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## What is the Use of International Law? International Law as a 21st Century Guardian of Welfare

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## ESSAY

# WHAT IS THE USE OF INTERNATIONAL LAW? INTERNATIONAL LAW AS A 21ST CENTURY GUARDIAN OF WELFARE

*Emmanuelle Jouannet\**

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“The purposes of the United Nations are:

1. To maintain international peace and security (. . .)
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples (. . .)
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights (. . .).”

(UN Charter, Article 1)

What is the use of international law?<sup>1</sup> Answering this apparently simple question that we put to the members of the European Society of

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1. This Essay is a more in-depth version of a presentation made at the Conference of the European Society of International Law at the Université Paris I in May 2006 (*See Select Proceedings of the European Society of International Law*, vol. 1, 2006, (Emmanuelle Jouannet, Hélène Ruiz Fabri and Vincent Tomkiewics, forthcoming May 2008). It has also been substantially modified, and I would like to extend my gratitude to the following colleagues who took the time to exchange some of their ideas with me: Michel Xifaras, Olivier Corten, Andréa Bianchi, Hélène Ruiz Fabri, Jean Marc Sorel, Martti Koskenniemi, Monique Chemillier-Gendreau and Nathaniel Berman.

International Law requires embarking on an interpretative quest of great magnitude, the main aspects of which I would like to sketch out here. This preliminary inquiry is not limited to current representations of modern-day international law including governance, networks, fragmentation, globalization, linkage or constitutionalization. Rather, these phenomena are viewed as part of a wider tendency which has characterized modern international law for at least a century. Further, this work suggests that certain concepts, such as that of “crisis,” that lead us to mistake the emergence of new techniques of legal regulation for irreversible shortcomings, are inadequate.<sup>2</sup>

My thesis is that international law currently represents a welfare-driven and bio-political structuring mode for international society which not only counterbalances liberal economic globalization, but also draws from it. This inquiry offers a political interpretation of contemporary international law to clarify its functioning and the effects of its legal rationality, as well as to answer the question of its efficacy. An evolution has taken place for at least a century and has only attained partial completion.<sup>3</sup> It is the fruit of modernity that constantly projects its aspirations, its unity, and its contradictions onto the international legal system. At the outset of the 21st Century, this system has become a guardian of welfare.

This inquiry essentially aims to provide a more differentiated vision of international law, and thus to provide a better understanding of its complex path. This reading of international law is intended to be prolific enough to be reflected upon, all the while reconstituting international law’s meaning and making it problematic in fact. The only thing that could have made me hesitate is that this thesis, and the term “law providence,” can reinforce prejudices against international law and also create a reactionary prophesy, can support simplified convictions, can create misunderstandings, or can return to praise the resurrection of a strict or ultra-liberal idea of international law. This last idea, which at the outset appeared to me quite naïve, rests on a mistake that I would like to show concerning the evolution and significance of international law and that will be a futile step in its principal. To make everything problematic, all the while retracing this providential (beneficial) dimension of international law, does not mean that I do not wish to address the strictly liberal ideas of law that have never existed so purely as these have. The obstacles and perverse effects that direct a providential law are those of an

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2. See JACQUES DONZELOT, *LA POLICE DES FAMILLES* 13 (2005). For a more indepth discussion on the evolution of international law, see HÉLÈNE RUIZ FABRI, *LE DROIT DANS LES RELATIONS INTERNATIONALES*, 65 *Politique Étrangère* 660 (2000).

3. See ANTOINE GARAPON, *LE GARDIEN DES PROMESSES* 269 (1996).

international law that is in reality liberal-providence like I am trying to demonstrate; there is no way to avoid the difficulties that can arise when measuring the risks without mortgaging the dualist principle.

## I. AIMS AND OBJECTIVES

International law is organized to best enable it to attain its aims and objectives, and it represents a compromise between the aims that different international actors seek to achieve through it. International law is also the result of the State practice that has developed in response to the various challenges confronted since 1945. This State practice's underlying welfare logic is particularly important to highlight. Further, many of the foundational objectives of 1945 do not resolve conflicts between the aims of the law, but rather conceive of conflicts as part of the rule of law.

### *A. The Objectives of the United Nations Charter: Material Law/ Formal Law and the Problem of Conflict*

One encounters difficulties today when trying to analyze the general objectives that emanate from the enthusiasm and consensus of 1945. How should we interpret them considering how general they are and how much the world has changed?<sup>4</sup> Everyone agrees that international law should promote peace, justice, economic development, and human rights, and combat world poverty. But notwithstanding the validity of these very general postulates and the apparent suitability of international law as a means to pursue them, there is little consensus on how to use the law to this effect. The law needs to promote peace, but does this mean absence of war, or harmonious development of different human societies? Are human rights norms compatible with the laws of Islamic States or Asian values? Is justice achieved by reconciliatory pardoning of faults committed, or by punishing guilty individuals in international criminal courts? The legal objectives defined by the members of international society are so general and abstract that they leave room for endless conflicts. Thierry de Montbrial suggested that a very similar problem arose in relation to the grand abstract ideas of equality and liberty that drove the French Revolution. As indicated by Albert Sorel in *L'Europe et la Révolution française*:

The principles of the French Revolution were abstract and universal, which is why they found wide endorsement so easily; but that is also why they carried such different consequences depending

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4. See generally MARTTI KOSKENNIEMI, *LA POLITIQUE DU DROIT INTERNATIONAL* 326 (2007).

on the social environment which adopted them. It is only in the consciousness of the philosopher that these grand ideas conserve their metaphysical purity . . . Whoever applies them, identifies with them, makes them his own, merely denaturises them.<sup>5</sup>

The same can be said of the principal aims and objectives of contemporary international law laid down in the Charter, which are so abstract that they contain an incredible degree of indeterminacy and leave an impressive margin of appreciation. Denaturization is never a distant prospect. Of course, differences in State opinion are nothing new when it comes to the interpretation of the Charter, and are a perfectly natural occurrence in our decentralized system. As has been observed by Martti Koskenniemi, governments, professionals and other actors should be engaged in discussion and even in disputes over the aims and objectives of the law.<sup>6</sup> This is an ordinary and necessary aspect of a lively and pluralist society of States and other actors intent on fathoming the content of their legal commitments.

