enduring debates about the nature and purpose of international society or community, the meaning and relevance of ‘national interest’, and the possibilities of explaining and structuring international law on the basis of game-theoretic models that presuppose the instrumental rationality of collective actors.

2.1.1. Statism and International Community

The realist view that international relations is a Hobbesian anarchy, in which states as unitary and rational actors seek to maximize their relative power and the realization of their defined

national interests within the constraints imposed by the power and interests of other states, continues to exert strong effects on international law theory (see e.g. Laddet de Lacharrière, 1983), even while few international law scholars accept it in its entirety (Combacau and Sur, 1999 is among the more Hobbesian of academic international law texts). Many Grotian pluralists continue to take statist positions, treating states as pre-legal political facts, with governmental institutions that are strong *vis-à-vis* the society, and a tightly held foreign affairs structure that enables the state to function in international law as a univocal corporate body (Combacau and Sur, 1999). International law is then theorized as the norms that emerge by agreement or consensus in the interactions among these entities. Even the most realist-inclined among the pluralists accept that some sort of international society exists, but they regard it as a society of states in which the Hobbesian problem of anarchy has been assuaged but not overcome.

Attacking such pluralist statism has been one of the most prevalent objectives in the literature of recent decades. A cluster of German and Austrian scholars has argued that the problem of anarchy has been partially overcome by international constitutionalism, above all the adoption of the United Nations Charter (e.g. Verdross and Simma, 1984). Several North American scholars have argued that international law is made by transnational networks formed among specialist state organs (Slaughter, 2000) or amongst a combination of state and private actors, and have endeavored to disaggregate ‘the state’ into its many components with distinct agendas and interests. This has carried forward a view, widely held in US scholarship, that sovereignty should be approached in functional rather than in categorical terms (Koh, 1991). In such functionalist thinking, the state is simply one contender among many to be considered when the allocation of governance powers is made as part of the optimal functional design of each governance regime. Feminist scholars concentrated in Australia and North America have attacked the gendered imagery of pluralist statism, and highlight its adverse implications for women (Charlesworth and Chinkin, 2000; Knop, 2002). An assortment of European scholars, inspired by the trajectory of the EU or (as in the case of Allott, 2001) perturbed that the imagery of the state remains so dominant in the EU, have argued for an international community of overlapping communities (Paulus, 2001) or a society of all societies (Allott, 2001) that transcends statism. Yet many scholars in developing countries have defended the traditional state-centered system of international law, and have worked hard to try to increase the influence of these states within it (Maluwa, 1999). The government of India, a country with a flourishing civil society and vast numbers of activists and intellectuals not co-opted by government power, is one of many to argue against a comprehensive opening of the inter-state WTO to NGOs, and to oppose the admissibility of amicus briefs by non-state groups in WTO dispute settlement

proceedings. While some defenders of statism are doubtless beneficiaries of the privileges of power and access to transnational capitalism that statism entrenches, many are genuinely concerned that weakening of the state and empowering of 'transnational civil society' will further heighten global inequality.

Statism is giving way to a richer conception of international society. But neither in theory nor in practice is the widening conception of international society keeping pace with the rapidly rising demands for more participation and more legitimacy in global governance. Three reasons for this slowness may be noted. First, the starting points for theorizing international legitimacy vary across countries, regions, and political traditions. Secondly, patterns of political decision-making and law-making that are entrenched within large or long-stable states are not easily changed to accommodate a new politics of global governance or a new role for international law. Proponents of such internationalist changes are encountering both political resistance and increasingly sophisticated theoretical opposition (e.g. Bradley and Goldsmith, 2003). Thirdly, states fulfill important roles that are not easily replicated outside a statist framework.

