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Institutional Aspects of International Governance

ELISABETH ZOLLER*

Professor Elisabeth Zoller discusses the domain and the methods of international governance. In Part I, she addresses the notion of the "international community." Professor Zoller argues that the international community is not really a community at all, but several "intertangled communities" with common interests. These common interests emerged as a result of several worldwide events, such as World War I and the Great Depression. The author asserts that common interests among nation states and priority setting are the two prerequisites necessary for international governance. In Part II, the author examines the methods of international governance, beginning with the proposition that governance is linked to power. Although power is decentralized in international governance, it can still be exercised collectively. Professor Zoller continues by describing the evolution of a model of international governance. She concludes by suggesting that the shortcomings of global regulation, especially with respect to environmental issues, can be addressed most effectively by the institutional aspects of international governance. To that end, the success of international governance, in terms of international environmental protection, depends upon the leadership exerted by the "great powers," specifically the United States.

Many students of international law and politics are inclined to use the term "anarchy" to designate a society of sovereign states. For them, anarchy necessarily exists when there is no authority to order the state how to act. Drawing on Hobbes, they usually explain the essence of the "anarchic" international system by the fact that there is no actor with legitimate authority to tell a state what to do.

Such a simplistic approach to the international society has never fit reality. Since the beginning of the modern international society, as it came into being with the Peace Treaties of Westphalia (1648),[1] sovereign states have never

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1. *See* Leo Gross, *The Peace of Westphalia (1648-1948)*, 42 AM. J. INT'L L. 20 (1948).

acted toward each other in an "anarchic" manner. True, states have never behaved as members of a political society because an international society of states is not a polity. However, they have never carried out their mutual intercourse in a chaotic manner without any regard for common rules. Whether we refer to the Eurocentric model of the nineteenth century or to the contemporary global society, the conduct of states has always been determined by certain principles, norms, rules, and procedures. This is because the allegedly "anarchic" international society possesses international institutions. Robert Keohane has suggested that "when we ask whether 'x' is an institution, we ask whether we can identify persistent sets of rules that constrain activity, shape expectations, and prescribe roles."[2] Broadly speaking, institutions are the traditions, basic rules, and organization of a society.

Because of international institutions, states know what to expect from each other. On a day-to-day basis, states can routinely foresee and predict the responses of other states. They usually adjust their conduct to the behavior of their counterparts. This pattern of mutual expectations and reciprocal behavior represents the very fabric of the international order. When we refer to the "order" of the international society, we necessarily imply that this society is "governed" in the loose sense of the term. Thus, under certain conditions, it is legitimate to refer to an international "governance." However, one should bear in mind that governance among sovereign and equal states is bound to be a "governance without government."[3] Oran R. Young explains that this idea "refers to the role that social institutions or governance systems, in contrast to organizations or material entities, play in solving the collective action problems that pervade social relations under conditions of interdependence."[4] This paper attempts to determine which institutions make this international governance possible.

Governance means setting priorities and using power to attain them. It can take many forms, such as setting rules and regulations, providing incentives and support, promising rewards, or threatening punishments. However, no matter the various forms it may take, governance calls into question two major issues: The first--*what* is going to be governed--will be discussed in Part I; the second issue--*how* this will be governed--will be addressed in Part II.

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2. ROBERT D. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER 164 (1989).

3. *See* Governance Without Government: Order and Change in World Politics (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

4. ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 16 (1994).

I. THE DOMAIN OF INTERNATIONAL GOVERNANCE

The domain of international governance raises a perennial question in the theory of international law: What are the common interests of a society of states? Not so long ago, it was still possible to give a rather simple and straightforward answer to this question. The international society, a society with limited common interests, never had a sense of "commonness" similar to that of national communities.[5] In spite of the oft-quoted expression "international community," the international society is barely a community. Rather, there are several intertangled communities instead of the community as a whole.[6] For example, there is an international community of merchant-seamen, international scholars, writers, scientists, and ecologists.[7] The truth is that a society of states has no common political project, but has as many national projects as there are states. As long as the nation-state remains the community in which most men and women envision the fulfillment of their social needs, nation-states will continue to find ways to carry on their day-to-day intercourse in an orderly and predictable fashion. That is the role for which states have chosen to use international law as the fundamental institution of the international society. For that purpose, international law has proven to be a serviceable instrument.[8]