Yet it seems necessary to go further still and to realize that the law has become more contradictory by reason of the substantial objectives defined by the Charter. It is precisely because the legal principles and objectives are substantive, and not just formal, that they create endless conflict. The communal aspect of post-war international law lies in the formal secondary rules of creation and of conflict-resolution, while the substantive primary rules are prone to conflict. The Charter represents a further step in a development that originated in the League of Nations and the interwar period, as a result of which substantive law, not formal law, now forms the basis of the international legal system. This represents a switch in priorities. The inability of European nations to agree on a definition of common interest (in particular common religious interest) in the 16th and 17th centuries prompted these nations to favour a liberal, classical, voluntary law of nations in which agreements were governed by a set of purely formal rules based on cooperation and respect for sovereignty. These rules applied to all States without subjecting any of them to anything substantial; they merely prescribed equality and trade reciprocity, and resolved disputes. The substantive objectives defined in the 1945 Charter and the legal values they convey work in the opposite manner. Their effect is to instil conflict in international law and not merely to enable conflict resolution.<sup>7</sup>

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5. See ALBERT SOREL, *L'EUROPE ET LA RÉVOLUTION FRANÇAISE* (Plon-Nourrit et Cie ed. 1904), quoted in THIERRY DE MONTBRIAL, *L'ACTION ET LE SYSTÈME DU MONDE* 394 (2002).

6. KOSKENNIEMI, *supra* note 4, at 322.

7. See FRANCOIS EWALD, *L'ÉTAT-PROVIDENCE* 513–17 (Bernard Gasset ed., 1986).

Observers often point out the return to substantive law, but have seldom systematically theorized the implications of this new tendency. One can, however, make out a number of decisive consequences, as discussed below.

First, conflict is no longer situated outside the law, but lies within substantive law itself. There was no social contract in 1945, just as there was none in 1918, but rather there was a provisional consensus which made it possible to define the legal values and aims to be achieved by international society at that precise moment. The objectives laid down in the Charter were never entrenched from the onset and have been reinterpreted numerous times, as the true content of values can never be set in stone. This explains why interpretational conflict is an everyday part of international politics, a means of developing objectives which may appear consensual, but which are actually constantly renegotiated. This perspective should lead us to re-evaluate the recurrent idea of “crisis” in contemporary international law, and to appreciate it in the context of this development. International law is affected by an inevitable and endogenous “continuous crisis,” which renders it instable, albeit not in an alarming or singular manner. This is a logical effect of the law’s substantive nature.<sup>8</sup>

Second, the law itself has become an object of conflict. It has become a weapon of choice, an instrument of assertion, a strategic stake. International law is no longer simply a means of limiting State behavior, but is a tool in the hands of States and has become an instrument for the defence of any position. Instrumentalism, often associated with a pragmatic Anglo-Saxon attitude, is now a largely generalized phenomenon favouring the shift toward a more substantive international law.

Third, we are currently going through a “universality crisis.”<sup>9</sup> Practices within international law have changed to accommodate new substantive objectives that no longer merely define a framework within which sovereignties are juxtaposed, but also define a common interest based on universality. Yet just as in 16th and 17th century Europe, actors still have their own ways of conceiving of common and universal interests, and one’s partners’ contrary conceptions are generally perceived as strange and imperialist. It is therefore normal that we should be going through a “universality crisis” as a result of these differences in conceptions.

Fourth, the practice of consensus has become prevalent. The fact that international law is more prone to conflict and is enduring a “universality

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8. Conversely, although I will not elaborate on the point here, the law can suffer exogenous shocks which can cause “crises” that are all the worse.

9. See generally MIREILLE DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL* (2004).

crisis” does not mean that international society has become more self-contradictory. Its actors have adapted, finding balances between their respective rights and reaching compromises by means of mutual interpretative concessions. The practice of consensus decision-making is characteristic of this development, as it enables the achievement of “agreement within disagreement.”<sup>10</sup>

Finally, we are witnessing a “moralisation of law.” If law is acquiring substantive objectives, if it incarnates values, this means that the boundaries between law and morality are becoming more difficult to discern.<sup>11</sup> Moral values are being translated into legal principles, and the distinction between law and morality is now merely a matter of degree and not of nature. It is, for example, characteristic that the “right of intervention” can now easily be invoked as a “duty to intervene,” and that war is once again becoming an instrument of ethical intervention.<sup>12</sup> This is precisely the reason why early international jurists, from Grotius to Vattel, spent two centuries attempting to desubstantivize international law, and the law of war in particular. The idea of just war, and the accompanying notion of just cause, caused too much conflict and were abandoned by these authors in favor of a set of purely formal rules governing the recourse to war.

Despite the return to a substantive law paradigm, international society is much less developed than are domestic societies. An international civil society is only just emerging, and world public opinion is a shaky concept often controlled by interest groups. This creates a risk that that the society will not be sufficiently concerned with its future, especially if the same group of legal entities remains engaged in a repetitive quarrel about the objectives of the Charter. The quarrel is healthy, yet somehow sterile, as it cannot prompt a more radical debate on the future of international law. The truly decisive question we should attempt to answer is that of where the law is heading and what its trajectory should be. In other words, which are the substantive principles that have managed to

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10. EWALD, *supra* note 7, at 516.

11. See generally STANLEY HOFFMANN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* (THE FRANK W. ABRAMS LECTURES) (1981); *TRADITIONS OF INTERNATIONAL ETHICS* (Terry Nardin & David R Mapel eds., 1992).

12. See MICHAEL WALZER, *JUST AND UNJUST WARS* 86–108 (1992); see also JAMES TURNER JOHNSON, *Threats, Values, and Defense: Does the Defense of Values by Force Remain a Moral Possibility?*, in *JUST WAR THEORY* 55, 55–60 (Jean Bethke Elshtain ed., 1991); see also GENE M. LYONS & MICHAEL MASTANDUNO, *State Sovereignty and International Intervention: Reflections on the Present and Prospects for the Future*, in *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 250, 260–65 (Gene M. Lyons & Michael Mastanduno eds., 1995); OLIVIER CORTEN, *LE RETOUR DES GUERRES PRÉVENTIVES: LE DROIT INTERNATIONAL MENACÉ* 12 (2003); MARIO BETTATI, *LE DROIT D'INGÉRENCE: MUTATION DE L'ORDRE INTERNATIONAL* 89–100 (1996).

prevail in legal technique and practice despite being a source of controversy, and which of these have helped create new, modern-day power and knowledge structures?