2.1.2 National Interest

The challenges to statism carry within them a range of objections to the notion that international politics can or should be predicated on the pursuit of 'national interest'. The disaggregation of inter-state interactions, and the networks of integration resulting from the increasing density and range of cross-border transactions, makes processes of interest calculation so complex that a single 'national' interest may often seem indefinable. Yet while government and democratic politics remain so much dependent on the state as the key form of political and legal organization, politicians whose continuing power derives from state political systems are only rarely able to transcend the language of 'national interest' when challenged by rivals for their constituencies. This constraint is reflected in the structure and operation of international law. The model of inter-state bargaining in pursuit of perceived national interests thus remains a persuasive starting-point in explaining the formation and design of many international legal regimes, and in explaining why substantial gains in aggregate global welfare that ought morally to be pursued are not in fact achieved because of the inability to capture these gains through the limited processes of bargaining among self-interested states. This bargaining model of regime theory does not in itself explain, however, how particular interests come to be identified as 'national' interests, how such 'interests' or 'preferences' are constructed and reconstructed through social processes that are not reducible to simple aggregation of the diverse interests that

wield influence in political processes within each state, or how constitutive norms and social processes shape the design and operation of regimes in ways not covered by the express bargaining process (Hurrell, 1993). Constructivist or reflectivist alternatives to rationalist bargaining models have been proposed within regime theory as means to consider these questions (e.g. Kratochwil, 1989). These have significant implications for theorizing the role of international law. But the problems of developing robust methodologies for testing such constructivist or reflectivist theories have limited the progress of the empirical studies that are needed to give these theories practical purchase.

The long cosmopolitanist tradition of positing a global societal interest which differs from the interplay of national or sectoral interests has continuing vitality as a source of normative challenges to the pre-eminence of 'national interest'. Modern cosmopolitanists seek to embed international law in an international society of societies (e.g. Allott, 2001), or in transnational civil society. But the continuing practical need for state action, and the enduring importance of national sources of political motivation, has more often provoked intermediate Grotian scholarly responses that respond to, but temper, this cosmopolitanist impulse. One Grotian claim is that international institutions, such as international human rights treaty bodies, are trustees of a global interest. Another is the argument that states in some circumstances act as representatives of an international community interest. This argument was used to support NATO's 1999 use of force against Serbia in relation to Kosovo, as well as the international governance regime subsequently applied in Kosovo.

The long campaign waged by free-trade liberals in the tradition of the English publicist Richard Cobden (1804-65), arguing that transnational commerce should be freed from regulatory or military interference by nationalistic politicians, has been remarkably effective in undermining mercantilist notions of 'national interest'. This liberal ideology is evident in much legal scholarship on the design of international economic institutions. It underpins restrictions on protectionism, and on the invocation of national interest clauses such as the national security exception in the General Agreement on Tariffs and Trade (GATT). But the scholarly application of sophisticated liberal economic analysis to the design of international law rules and institutions has remained surprisingly rare, with a few notable exceptions concentrated mainly in trade and finance (e.g. Sykes, 1999). The Marxist proposition that 'national interest' is a myth obscuring the unity of transnational capitalist interests (a view that overlaps in part with Cobdenite liberalism) has not been incorporated into a substantial reconstruction of international law theory nor into a robust agenda of research on the international legal implications of capitalist structures. The possibilities of such an agenda have, however, been suggested, in 'post-colonial'

literature and in some of the lines of critique of globalization and neo-liberalism, including work focused on intergovernmental international financial institutions and on transnational ‘rule of law’ initiatives (see Chimni, 1999).

Against such an array of theoretical challenges, few modern international lawyers have been willing to venture strong normative defenses of the concept of ‘national interest’, and those who have, such as then legal adviser to the French Ministry of Foreign Affairs Guy Ladreit de Lacharrière (Ladreit de Lacharrière, 1983), have been castigated by others in the field as Machiavellian parochialists. Yet it must not be overlooked that the concept of ‘national interest’ emerged in part to counter and eclipse tendencies to act purely in the dynastic or personal interests of a monarch or tyrant, and the concept continues to have a democratic appeal, especially because the international legal effects of a state’s actions may endure long after the incumbent regime is gone. An understanding of international law in Grotian pluralist terms as a balancing of national interests has the attraction of attenuating inter-state inequalities and doubtful claims of the powerful to be custodians of universal values. This pluralist view appears in concurring opinions in the ICJ in the *Yerodia* case (*Democratic Republic of the Congo v Belgium*, 2002). The ICJ declared unlawful Belgium’s issuance of an arrest warrant against the DRC Minister of Foreign Affairs, while he was in office, for crimes against humanity he had allegedly committed in the DRC against DRC nationals. While the Court’s judgment on the narrow issue imposed only modest limitations on the increasingly vigorous human rights-inspired claims for universal jurisdiction, several judges took broader positions in emphasizing that the interest of all in preventing and punishing crimes against humanity does not totally supersede the particular national interest of the DRC. Some of the judges emphasizing the DRC’s national interest noted the history of Belgian colonialism and neo-colonialism in the Congo, and also expressed the suspicion that the exercise of universal jurisdiction by Third World states over the leaders of rich countries would be met with much less Western enthusiasm.