International governance, as provided by the institutions of classical international law, was necessarily limited. The common ground of nation-states was commensurate with the limited needs of the international society. After World War I, the common interests of states expanded tremendously. In the same manner that the Civil War transformed the United States, World War I radically modified the international society. Common interests between states principally developed as the result of scientific and technological progress and the economic expansion that followed.

Like economic crises, serious military crises tended to become world-wide, though to a lesser degree. Accordingly, two events are crucial to

5. "Commonness," as employed here to define the shared hopes and aspirations of a people, is not in the least identical to *res communis* as it is understood by Henkin (commonage). Louis Henkin, *General Course on Public International Law*, 216 R.C.A.D.I. 105, 105-26 (1989).

6. Tonnies' two concepts *Gemeinschaft* (community) and Gesellschaft (society) are helpful, by analogy, in understanding the problem. FERDINAND TONNIES, COMMUNITY & SOCIETY 33-35 (Charles P. Loomis trans., Transaction Books 1988) (1957).

7. *See* PAUL REUTER, ETUDE DE LA RÈGLE: TOUTE PRISE DOIT ÊTRE JUGÉE (1933). Paul Reuter interestingly refers to *"la première communauté internationale, celle des gens de mer"* ("the first international community, that of men of the sea").

8. *See* JAMES BRIERLY, THE LAW OF NATIONS 78 (4th ed. 1949).

understanding how states eventually became enmeshed in the web of interdependence which has greatly reduced their freedom of action. First, the Great War demonstrated in the most tragic manner that questions of peace and security were a common concern for all states. The Great War marked the first time a war could be world-wide; this was made possible, if not inevitable, by technological progress. As it became an all-out war, World War I affected international society as a whole. Peace became a common interest for all states, and an institutional framework, the League of Nations, was created to insure that this common interest would be protected.[9] Collective security was the basic rule of this new institution.

The second event that dramatically expanded the common interest of states was the Great Depression. The economic crisis that plagued the industrialized world during the 1930s demonstrated that national wealth and economic growth had become a matter of international concern. The Great Depression made common economic interests between states a matter of collective concern.[10] After World War II, these common interests were given their institutional foundations by the Bretton Woods system[11] and GATT.[12] Similar to the League of Nations, this new international economic system involved normative aspects, new rules and principles, new organizations and agencies, and structural elements.

Whether political or economic, common interests between states emerged more as a matter of experience than as a matter of logic. The historical record shows that a consciousness of common interests between states comes into being when there is tangible evidence that action has to be taken. As long as common interests are looming on the horizon, the chance that they will materialize in the form of international institutions remains slim. In other words, common interests have to go through a process of crystallization in order to be taken into account by some sort of international institution. They have to be perceived as real. Until this process has occurred, the common interests of states will not be institutionalized. They will remain within the exclusive jurisdiction of the states and will not become part of the international "commonness."

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9. D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 17 (4th ed. 1982).

10. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 5-7 (2d ed. 1990).

11. Bretton Woods Agreement, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, *as amended* May 31, 1968, 20 U.S.T. 2775.

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194.