### *B. The Emergence of Welfare-Inducing International Law*

Contemporary international law has seen increasing use since 1945—though its general use can be traced back to the end of the 19th century—with the aim of resolving the more traditional problems regarding peaceful coexistence of States, but also to address and tackle new issues like safeguarding rights of the human person, market imperatives, and protecting and assuring the well-being of the world population. Contemporary international law's current trajectory is complex and is the product of international practices aimed at tackling the problems the international society faced after the war, and which have today attained a certain coherence and intelligibility. These practices have marked a considerable change in international legal activity. Its objective is not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, their education, and their sanitary well being.

Mindful of these objectives, international law is now primarily a guardian of welfare. Just as liberal European States have become welfare States at a domestic level, contemporary international law evolved from a liberal law with a limited role of regulating essential co-existential issues into a multifunctional guardian of welfare governing the lives of States and individuals.<sup>13</sup> It is widely considered the ultimate guarantor of collective wellbeing. International law is no longer merely a means of social regulation, but is becoming an instrument of intervention; it is being used to transform international society in order to make up for economic, social, or equitable imbalances. Further, it represents a new mode of exercising power, since it requires putting specific regulatory techniques and practices in place. The aim is not, of course, to foster an insurance-orientated international law capable of developing risk-management techniques on the basis of indemnity or social security, much as certain States have done. Rather, the emergence of a welfare-inducing international law, incomplete as it may be, possesses several interventionist finalities aimed at the solution of international problems

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13. The expression "welfare-inducing international law" obviously needs to be nuanced because it does not represent a direct transposition of the concept of the welfare State as it exists at a domestic level. There are certain parallels with the welfare State in as far as multi-interventionism and the substantive nature of the law are concerned, and also to the extent that both concepts aim at social progress. In these respects, the analogy can actually be very helpful. But we are far less concerned, here, with the principles of solidarity and redistribution which have been so characteristic of the welfare State. See generally PIERRE ROSANVALLON, *LA CRISE DE L'ÉTAT-PROVIDENCE* (2d ed. 1992).



of economic, social, intellectual or humanitarian nature. The legal interventionism that has characterized this development has a wide scope, and even the meaning of legal intervention is changing drastically.<sup>14</sup> This interventionism extends beyond mere “intervention” in a military or emergency response sense. It actually corresponds to the omnidirectional expansion that has characterized the development of international law and which has recently contributed to *revalorizing* it by making it humanist and welfare-inducing.

Another recent change in international law is its transformation into a policing instrument to safeguard the world population. This policing aspect does not imply that law has an essentially repressive function, but rather corresponds to the impact of certain treaties of the 18th and 19th century, the aim of which was to “keep watch over” society.<sup>15</sup> This conception was also reflected in the views of Vattel and Wolff at the time. Michel Foucault attributes a particular sense to this notion of policing at a domestic level, and demonstrates how it can evolve into a bio-competency.<sup>16</sup> According to this author, one of the fundamental traits of the modern State lies in its ability to exercise power over the lives, the safety, the health and morality of its population, to the extent that these bio-politics, which focus more on life than on liberty, fuel the development of welfare-inducing law.

A similar bio-competency may be developing at an international level.<sup>17</sup> One can certainly affirm the onset of a proliferation of rules aimed at promoting health, a balanced diet, adequate lodging, acceptable living conditions, or controlling global warming.<sup>18</sup> Development implies freedom from dependency as well as being a liberty in its own right. These rules also deal with the relationship between man and nature, his

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14. MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE* 165 (1988).

15. “Policing aims at guaranteeing the wellbeing of the State by means of appropriate legislation and by empowering and invigorating it to the greatest extent possible. The science of policing consists in regulating all things pertaining to the present state of society, in consolidating and improving it, and in assuring the wellbeing of all its members.” JOHANN HEINRICH GOTTLÖB VON JUSTI, *Éléments Généraux de Police* (Rozet 1769), *quoted in* DONZELOT, *supra* note 2, at 12. *See also* PAOLO NAPOLI, *NAISSANCE DE LA POLICE MODERNE: POUVOIR, NORMES, SOCIÉTÉ* (2003).

16. *See* MICHEL FOUCAULT, *NAISSANCE DE LA BIOPOLITIQUE: COURS AU COLLÈGE DE FRANCE* (2004); *see also* MICHEL FOUCAULT, *HISTOIRE DE LA SEXUALITÉ: LA VOLONTÉ DE SAVOIR* (1976).

17. *See also* MICHAEL HARTD & ANTONIO NÉGRI, *EMPIRE* 46 (2000) (defending the idea of Empire with out imperialism); ATILIO A. BORON, *EMPIRE & IMPÉRIALISME* 30–31 (Marie-Anne Dubosc trans., 2003) (explaining that notion of “bio-competency” invented by Foucault is in reality a dated notion).

18. *See* FOUCAULT *supra* note 16, at 16.

surroundings and the environment.<sup>19</sup> In addition, the idea of safety has grown from the idea of sovereignty, and has, within this proliferation of institutions, rules and practices of welfare-inducing international law, become the legal instrument par excellence.<sup>20</sup> Various threats, including security, environmental, social, and sanitation threats, have become considerable accelerators of this tendency, because they lead international actors to think about social interconnections in collective terms and to form what Jürgen Habermas called an “involuntary community of risks.”<sup>21</sup> The law now aims not only at protecting individual States from aggression from other States, but also at managing collective risks and threats and the way in which individuals, populations, and States regulate their lives, since the life of any given man, population, or State is henceforth considered to be a risk factor for others.<sup>22</sup> As Ulrich Beck suggests,<sup>23</sup> this development touches the very core of modern domestic societies and international society, which simultaneously recognize the classical concept of “redistribution of riches” and the more modern “risk redistribution” society.

It may seem odd that this type of law developed in a world dominated by economic globalization. However, the fact that contemporary international law and its welfare-inducing aspects have developed in this way does not mean that we have now completely abandoned the old liberal paradigm and have moved on to a new, exclusively welfare-inducing model. Further, one would be mistaken to reduce the development of the international legal order to a by-product of economic currents generated by public and private transnational activities based on strictly liberal regulation, competition, and non-intervention. In fact, the practices and appearances of welfare-inducing law are perpetually influenced by the classical, liberal practices from which it would appear so detached, and even by current globalization practices. This has been supported by many observers, albeit not necessarily on the basis of a political interpretation of the sort I am proposing here, but in other, equally legitimate ways. Examples include reference to the subsistence of classical interstate structures

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19. See U.N. Conference on Env't and Dev., June 3–14, 1992, *Rio Declaration on Env't and Dev.*, annex I, princ. 1, U.N. Doc A/CONF.151/26/Rev.1 (Vol.I) (Jan. 1993) (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).