2.1.3 *Instrumental Rationality*

Realist and rationalist theories of international relations assume that states are instrumentally rational actors, such that each state will act so as to maximize the realization of its interests within the constraints of limited information and uncertainty about the intentions of others. All recognize that this is simply an assumption, convenient for modeling regularities in international affairs but not universally realized in practice. Many also make the normative argument that rationality of policy decisions ought to be a goal of decision-makers and decision-making processes—several leading works in the history of realism are both counsels to rationality and

efforts to manage the gap between the aspiration for rationality and the idiosyncratic irrationalities of practice. International law is concerned with structuring patterns of behavior and increasing the predictability of behavior in international society. In this respect, international law serves rationalist purposes. Rational institutionalist theory has focused on analyzing specific non-normative functions served by law and international legal institutions (Keohane, 1997; Slaughter, 2000). In line with this rationalist functionalism, but for different reasons, positivist international law theory also embraces rationality as both a feature and a desideratum of the international legal system. This is manifest in the positivist view that international legal obligation is a result of state willing; and also in specific doctrinal structures, such as the rules of attribution in the law of state responsibility (Crawford, 2002).

Any modern theory of international law is bound to place a premium on rationality. Accepting that, some challenges to the assumption of instrumental rationality may be noted. First, unless international institutions are simply endogenous to the interests of the member states, the dynamics of rule interpretation, authoritative decision, and institutional policy formation are likely to be different in an international institutional context than they would be if left entirely to the member states. Institutions develop their own patterns of meaning and value, and their own structures of decision-making. Organization theorists have argued persuasively that institutions are seldom structured to maximize achievement of a single goal through processes characterized by Weberian rationality. Institutions are more likely to involve the interplay of mutually checking features (such as a logic of action and a logic of rhetorical justification), and their structures are as likely to be determined by mimesis or path dependence as by pure rationalist efficiency. Secondly, in international affairs, rationality is notably bounded, and subject to severe limitations of informational uncertainty, limited capacity, and cultural dissonance. Thirdly and most importantly, international law has expressive functions, and objectives such as symbolic legitimation, that are not readily reducible to instrumental rationality. Neglect of this complex range of functions has overly narrowed the important research agenda of compliance with international law. Robust studies of variations in correspondence between rules and behavior have provided valuable insights, but for many purposes the research issues must be framed more broadly. The concept of compliance with law does not have meaning independent of the questions of what is meant by 'law', how legal rules relate to legal processes, and how the rules and process of law relate to other normative systems.

2.2 External Critiques and Alternatives to the Dominant Positivist Approach: Critical, Marxist, and Constructivist Scholarship

The separation of the goals of codification and progressive development, embodied in the provisions of the United Nations Charter establishing the International Law Commission (ILC), has a long pedigree in analytic positivist writing about international law. The separation itself incorporates a positivist commitment to firm distinctions between ‘fact’ and ‘value’, and ‘is’ and ‘ought’. Influenced by the interpretive turn in the humanities, as well as the tenets of American Legal Realism, scholarship in critical, Marxist and constructivist traditions has challenged the confidence with which this set of positivist distinctions is asserted in international law.

The best of the early critical scholarship utilized anti-foundationalist ideas to challenge positivist jurisprudential concepts and assumptions such as the existence and completeness of an international legal system (e.g. Carty, 1986), or the separability of particular legal strategies such as international institutionalization from the political and intellectual engagements of their proponents (e.g. Kennedy, 1987). Upon this base have been built illuminating accounts of the history (Koskenniemi, 2002; Anghie, 1999; Berman, 2000) and sociology (Kennedy, 2000) of the discipline of international law, an increasingly suggestive engagement of international law with the discipline of comparative law, and valuable explorations of the scope and human implications of such fundamental concepts as self-determination (Knop, 2002).