In addition to common interests, a second prerequisite for governance is a setting of priorities. For example, the difficulty with environmental matters is the wide and sharp disagreement as to which priorities ought to be put on the agenda. Industrialized countries and developing states do not share identical views on ecological issues. Moreover, there are disagreements among scientists and academics as to the reality of potential economic dangers. For instance, with respect to the 1995 flood disasters in Europe, the media has made much of the hypothesis that weather patterns have been insidiously affected by global warming. But many climatologists believe that evidence is still insufficient to draw a direct link between changing weather patterns and the recent flood disasters. The common interests of states regarding many environmental issues have not yet crystallized. Hence, many scholars are disillusioned by the paucity of international environmental law.[13]

The reason for a loose and weak international governance in environmental issues lies within the very substance of the issues themselves, not with international institutions. Should environmental matters be perceived as genuine threats to the common interests of states, international institutions are available to address these threats. For instance, the mandate of the United Nations Security Council is so broad that it could, if necessary, lawfully address environmental dangers to international peace and security. As a practical matter, it remains within the discretion of the Security Council to decide what is a "threat to the peace."[14]

As the foregoing analysis demonstrates, the domain of international governance is always a faithful image of the common interests of states. Where there is international governance of some sort, there always will be common interests between states. It remains to be seen how these common interests come into being and, in particular, whether the market automatically produces them. Should the latter occur, the global market would be the governor, and the institution of international governance would be irrelevant. The idea that the market is self-contained, self-sustained, and self-regulated is well-received today in academic and political circles. Indeed, this idea is at the heart of the "Contract with America" which the Republican Party entered into with the American people.[15]

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13. *See, e.g.*, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL PROTECTION (Peter M. Hass et al. eds., 1993).

14. *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS 725-26 (1951).

15. REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994)

This "automatic pilot" theory of the market is among the basic tenets of liberalism. For economists and political thinkers, such as Adam Smith or Herbert Spencer, social harmony is spontaneous. It does not require coercive force to be produced or maintained. *Laissez-faire*, the pursuit by each individual of his own interests, produces social cooperation automatically.

Whether this theory actually works, in terms of private individuals in their capacity as rational economic agents, has already been challenged and remains an open question.[16] The theory holds some truth, provided that the individual in question is the *homo economicus* motivated by self-interest. However, the proposition that this theory also applies to the global market, deemed to consist only of independent agents trading for their own account and competing against each other, is disputable. The actors of the global market (firms, "privatized" government agencies, and persons) are independent agents only to a limited extent. Next to them, or behind them, are states with national goals and political projects. These powerful political groups are driven by other motives. More often than not, national administrations put their full weight behind the efforts of national firms to win significant contracts abroad.[17] Therefore, it may be true that impassionate economic rationality governs the global market. But this is not the case with global society, where economic rationality coexists with a struggle for power.[18]

Accordingly, it is highly unrealistic to believe that automatic governance could spontaneously emerge from the global society. International governance is neither self-established nor coercively produced. The truth lies between the two possibilities because, as Charles De Visscher states, "the demands of coexistence awaken a consciousness of certain social values which shapes and sustains a teleological and functional conception of power."[19] The extent to which power becomes a crucial factor in sustaining governance remains to be seen.

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16. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 200-29 (George Simpson trans., Free Press 1964) (1893). The current discussion is but the Durkheim-Spencer debate recast.

17. Competition in the global marketplace is increasingly backed by high intensity nation-states advocacy. For the United States, see Toward a National Export Strategy: U.S. Jobs: U.S. Exports, Report to the Congress, Sept. 30, 1993 and the remarks of Jeffrey E. Garten, Under Secretary of Commerce for International Trade, Before the Council on Foreign Relations, Jan. 9, 1995.

18. Despite the rhetoric, there is still much truth to Edward H. Carr's devastating criticism of "the paradise of laissez-faire." EDWARD H. CARR, THE TWENTY YEARS' CRISES (1919-1939) 43-46 (1962).

19. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 145 (P.E. Corbett trans., 1968).

II. THE METHODS OF INTERNATIONAL GOVERNANCE

Governance may not require a government, but if successful, it ultimately differentiates between the governors on the one hand and the governed on the other. Governance is thus linked to power. In its most general form, governance is similar to power; it involves getting others to do the things you want them to do.