20. EWALD, *supra* note 7, at 375.

21. JÜRGEN HABERMAS, *LE PROJET DE PAIX PERPÉTUELLE: LE BICENTENAIRE D'UNE IDÉE KANTIENNE* 74 (Rainer Rochlitz trans., Le Cerf 1996).

22. EWALD, *supra* note 7, at 375.

23. ULRICH BECK, *LA SOCIÉTÉ DU RISQUE: SUR LA VOIE D'UNE AUTRE* 35–36 (Laure Bernardi, trans., Flammarion 2001) (1986). The society of large-scale or collective risk cannot, however, be said to incarnate an altogether new model of modernity, since risk (be it individual or large-scale) is, in any case, an aspect inherent to the welfare society, which is based on a redistribution of riches and risk management.

despite common finalities; the intersection of public law and the law of public actors on the one hand, and private law and the law of private actors on the other; and the fragmentation of international law and attempts at hierarchical stratification. The traditional distinction between public international law and private transnational law has thus given way to an intermingling of application areas, much in the same way as interrelationships between traditional actors, public actors, and private operators have intensified as part of the same development.<sup>24</sup>

The international legal system is complex, and its evolution toward an interventionist, welfare-inducing law is infused with liberal, formal and private elements. There are various meanings to the idea of welfare-inducing international law. More precisely, international law can be considered to be only residually welfare-inducing, as has been observed by Titmuss,<sup>25</sup> or can be perceived as welfare-inducing and liberal at once, as maintained by Gøsta Esping-Andersen.<sup>26</sup>

The phenomenon of socialization of the law does not necessarily coincide with an expansion of public international law to the detriment of private transnational law. This does not need to be the case because interventionist legal practices can have a private contractual basis just as much as they can be based on a multilateral public treaty, and can require action on the part of private actors as much as action on the part of public actors. Take a few examples: The first concerns the implementation of the welfare-inducing and interventionist Kyoto Protocol. The *a priori* objective of the Kyoto Protocol is only to limit State greenhouse gas emissions, and therefore facially relies only on States. In reality, however, successful implementation of the protocol depends on mobilization of the private sector, notably corporate action, as well as action taken pursuant to the Protocol's two flexibility mechanisms: the clean development mechanism (CDM) and the mechanism for joint implemen-

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24. For examples, see Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 *EUROPEAN J. INT'L LAW* 435–48(1997); Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3–28 (Gunther Teubner ed., 1997); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law* 10 *IND. J. GLOBAL LEGAL STUD.* 25 (2003); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT'L L.* 999; Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. COLO. L. REV.* 1555 (1999).

25. See RICHARD TITMUSS, *COMMITMENT TO WELFARE* 124 (1968).

26. See GØSTA ESPING-ANDERSEN, *LES TROIS MONDES DE L'ÉTAT-PROVIDENCE* 62 (1999) (“The fact that liberalism has warmed to social protection demonstrates that liberal practice is suppler than one thinks, which can be explained by the fact that under certain conditions, social protection can help consolidate the commercialisation of work without causing undesirable social effects.”).

tation (JI) which enables the Compliance Committee to cooperate with private actors (and especially with NGOs).

There are other examples of transnational efforts to legally and politically recognize health as a “world public interest” through public private action. The global struggle against malaria is a clear example. ASAQ is a new drug against malaria, a disease that kills over a million people in the most impoverished countries each year. It was released for sale on March 1, 2007, and is sold for a dollar a packet. Thanks to an extremely dynamic network of public and private actors consisting of NGOs, private foundations, pharmaceutical laboratories, public universities and UN agencies, it is marketed without any trademark. One is thus confronted with a process that defies legal compartmentalization and categorization. This cooperative effort between the public and private spheres demonstrates how the development of international law can be viewed in terms of welfare inducement.

It would be short-sighted to associate the liberal side of international law with private law and welfare-inducing international law with public international law. Such a view is corroborated neither by history nor by current developments, and entails interpreting the term “liberal” in a purely economic sense. The two models are superposed, and the interventionism inherent in welfare-inducing law favors the proliferation of operators, norms, and fields of intervention. Since international law has not yet seen true unification and centralization of political interests (an aspect that could also be said to be illusory in domestic systems), welfare-inducing law brings together various dispersed, specialized, and even contradictory policies and practices often driven by opposing interests.

Furthermore, welfare-inducing practices stimulate economic globalization to the extent that the latter represents a paradoxical motor of welfare-inducement: globalization driven to extremes prompts resistance and a need for corrections and adaptations by means of the law. It is fascinating to observe that something very similar already occurred during the first large pre-1914 wave of economic globalization, which coincided with colonization. Suzanne Berger described that the early domestic foundations for the welfare State were laid in this period when laws on accidents at work and on working time were put in place.<sup>27</sup> The author demonstrates very succinctly that this initial globalization certainly did not come in the way of distributive principles and social democracy and that it spawned these developments.<sup>28</sup> Michael Foucault, for his part, has

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27. SUZANNE BERGER, *NOTRE PREMIÈRE MONDIALISATION: LEÇONS D'UN ECHEC OUBLIÉ* 78 (2003).

28. *Id.* at 79.

analysed how bio-politics aimed at the protection of a population's health and environment have always required a liberal society.<sup>29</sup> Last but not least, developments of this sort can also be analysed in terms of the evolution of liberal and humanist individualism, as illustrated by Marcel Gauchet.<sup>30</sup> As a result of the gradual differentiation between collectives such as States and peoples, and of a truly constructive endeavour undertaken by concrete individuals in Western societies on the basis of abstract conceptions of the individual, the individual has increasingly become a central preoccupation for international society. There is a tendency toward attributing a substantive meaning to the liberty of the individual according to the means available to protect it. In particular, the rights and liberties of individuals have been enhanced by virtue of the improvements made to collective conditions. Seen in this way, welfare-inducing law can be perceived as a confirmation and not as a rejection of liberal principles. The norms and institutions of international law now remedy deficiencies and difficulties that formerly seemed to affect States and individuals separately, and which therefore called for personal or national remedies. These are, however, difficulties and problems the external effects of which have been known for a long time, and which are at the origins of the ideas of collective "detriment" or "good."