Marxist writing on international law, having dwindled in the last decades of the twentieth century, began to revive in response to perceived injustices of global economic arrangements. The renewal of the critique of international law as an ideology connected to the global expansion of liberal capitalism has been accompanied by calls to recast international law in terms of transnational economic forces and institutions rather than the relations of formally independent and equal states (Chimni, 1999). But little progress has yet been made in carrying forward this agenda or developing the legally oriented counter-hegemonic discourse its proponents call for.

Like critical theory and the less-materialistic strands of Marxist thought, constructivist scholarship has emphasized the social construction of international legal concepts, and the inseparability of scholarly description from this process of construction. Constructivists have tended to accept the internal value of positivist explanatory methodologies and doctrinal structures, but to regard these as inherently too limited. They have focused on building conceptual accounts of the wider social relations and intersubjective community which shape and make possible particular structures of positive law. Some have sought to do this in Habermasian fashion through the claimed universality of speech acts (Habermas, 1996), arguing, for example, that a Hobbesian focus on threats and sanctions has overemphasized the perlocutionary force of

speech acts as compared to the evident significance of illocution in social norm formation (Kratochwil, 1989). Others have made idealist arguments for the self-constitution of a universal social consciousness in order to create, through ideas, a truly universal society of societies with its own constitutionalism and layered legal system (Allott, 2001). But ‘constructivism’ is a very loose designation for a variety of ideas and methods, and no unified constructivist school or research program has emerged.

The methodological self-consciousness stimulated by these and other movements has problematized the claim, made, for instance, by Lassa Oppenheim at the beginning of the twentieth century, that scholarship can and should separate the tasks of presenting an analytic report of practice, then if necessary critiquing rules or institutions and suggesting improvements. Yet at the same time, judicialization and legalization in some areas of international political practice are creating more and more situations where the profession and vocation of the international lawyer entails working within this established framework. This work has generated an increasing volume of materials that provide a credible basis for positivist statements of legal doctrine and critique on many issues of practical importance (see e.g. the ILC’s work on state responsibility, Crawford, 2002). The scholarly styles of serving or aspiring government legal advisers, counsel, judges, and international civil servants continue to dominate the field, and sustain a progress-oriented positivist approach to practice. Yet these same participants are conscious of the need to respond to current problems of theory that will necessarily shape scholarship.

3. Future Agendas of International Legal Scholarship

Many of the most challenging themes in the future of international legal scholarship are enduring ones in the history of international law that call not so much for solution as for re-engagement. These include the roles of international law in accentuating or alleviating poverty and inequality (Pogge, 2002); social violence and transnational violence, including arms sales and financing; nuclear obliteration; the legal structures for the movement of people and for political expression through citizenship or self-determination (Knop, 2002); the marginalization or (re-)integration of religiosity and religious power structures in the law of the global political order; the roles and responsibilities of corporations and of networks; the roles of states and the implications of variations in state formations and in national legal cultures. Other pressing themes are more technical and manageable as the discipline evolves: the development of international administrative law; the relations between international, transnational, and state law; the

integration of international economic law with global and local social and environmental policy; rethinking the structures of jurisdiction and arrangements for enforcement to better address the Internet, transnational crime, global commons, and other non-territorial issues. This section will highlight two broad research agendas that will likely be at the center of Grotian approaches to the theory and practice of the discipline: legitimacy and democracy in international governance; and the roles of normativity in international order.

3.1 Legitimacy, Democracy, and Justice in International Governance

Among the most pressing problems of the international legal order are those of legitimacy, democracy, and justice in emerging governance regimes. Efforts to address comparable problems in the European Union—through such initiatives as the directly elected European Parliament, strong judicial institutions led by the European Court of Justice, the recondite but participatory committee system studied under the ‘comitology’ rubric, and an increasingly rights-oriented constitutionalism— provide relevant diagnostics and useful precedents for global governance. But the EU is an exceptional case. European integration as a political project has had sufficient enduring public support in the EU member and applicant states to carry the institutions through periods of technocratic European Commission governance, then of state domination via the European Council, and into the present era of legitimacy enhancing reform.