At the international level, governance is paradoxically both easier and more difficult to insure than at the domestic level. It is easier because the dramatic inequality of power between states operates as a *de facto* radical division between the strong and the weak. However, governance is more difficult because nothing *de jure* can be drawn from this *de facto* inequality, since the weak states, like the strong, are sovereign entities. The principle of the sovereign equality of states acts as a litmus test, dividing legitimate and illegitimate governance at the international level. Sovereign equality must be satisfied in one way or another for governance to be accepted and successful. Interestingly, international society possesses the institutions which make it possible for international governance to be compatible with the sovereign equality of states.

The proposition that the international society remains unorganized hardly needs demonstration. Much of the legal system is entirely based on the voluntary consent of the members of the society; if they refuse to consent, the rules may not come into being. Many scholars build on the unorganized state of the international society to demonstrate that international institutions are solely dependent on the will of the states. It is plainly clear that whether we address treaty law or customary law, the will of the states is a decisive element in the international law-making process.

The rules do not, in every circumstance, require the express consent of a state to be enforceable against it. Should this be the case, many universal laws would disappear, since it would be necessary to prove that each one had been accepted by every state of the world.

This is not how things work at the international level. Instead, a customary rule may be used against a state even if none of the cases cited is taken from that state. This is conditioned upon a finding of enough precedent to leave no doubt in the rule's universal character. This condition is usually considered to be fulfilled in regimes established by a group of states as objective, or based on a status. The expression "objective situation" may be

usefully applied to the status of Antarctica as defined by the Antarctic Treaty,[20] completed by the 1991 Protocol on Environmental Protection.[21] The Advisory Opinion of the International Court of Justice (ICJ) concerning reparation for injuries suffered in the service of the United Nations refers to the same idea: "Fifty states representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone."[22]

A similar idea recurs in the North Sea Continental Shelf cases.[23] In those cases, the International Court of Justice was requested to give its opinion as to whether a norm of customary law in favor of the equidistance principle could have emerged simultaneously or immediately subsequent to the 1958 Geneva Convention on the Continental Shelf. In addressing the transformation of a treaty rule into a customary norm, the ICJ addressed a key issue in international governance, namely, to what extent a group of states can make law for other states. Despite the sovereign equality of states, the Court had no qualms in accepting this possibility. It considered that "a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specially affected." The Court even said that this law-making process should take a very short time provided that state practices, including those of states whose interests are specially affected, are both extensive and virtually uniform in terms of the provision invoked.

The transformation of a treaty norm into a customary rule is the most common device by which international governance is made possible. In the North Sea Continental Shelf cases, the law-making process in international society was at stake. The Court accepted a quasi-legislative function on the part of those states whose interests were specially affected.[24] International governance is not lacking because of institutional weakness; it is lacking because of an absence of political will. Absent a clear political will to use existing international institutions effectively, the machinery of international governance remains at a standstill.

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20. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

21. Antarctica Treaty's Protocol on Environmental Protection: Final Act, 30 I.L.M. 1455 (1991).

22. Reparation for Injuries Suffered in the Service of the United Nations (U.N. v. U.S.; U.N. v. Fr.; U.N. v. Belg.), 1949 I.C.J. 178 (Apr. 11).

23. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 42 (Feb. 20).

24. *See* Krystyna Marek, *Le Problème des Sources du Droit International dans L'arrêt sur le Plateau Continental de la Mer du Nord*, 1970 REVUE BELGE DE DROIT INTERNATIONAL 44.

Whether it is addressed as a matter of customary law or as a matter of treaty law, the normative aspect of international governance eventually leads to the same end result. International institutions do exist that enable a group of states, often under the guidance of a leader, to steer the international society of states as a whole towards certain priorities. Concrete examples abound: freedom of navigation on the high sea, the non-use of armed force except in self-defense, respect and protection of fundamental human rights, and non-proliferation rules for nuclear weapons. In all these cases, international governance originated in an initiative taken by one, or a few, states; it was carried out in an international instrument of some sort, usually a treaty or a declaration, which eventually became the law of the international society. Where does that lead us? Simply to this: Governance is effectuated through law, and law comes into being through power. In the case of international governance, the problem is somewhat more intricate because power is decentralized. However, this drawback, which could potentially prevent international governance from existing at all, is alleviated by the fact that power may be exercised collectively. This is the *raison d'être* of international organizations.