To appreciate the evolution toward welfare-inducement under international law, it is necessary to reinterpret the objectives and principles of contemporary law as it developed concurrent with changes in political, economic and social history. Liberal western democracies had a profound influence on contemporary international law and instilled in it a certain legal ethnocentrism. Though the objectives of the Charter that emerged in 1945 are currently a source of controversy, they are in fact the product of a process that spanned several centuries. Western social policies crystallized at a domestic and international level in the course of the 20th century, when the failure of classical liberal conceptions of liberty (and of sovereignty) became apparent and industrial and post-industrial capitalism increasingly gave rise to problems. In a way, it is the same trauma that has afflicted the domestic and international spheres, triggered by the realization that individual liberty and State sovereignty do not, when condemned to negative forms of coexistence, bring about improvement but make things worse. Cooperation and solidarity require alternative practices inspired by these experiences and by the progress of social sciences. The debate has been ongoing in Europe and in the

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29. See generally FOUCAULT, *supra* note 16.

30. See MARCEL GAUCHET, *LA DÉMOCRATIE CONTRE ELLE-MÊME* 341 (2002); see also MONIQUE CANTO-SPERBER & NADIA URBINATI, *LE SOCIALISME LIBÉRAL: UNE ANTHOLOGIE: EUROPE-ÉTATS-UNIS* (2003).

United States ever since the emergence of solidarist doctrines, but only really surfaced at an international level in the wake of the First World War. The idea of the League of Nations was defended by those who defended social laws in domestic systems, such as Georges Scelle, Léon Bourgeois, Georges Gurvitch, and Maxime Leroy,<sup>31</sup> the underlying thought being that a solidarist society would be a “safeguard” against war and would guarantee the wellbeing of all. This moment also marked the birth of the ILO.

The Second World War did not put an end to this process, and from 1941 onwards, social security was declared an essential element of future international peace. In the Atlantic Charter, Roosevelt and Churchill defined the forthcoming objectives of international society in the following terms:

To bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and *social security* (. . .)  
(To) afford assurance that all the men in all the lands may live out their lives in freedom from fear and want (points 5 and 6).

The tenor of these objectives comes as no surprise. The Charter came shortly after the introduction of the New Deal in the United States, which was before the Second World War. In 1944, Freda Kirchwey proclaimed, “Only a worldwide, more expansive and consistent New Deal can prevent a World War III.”<sup>32</sup> The European countries, for their part, emerged from the war with a new, more social conception of democracy, prepared to combat poverty and social misery in order to prevent another breakdown of democracy. The western post-war democracies set out to secure solidarity and full employment in a society based on free-market capitalism. The famous Beveridge Report published in Britain in 1942 intended to “rid society of want and all major risks.” In 1943, the CNR (the French National Council of the Resistance) published a report in which it deemed it necessary “to be protected against social risks by virtue of a regime based on foresight and assistance capable of abolishing

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31. See generally LÉON BOURGEOIS, *POUR LA SOCIÉTÉ DES NATIONS* (1910); LÉON BOURGEOIS, *LE TRAITÉ DE PAIX DE VERSAILLES* (1919); GEORGES SCELLE, *LE PACTE DES NATIONS* (1919); GEORGES SCELLE, *L'ORGANISATION INTERNATIONALE DU TRAVAIL ET LE B.I.T.* (1930); MAXIME LEROY, *L'ÈRE WILSON, LA SOCIÉTÉ DES NATIONS* (1917); GEORGES GURVITCH, *L'IDÉE DU DROIT SOCIAL* (1932); GEORGES GURVITCH, *LE TEMPS PRÉSENT ET L'IDÉE DU DROIT SOCIAL* (1931), cited in EWALD, *supra* note 7, at 397.

32. See Freda Kirchwey, *Program of Action*, 11 *THE NATION* 300 (1944). On extending the New Deal to other countries, see FRANZ SCHURMANN, *THE LOGIC OF WORLD POWER: AN INQUIRY INTO THE ORIGINS, CURRENTS, AND CONTRADICTIONS OF WORLD POLITICS* (1974).

misery once and for all.”<sup>33</sup> Indeed, it was Churchill, Roosevelt, and de Gaulle who were to lay the foundations for the 1945 Charter and future international society. It is natural that they should project their ideals onto the future international legal system in addition to bringing about a realist repartition of powers in the future Security Council and putting in place an essentially liberal economic order by means of the Bretton Woods Agreements.<sup>34</sup> Yet the evils the European countries and Roosevelt’s America aimed at eradicating in 1945 are largely the same ones international society faces today: war scars, disease, poverty and ignorance.

The emphasis after the Second World War on the liberties of individuals (and of peoples) as well as on the new economic and social dimensions of the law indicated that these plights had “hollowed out from within” a world that seemed not to care about them enough.<sup>35</sup> In my opinion, the apparent paradox of the objectives of contemporary international law (formal/substantive; liberty/wellbeing; civil rights/social rights; State/people/individual) is the overall result of the historical development of western legal humanism in its liberal and conservative form, in its initial individualist form, and in its eventual social, paternalist and solidarist, i.e. welfare-inducing form. This explains the current dilemma of an international society no longer only confronted with the issue of war and peace, but also torn between liberty and life; between liberties and the economic, social and environmental wellbeing of the planet; between market exigencies and imperatives of compassion.

The specific welfare-inducing law and bioethical power issues this Essay addresses should not indicate partisanship or militancy, and do not have the negative meanings that authors such as Foucault, Hardt, or Negri attribute to them. That is, the development interpreted as welfare-inducing, interventionist, and bio-political does not necessarily transform contemporary law into a steel cage that will imprison everything and everyone as a global “Empire” takes its grip.<sup>36</sup> On the contrary, the terms employed in this essay are less radical, and describe practices which are infinitely more ambivalent than the above authors suggest.

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33. FRANCIS DEMIER, *HISTOIRE DES POLITIQUES SOCIALES: EUROPE, XIX–XX SIECLE* 68 (1996).