The governance of global integration cannot depend on such a level of global popular or political support to overcome shortfalls in public participation and democratic accountability. Most theories of democracy within states presuppose not only an organized polity akin to a state, but also a strong identity-community (demos) and the concentrated institutional powers of a government. These and other features of national democratic theory render improbable its simple transposition to global governance.

A particular European social consciousness is reflected in proposals directed toward the emergence of a kind of universal state predicated on mutuality as to incontrovertible principles of justice and the consequent possibility of submitting to third-party judgment. A similar particularity characterizes proposals to develop a global public sphere of deliberative democracy structured around constitutive process rules of participation and reasoned dialogue (Habermas, 1996), or to construct regional and global rights-respecting democratic institutions to supplement states and overcome the limitations of states as organs of global cosmopolitan democracy. It is doubtful that these proposals will provide principles for an architecture robust enough to cope with the harder politics, violence, and heterogeneity that confronts global governance.

If these cosmopolitanist solutions are implausible, the traditional realist alternatives of

balance of power or hegemony are starkly insufficient. The most likely ways forward are Grotian efforts to shape agreed principles of international legitimacy and pursue their implementation. Procedural rule-of-law principles of legitimacy already attract broad support: international rules that satisfy tests of sources-pedigree, determinacy, perceived fairness, and coherence with other rules and with systemic principles, exert a greater compliance-pull than other rules (Franck, 1990). More far-reaching substantive concepts of legitimacy, buttressed by more effective systems of accountability and popular participation, will be essential for the implementation and sustainability of the kinds of international governance that are now emerging or proposed.

The Western sense of living in a post-political age after the fall of the Berlin Wall in 1989 renewed amongst many international lawyers an instinctive aspiration to technocratic progress. In this era, the old topic of political revolution has almost entirely disappeared from the literature of international law, eclipsed in the 1990s by studies of the roles of international law in national democratization, and thereafter by studies of the roles of international law in the context of non-state terrorism and related political pathologies. Yet fundamentally different world-views, and deep disagreement, inevitably remain central to international politics. Lasting solutions to problems of governance and legitimacy cannot in the long run be pursued without a theory of real politics that serves internationally at least some of the functions fulfilled nationally by democracy, and that confronts the possibilities of revolution. The tendency to renewed interest in stark politics and in critiques of liberalism, most notably the writings of Carl Schmitt (Koskeniemi, 2002), is a reaction against this dearth, but not one likely to provide normatively attractive solutions.

3.2 Normativity and International Order

A determination to make the emerging professional discipline of international law truly normative formed part of the shared sensibility and civilizing mission that animated activists in the formation and early work of the Institut de Droit International and the International Law Association in the late nineteenth century (Koskeniemi, 2002). This is exemplified in Lassa Oppenheim's *International Law* (1905), stressing that the progress of international law would depend on whether the legal school of international jurists prevailed over the diplomatic school. For Oppenheim, both the diplomat and the international jurist were directly engaged with practical problems, but he understood progress through international law as entailing a more principled and rule-governed conduct of international politics than would result if each question were left simply to the diplomatic considerations of the moment. Many European international lawyers perceive a contemporary iteration of this struggle between a normative international

community and a traditional diplomatic case-by-case approach to international order in debates between the United States and Europe over adherence to major multilateral treaties. While the United States is party to many such treaties and is a prime mover in many multilateral initiatives, it has conspicuously refused to participate in such widely accepted regimes as the Kyoto Protocol on climate change, the International Criminal Court statute, the Landmines Convention, the Biodiversity Convention, and the Convention on the Rights of the Child.

If the United States is indeed a special case, at least five explanatory variables are involved. First, as a single superpower, it can afford to stay outside some agreements that might constrain its freedom of action—but while the configuration of power clearly matters, doubts arise about this as a complete explanation because the United States has been reluctant to enter constraining agreements at times in its history when it was not the leading power. Secondly, the US domestic ideology of popular sovereignty may be so strong as to raise major concerns about any transfer of significant powers to an extra-national body. If this is so, current international concerns about US attitudes may reflect not a change in US behavior but a change in the international system, characterized by the adoption of more agreements with deeper governance implications than existed hitherto. Thirdly, US constitutional structure and political understandings, including the minority veto rule under which the approval of two-thirds of the Senate is thought to be required for certain treaties, provide a large number of opportunities for special interest groups to intervene to derail a proposed treaty.