During the nineteenth century, international governance was effectuated by a *de facto* government composed of the Great Powers. This was the Concert of Europe. It may be said that the governance provided by the Concert was an unpalatable experience for smaller powers who had to endure the superiority of the stronger powers. But this is not the decisive issue. The truth of the matter is that this *de facto* government met an urgent need which the law took into account. Since then, governance has never left the international stage. The only change, albeit an important one, is that international governance has been legitimized because states have entrusted such governance to institutions more democratic than the Concert of Europe. Today, international governance is entrusted to the United Nations and its specialized agencies. With respect to contemporary international legitimacy, any other arrangement is almost inconceivable. As a matter of law, international governance entrusted to a single and all-encompassing universal organization is a logical consequence of the principle of the sovereign equality of states. It is the only way that international governance can be democratically exercised.

After World War II, international organizations, in particular the United Nations and its specialized agencies, were established to give the world democratic instruments for international governance. At that time,

international organizations and international regimes were two sides of the same coin. The international organizations referred to the structural or institutional arrangements, whereas the international regimes referred to the norms and principles laid down by these organizations.

The model of international governance envisioned after World War II was actually a projection of the New Deal Regulatory State.[25] The proposition that the "Administrative State" encountered dire times with deregulation needs no further discussion. There is little doubt that the powerful deregulation movement initiated in the United States in the late 1970s had some spill-over effects on the international scene. In particular, the new thinking fostered self-regulation by the market instead of regulation directed by institutions or agencies. An open question remains whether adequate environmental protection can be insured solely through the magic help of the invisible hand. What came to be known as "the tragedy of the commons" originated in the demonstration that the market fails to protect the global commons.[26]

Although "global regulation is now developing around certain environmental issues,"[27] many scholars believe it is still an insufficient and piecemeal attempt to meet global needs. The shortcomings of global regulation call for the enhancement of the institutional aspects of international governance. For example, it has been suggested that the U.N. Charter be amended, even to the extent of creating a new organ to address environmental concerns.[28] It is doubtful, however, that a new organ is necessary given the General Assembly's broad powers to address "social and . . . health" issues,[29] the ECOSOC's competence to prepare "draft conventions" with respect to "economic . . . health, and related matters,"[30] not to mention the Security Council's core mandate to deal with "threats to the peace."[31]

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25. *See* Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, *in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 125-56 (John G. Ruggie ed., 1993).

26. *See* BRUCE RUSSETT & HARVEY STARR, WORLD POLITICS: THE MENU FOR CHOICE 456-58 (4th ed. 1992).

27. ALFRED C. AMAN JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 131 (1992).

28. *See* Patricia Birnie, *The UN and the Environment*, *in* UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 327 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993). *See also* Paul C. Szasz, *Restructuring the International Organizational Framework*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 340, 356-76 (Edith Brown Weiss ed., 1992).

29. U.N. CHARTER art. 13, ¶ 1.

30. U.N. CHARTER, art. 62, ¶¶ 1, 3.

31. Kelsen, *supra* note 14, at 726. *See also* Wilhelm Wengler, *International Law and the Concept of a New World Order*, *in* FEDERALISM-IN-THE-MAKING 122, 122-24 (McWhinney et al. eds., 1992).

As this paper demonstrates, although states possess the necessary institutions for international governance, they lack the political will to make use of them. In this respect, the problem is first and foremost a political one. International governance is a matter of power.[32] To this extent, the role of the great powers, particularly the United States, is crucial to the success of international governance. International environmental protection is a matter of leadership; in that field, as in many others, the United States is "bound to lead."[33] Insofar as the United States is a democratic power, private citizens are ultimately responsible for ensuring that its leadership is heading in the right direction.

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32. This aspect of the problem is well-seen and discerned in ANDREW HURRELL & BENEDICT KINGSBURY, *The International Politics of the Environment: An Introduction*, *in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 1, 1-47 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

33. JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER (1990).