34. See Jean-Pierre Cot & Alain Pellet, *Préambule*, in *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE* 287, 304–12 (Jean-Pierre Cot, Alain Pellet & Mathias Forteau eds., 3d ed. 2005).

35. GAUCHET, *supra* note 30, at 334.

36. See HARDT & NÉGRI, *supra* note 17. This notion of Empire is characterised by “marginal imperial sovereignty,” which should not be confused with the idea of a supranational world State. *Id.* at 66. *But see* BORON, *supra* note 17 (identifying the historical and conceptual inaccuracies of this thesis). The notion cannot be described on the sole basis of a term like global governance, either. See, e.g., *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (1992).

They aim to convey, in the most accurate way possible, what flows from the observation of various existing legal practices related to socialising processes and to illustrate the fact that, contrary to what certain authors have been contending for a long time—and most notably since the failure of endeavours such as the New International Economic Order in the 1970s—that international law not only transports liberal values, but also welfare-inducing and interventionist practices and values.<sup>37</sup> Liberal welfare-inducing law thus represents a new legal, political and economic configuration at the international level, and not merely a liberal configuration.

*C. Instrumental Logic and Common Principles: Internalization, Fragmentation and Constitutionalization*

The principal role of international law does still consist, of course, of liberal regulation of conduct and of the resolution of conflict, aimed at promoting coexistence of sovereign liberties. But besides its original prescriptive and organizational roles, international law also fulfils a substantive, interventionist role. It governs domestic situations, reconstructs States, promotes democracy, and addresses collective interests pertaining to the environment, health, and culture. The result has been one of the most important developments in contemporary international law: the regulation not only of interstate relations, but also of domestic situations.

The fact that rules of international origin increasingly penetrate into domestic systems is testimony to a post-1945 desire to regulate the conduct of private individuals or the conduct of States *vis-à-vis* their subjects in addition to regulating relations that are strictly interstate. Although this decisive aspect no longer commands as much of international lawyers' attention as it used to, the internalization of international law has long-term implications for the definition of international law, as well as its relationship with domestic law and the re-designation of our field of study, as has been demonstrated by Jean Combacau.<sup>38</sup> Moreover, as emphasised by Gunther Teubner, Jean-Guy Belley, and Charles-Albert Morand,<sup>39</sup> it is

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37. Accordingly, it seems appropriate to nuance the overly liberal interpretations of contemporary international law that have featured in an extremely abundant, notably Anglo-Saxon literature, but which have also been formulated by authors of various other origins. See generally THOMAS MARTIN FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN AN AGE OF INDIVIDUALISM* (2001); FERNANDO TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2005); THOMAS WALDE, *REQUIEM FOR THE NEW ECONOMIC ORDER* (1997).

38. See Jean Combacau, *Statut du Droit International et Statut des Internationalistes: Ce qui est et ce qui pourrait être*, in *ENSEIGNEMENT DU DROIT INTERNATIONAL. RECHERCHE ET PRATIQUE* 259, 259–78 (Société française pour le droit international ed., 1997).

39. See CHARLES-ALBERT MORAND, *LE DROIT SAISI PAR LA MONDIALISATION* (2001); Jean-Guy Belley, *Une Métaphore Chimique pour le Droit*, in *LE DROIT SOLUBLE* 7 (1996);



used for the attainment of specific objectives and to re-equilibrate economic, political, and social imbalances. The predominant economic system is obviously not indifferent to this development since it is based on a functionalist rationale, as are the ongoing commercialization and legalization of the social relationships that are collateral to economic and financial transactions.

The market and political economics therefore play an important role in this context, but the way in which legal rationale is evolving is neither a consequence nor an implication of these factors. The international legal order has a natural tendency to decentralize and divide itself in accordance with the various different social and economic activities it overarches. Another part of the explanation lies in the materialization of the new initiators and co-creators of law together with whom the former Secretary General of the United Nations aimed at formulating a Global Compact, but it lies also in the emergence of that famous “involuntary community of risks” referred to earlier. Law is resorted to in reaction to risks and new threats, and often the available remedy is not of a general nature, but a specific response. The propensity to seek legal remedies has led to a legal regime that is attaining specificity and poignancy in a variety of sectors (the environment, crime, bioethics, etc.). International society has become a society of law characterized not by a shift toward world statehood, but by the emergence of different “pools of law.”<sup>40</sup> Also, the law has become a “social technique” through which a number of profitable (economic) activities and environmental, investment, trade, interstate, and individual rights-related problems are defined, managed, and channelled in as coherent a way as possible.

Some observers have also remarked that international and transnational rules appear to be becoming a lot more mobile, variable, alterable. They have become the immediate transposition of various substantive, cultural, social, and economic objectives set by States and international institutions as well as private operators. They convey a social consensus achieved by these actors at a given moment in response to a given social and political situation. In other words, what was formerly merely a pragmatist and anti-conceptualist conception of law attributed to a strong Anglo-American movement has actually become a reality of international law.

It thus comes as no surprise that the international legal structure is now undergoing the same development that once characterized domestic

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STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS (1992). *See also* LARS D. ERIKSSON ET AL., INTRODUCTION: A POLYTICAL MANIFESTO, IN POLYCENTRICITY 1 (1998); FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RÉSEAU? (2002).

40. *See* JACQUES CHEVALLIER, L'ÉTAT POST-MODERNE 94 (2d ed. 2004).

systems: namely, that of a proliferation of legal aims and functions. This follows an inflation of rules of hard law or soft law, of the bureaucratization of international relations by international institutions, and of the increasingly technical nature of certain branches of international law, the aims of which are very particular and precise.<sup>41</sup> In international law, however, more so than in domestic law, legal rules proliferate because existing texts are rarely abrogated. One convention, directive, resolution or declaration follows the next, yet the formation of new rules does not entail the disappearance of the old ones. Much uncertainty still surrounds the concepts of desuetude and caducity, wherefore the amount of legal rules does not cease to increase. It is also revealing that the texts are becoming ever longer, as they are now more exhaustive and technical. They are also increasingly numerated. The greater complexity and detail of current rules derives from their sector-related specificity. Correspondingly, the legal prescriptions of rules now weigh more heavily. New goals are emerging that are characteristic of a welfare-inducing society, backed by rules that are prospective and that act as an incitation rather than a sanction. The impressive development by firms of codes of best practice is a perfect example of this.<sup>42</sup> Finally, there has been a noticeable change in the sources of law, as all that is practical, bilateral, or singular is preferred to what is multilateral, and to modes of creation that are too formal.