Fourthly, US governmental processes and public culture may be more legalistic than in some other countries—treaties are scrutinized with great intensity by phalanxes of lawyers from numerous government agencies whose concerns about a minor detail or a remotely conceivable interpretation of the treaty may cause the government to back away. European governments in the EU may be more willing to trust to good sense and flexibility to work out such issues once a treaty is in force. But egregious US non-compliance, including the widespread failure to notify foreign defendants in US capital cases of their rights to contact their consulate as required by the Vienna Convention on Consular Relations, makes some observers skeptical about the consistency of the legalism of the Washington bureaucracy. Fifthly, on some issues, the United States holds positions fundamentally at odds with those embraced by international institutions, for example, on the moral question of the death penalty, or on the market-philosophy question of the use of tradable emissions permits in global environmental policy.

Oppenheim's European successors use essentially his terminology in regarding the European inclination to multilateralism as championing the modern legal school which represents the hope of progress, while US case-by-case evaluation of unilateral and power

political options alongside legalist strategies is the modern diplomatic school from which only occasional inspired contributions can be expected. Many adherents of this view, like many of their critics in the United States, frame the contemporary US hesitancy about multilateralism in terms of US exceptionalism. This framing was adopted and reinforced in much of the debate about US determination to act militarily against Iraq in 2003. But it can also be understood as involving EU exceptionalism. The EU is extraordinary in that very deep integration among formerly hostile sovereign states has been organized not through conquest or colonial unification but through the initial mechanism of treaties grounded in public international law. The use of treaties to structure cooperation on matters bearing intrusively on internal national policy-making is thus not only normal but advantageous for the EU and its member states. The difficulties the EU finds in pursuing a common military policy or even a unified foreign policy represent a weakness for the EU in traditional diplomacy, but one that can be potentially offset by international legalism and institutionalism. If the EU is becoming a quiet superpower, many of its techniques of external influence are law-structured: enlargement negotiations, conditional external aid, and multilateral agreement. The United States, by contrast, does well enough in traditional diplomacy and coercion for some of its leaders to feel confident in staying outside, or opposing, multilateral treaty initiatives.

Drawing comparisons and contrasts between European and US approaches has been a particularly attractive project to scholars in Europe anxious to promote a pan-European identity. But in global terms, the United States and the EU together set the parameters for most major governance questions. The OECD zone as a whole provides the initiative and the framing for almost every global governance regime that comes into being. Consultation takes place with other states whose support is needed to make the regime work, and the major Western NGOs usually have local partners in non-OECD areas, as indeed do multinational corporations in some cases. But, whereas the ambition of international law is global, full participation in the construction of the current international order is not. The project for a truly normative international law has adherents all over the world, and individuals from all regions have long played significant roles in international institutions. Even in the most pacific of governance regimes, however, the sense of profound inequalities of voice and unevenness in representation confront the normative project with serious problems of legitimacy, democracy, and justice (Charlesworth and Chinkin, 2000; Chimni, 1999; Maluwa, 1999). These are problems which the pragmatic problem-solving approach, with its diplomatic sensibility and case-by-case orientation, has perhaps made more acute as global governance regimes have proliferated and deepened. The concerns are heightened where global regimes seem to trade off lives in poor

countries for wealth preservation in rich countries, or to reproduce and intensify gross gender inequities, or to encompass the use by some states of military force in other states.

The framework of peaceful settlement of disputes, which the problem-solving approach incorporates, utilizes for war-avoidance purposes the concepts of bilaterality and opposability that had long been central to war. This structural parallel was prefigured in the close analogy drawn by Grotius between lawsuits and war. But the integration of war and peace in texts such as *De Jure Belli ac Pacis* has been supplanted by their sharp separation in modern texts. The modern problem-solving approach to war and other fundamental perturbations of order is accompanied by a stark Grotian-pluralist sense of the limits of what can be done through international law. Here even the elusive aspirational claims for global normativity seem to run out. This is illustrated in the extreme case by the profound problems of nuclear weapons, which continue to be addressed in international law scholarship not so much even in managerial terms but rather as problems touching the limits of the discipline. This tendency was accentuated by the holding of the ICJ (in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*), on the President's casting vote, that it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.