The increased number of sources and specificity of international law lead to fragmentation, creating a multitude of specialized or regional sub-systems. Conventions and legal texts are more and more often specialized or regional in nature, sometimes extremely technical, and aim to regulate social reality with the largest possible efficacy. In fact, a characteristic aspect of this welfare-inducing development has been an anarchic proliferation of rules destined to regulate many areas of social life. This proliferation also produces incomplete and instable rules. Each legal subsystem provides for its own particular responses and functions in ways that satisfy very specific needs. The solutions offered by these subsystems most often do not take into account common connections with other fields. The subsystems are set up by conventions that have a limited sphere of application, calibrated to the pursuit of a precise substantive result. This makes them easier to conclude, and they are necessary in that they enable international law to achieve its various concrete, specialized, and technical aims that rely on the constant increase

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41. See JÜNGER HABERMAS, *LA TECHNIQUE ET LA SCIENCE COMME IDÉOLOGIE* 87 (1973).

42. See, e.g., Gérard Farjat, *Nouvelles réflexions sur les codes de conduite privée*, in *LES TRANSFORMATIONS DE LA RÉGULATION JURIDIQUE* 151 (1998).

in legal rules in international society. But they favour segmentation of certain substantive areas to the detriment of the sum total, since specialized rules are directed at the pursuit of immediate and particular aims and not of general objectives. They thereby create the impression that international law is structured in a fragmented and disorderly manner, focussing on very particular economic, financial, environmental, social, or other aims.

There is nothing novel in illustrating the effects of this rationale. Substantive results are achieved in a functionalist manner and in ways that satisfy immediate interests, by trumping the law that is deemed formal and without due consideration for the general collective interest, with the consequence that the values to which these interests should be naturally subordinate are ignored. International law is thus marked by a new positivity and corresponds to a logic of efficiency. This extension has been brought about by a welfare-inducing international society which, although not a State, has its own somewhat uncoordinated and uncontrolled way of dealing with technological developments, the surge of capitalism, bureaucratic specialization, new adjacent security challenge, and the various new and social objectives defined by international society itself. This new law is effective because it does not allow for overly rigid or dogmatic conceptions of law, but rather is concrete, specialized and regionalized, adapted to particular objectives and particular contexts. Further, the elaboration and application of the law flows from the consensus of all the various actors involved, and not merely of States.

The success of a specialized response lends credence to the idea of a purely instrumental conception of internationalism, where international law is merely a vehicle for the interests of certain groups of actors in international society. This has prompted some to assume that international rules have become irreversibly dispersed or pluralized. However, while it is true that international law has acquired an instrumental and systemic function, it is not limited to this function. International law has thus far not become entirely instrumental. Research into the constitutionalization and unification of international law as well as the idea of communal law remains relevant as an analytical instrument, on the condition that such research is not taken to provide fail-safe and all-inclusive descriptions of reality. Not only do they reflect a certain regulatory ideal inherent in internationalist mentality, but they also find confirmation in pragmatist research into the positivist elements of common and unifying principles.<sup>43</sup> A universalizing approach to certain principles of interna-

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43. See generally MIREILLE DELMAS-MARTY, *POUR UN DROIT COMMUN* (1994).

tional law is quite defensible, as is the underlying ideological dimension, since the aim of universalization is the “sharing of a wider sense.”<sup>44</sup>

How can the dispersion of rules and the emergence of common principles be explained? They can be explained on the basis that the two phenomena are inextricably linked. It was the adoption of substantive principles in 1945 that led to the incredible extension of international law, and thus to its increasingly technical nature, its specialization and its fragmentation. Law is subject to division, proliferation, and segmentation as a result of our interventionist, humanist, and welfare-inducing objectives, because it is serving finalities that are substantive—and which do not cease to proliferate—as well as purely formal. As has been pointed out by Christopher L. Tomlins,<sup>45</sup> international law is thus subject to the same discrepancy that afflicts many highly legalistic domestic societies, in which law is torn between its social (and instrumental) function and its normative (and universal) function, between specific interests and autonomy or universality.<sup>46</sup>

International law’s interventionist and welfare-inducing pan-legalism can be explained by a “turn for the ethical” that commenced before 1945 and continued until the 1990s. The 1990s and the modern world’s shift toward globalization transported the issue to a practical level and rendered more visible a process which had been ongoing for a long time. International society’s pan-legalism is thus linked to very deep-seated ethics that are social (solidarity), biological (life), and liberal (liberty). These ethics were inscribed in the Charter, but only really became a striking source of difficulty since the 1990s and the end of the Cold War.

The law has since developed in a double manner. It is now made up of social subsystems with specific legal regulatory needs, and produces specific rules that are regional and flexible. It also finds expression in values that are considered fundamental and communal, and in the enunciation and internationalization of these principles. International law is not only an instrument for regional, categorical or specialized interests, but it can also transport and impose, or be considered to transport and impose, the fundamental ethical values of international politics as affirmed in the Charter. Refusal to take these communal finalities into account and insistence on classical positivism or relativist deconstructivism does not seem

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44. See FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RÉSEAU?* 160 (2002).

45. See Christopher L. Tomlins, *Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative*, 34 *LAW & SOC’Y REV.* 911 (2000); see also Christopher L. Tomlins, *Le Champ Juridique et Son Histoire: Récit, Justification et Explication. Réflexions à Partir du Cas Américain*, in *SUR LA PORTÉE SOCIALE DU DROIT: USAGES ET LÉGITIMITÉ DU REGISTRE JURIDIQUE* 79–103 (2005).

46. Tomlins, *Le Champ Juridique et Son Histoire*, *supra* note 45.

realistic, as Pierre-Marie Dupuy has explained.<sup>47</sup> Of course, as indicated, the law of 1945 is more prone to conflict because it is substantive. But this should not lead us to ignore its ethical and communal dimension, despite the fact that it generates many more conflicts than simple formal law does. This is subject to much greater criticism, attack, and denunciation when attached to substantive principles than when attached to the formal rules of creation and application.<sup>48</sup> Again, this is normal, as this finality and these common values are not beyond all doubt, but uncertain and provisory elements of our substantive law, and therefore need to be subject to permanent negotiation. But if one believes in the possibility of making collective decisions, which may be uncertain and fragile and which do not necessarily have to be hegemonic, this means that the decisions are communal and not individualist.<sup>49</sup> If the only logic to prevail in our internationalist world were the instrumentalist logic, this would mean that international law has really become a simple “tool-box” at the service of predominant interests. That would imply what has been termed an “eclipsing of aims” and a triumph of instrumental reasoning to the benefit of specific interests and a “disenchantment of international law.”