4. The Concept of International Law

Any useful theoretical concept of international law must reflect the different functions international law plays in theory and in practice. The function of dispute management, which has received particular emphasis in the English and French traditions and in much Commonwealth scholarship, is only one of many functions of international law. As Grotius' *De Jure Belli ac Pacis* manifests, the discipline of international law has historically been impelled by other systemic objectives, including the expression of essential values of the international political system, the development of a normative language for international politics, and the articulation and propagation of an international morality (Koskeniemi, 2002; Knop, 2002; Habermas, 1996; Anghie, 1999). Contemporary scholarship has highlighted many further functions of international law. With intensified patterns of transnational mimesis and borrowing, international law plays roles in the construction and transmission of the cognitive scripts and the technologies of a world culture, from the organization of a foreign ministry in virtually every state to the standardization of economic statistics and Internet protocols. In a context of increasingly dense international institutional governance, the theory of international law must take account of law's

functions in regime design and maintenance: establishing rules as focal points that provide an equilibrium in situations requiring coordination, where thereafter no participant has an incentive to defect from the rule; providing transparency and monitoring and some sanctioning in ways that make possible the capture of gains from cooperation without excessive cost; embedding international agreements in national law that can have more direct purchase on relevant actors; drawing systemic linkages among otherwise unrelated issues so as to raise the cost of violation; aiding powerful states to make commitments that others have confidence will be adhered to, by enmeshing them in deeper structures of legal obligations (Keohane, 1997).

Three simple jurisprudential approaches to the concept of international law were delineated in the seventeenth century and remain relevant. The most influential has been the Hobbesian command theory of law, which was applied also by Samuel Pufendorf to ground natural law in divine command. In command theories, the source of any particular norm is determinative of its validity as law. Under some other theories of natural law, it is not the source of the rule but the agreeability of the content of the proposed rule with some set of governing principles that determines its validity. Grotius provided the third alternative, a hybrid concept of international law that encompassed both the source of a rule (usually consent of the relevant actors) and the content of the rule (identification of rules from nature by use of right reason) as criteria in evaluating the validity of the rule.

Both strict sources-based positivism and content-focused policy science or political approaches now seem inadequate to meet the legal needs of a deepening international society. No longer is international society simply a minimum structure of basic order—it is more and more a purposive association based on solidarity, with more searching legal needs (Hurrell, 1993). This purposive quality is most evident in the structures of economic governance, but also in the assertion and transmission of values, in occasional collective mobilization of force or sanctions, and in pressing demands for global structures of equal concern and respect and for global distributive justice (largely unmet). For international law to instantiate and carry forward such a purposive society, international law requires a stronger theoretical structure.

An adequate theoretical approach to international law must continue to engage with and seek to shape practice. It must become more concerned with participation, and with managing inequality—the domination by the OECD world may be prolonged, but is not ultimately sustainable. It must (re-)integrate peace and force. It is likely to be more value-pluralist, and more dependent on democratic consent than at present. Its justifications will depend on showing its superiority to contending theories in achieving the fundamental normative objectives of international society. This justificatory case will likely depend more on legitimacy and

functional attributes than on the normative authority and technocratic expertise of an invisible college of international lawyers. It will be required to be an effective and parsimonious theory. This entails resisting the current tendency to overload international law that results from the continuous accretion to it of all kinds of transnational norms and private standards and overlapping national regulations. The focus of international law theory should instead be on systematization of the relations between different normative structures, including social norms. Such a theory will define and differentiate international law, separating the subject with clarity from other intellectual disciplines in order then to engage coherently with them. It will integrate an ethically justified normative positivism with theories going to the processes and content of international law, including a nested set of theories of governance, institutions, and community. It will be a hybrid of sources-based criteria and content-based criteria. In short, it will be Grotian.

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