Yet this is not the case of contemporary law. The law here sometimes acts as a “stopcock” for instrumentalist notions. Take a well-known and controversial example of a fundamental and communal legal limit established by international law: resistance of the *commercialization* of the value of health protection. Medicinal drugs are commercial items that are sold and bought, but that is no reason to transform health protection itself into a commercial item.<sup>50</sup> It is only logical and indeed necessary that pharmaceutical corporations protect their interests. We owe the availability of new drugs to the laws of the marketplace, which favor free competition. However, millions lack access to the drugs they need because access to generic drugs is not authorized. It is therefore up to international politics to take charge of this issue, not with a view to abolishing the free market that has made these drugs available to us, but to putting legal limits on the adverse effects on community needs. What is required is a compromise between the pharmaceutical industry and the right to medical treatment and health protection, a fundamental legal

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47. See, e.g., Pierre-Marie Dupuy, *L'Unité de l'ordre juridique international*, 297 RE-CUEIL DES COURS 10, 29 (2003).

48. Nevertheless, the formal rules of creation and application are now being put in question as well.

49. See generally Emmanuelle Jouannet, *IMPÉRIALISME ET DROIT INTERNATIONAL EN EUROPE ET AUX ETATS-UNIS* (2007).

50. See ANDRÉ COMTE-SPONVILLE, *LE CAPITALISME EST-IL MORAL?* 132–34 (2006).

value established by international law. André Comte-Sponville<sup>51</sup> emphasised that even though the marketplace and corporations may be best at generating wealth and good products, one must realize that they are not necessarily good at creating justice. That is not their role. Only States and other subjects of international law are capable of achieving this by subjecting the laws of the marketplace to certain fundamental legal limits.

#### *D. New Power-Related Challenges*

The global political balance is being subtly modified by the effects of contemporary international law. Legal interventionism is giving rise to new power-related challenges in domestic systems as well as in international society. It is bringing about new political balances. One would be mistaken to think that this extension of law coincides with a phenomenon of a limitation of power, since, on the contrary, it implies a strengthening of the grip of power on international and domestic social life. The expansion of law corresponds to an increase in the activities of its institutions, its bodies, its experts, its jurisdictions and international actors, all of which apply and control international legal rules.

The role of legal professionals, experts, and civil servants has also grown in importance. For example, the link between welfare-inducing law and the existence of a growing bureaucracy has been apparent for a long time.<sup>52</sup> Once a bureaucracy is in place, its international character leads it to use its power for its own enhancement and thus for the enhancement of interventionist law. International legal doctrine often focuses on the importance of this growing bureaucracy, but in reality its expansion may already have drawn to a close. The concurrent phenomena of regulation and governance that accompany the systematic and functional international legal process lead to polycentric, negotiated regulation, which increasingly escapes the grip of governmental bodies and thus stunts bureaucracy.<sup>53</sup> Can this not, for example, be said to be the case of financial law, of international economic law, and of (international) competition law?<sup>54</sup> In fact, the two phenomena coexist, because as illustrated, they pursue the same aim, albeit by different means.

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51. *Id.* at 139.

52. See ESPING-ADERSEN, *supra* note 26, at 140.

53. Alternatively, the activities of international organisations can also be integrated into this new regulation.

54. Equally striking is the emergence of power networks which are private in nature and which are at the service of weighty economic operators, such as those established by industrial think-tanks and public relations agencies. See BELÉN BALANYA ET AL., EUROPE INC: COMMENT LES MULTINATIONALES CONSTRUISENT L'EUROPE ET L'ÉCONOMIE MONDIALE 43 (2005).

The growth of interventionist international law coincides with the establishment of roles for those who create and apply it, given that the ongoing development of international legal rules in all areas of social life is leading various powers to intervene in these areas in the name of international law.<sup>55</sup> Another consequence of this is the increasingly important role played by international judges. Any society that is increasingly subjected to the rule of law will experience the “sanctification of the judge,”<sup>56</sup> and a change in the role of the latter, since judges are called upon increasingly often to resolve conflicts between multiple rules, and are also becoming the international order’s “guardians of values.”<sup>57</sup> But this extension of international law has also brought about its revalorisation in the eyes of its various actors. Social actors, States, minorities, individuals and indigenous peoples increasingly tend to formulate their claims in terms of rights, while other actors such as associations, trade unions, NGOs, international organizations, and foreign government agencies are assisting them in these legal formulations and obliging institutions to respect the relevant rules in the most scrupulous way possible. Some of these institutions include the IFHR, the HCR, the LawNet Center, the Institute for Human Rights and Development in Africa, and the Southeast Asia Fund for Institutional and Legal Development (SEAFILD). The aims of these social actors are not solely to claim elementary rights, but to resolve extremely complex legal situations that arise out of the actual domestic application of rights. Law has thus become an instrument and means of recourse in its own right when it comes to social, political, cultural, economic, domestic, or international conflict. International law is constantly resorted to as a means of combating arbitrariness and of remedying weaknesses, imbalances, and injustices in international society.

Yet although this increasingly important role of law can modify the balance of political powers, it also puts into question the legitimacy of the existing order. It can encourage support, but it can equally create resentment when welfare-inducing law fails to keep its promises. International law’s own expanse may undermine its effectiveness if expansion is not rooted in legitimacy and effectiveness. In 1945, international law was considered the solution to the world’s problems. In 2006, it may be a part of the problem.<sup>58</sup> But should the strength of inter-

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55. See Walter Leisner, *L’État de droit : une contradiction*, in RECUEIL D’ÉTUDES EN HOMMAGE À CHARLES EISENMANN 65, 73 (1975).

56. CHEVALLIER, *supra* note 40, at 133.

57. CHEVALLIER, *supra* note 40, at 133.

58. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

national law “be measured on the basis of what it has already achieved or in light of what it aims at?”<sup>59</sup>

## II. EFFECTIVENESS AND LEGITIMACY

As international society moves away from being strictly liberal and becomes welfare-inducing, international law is becoming increasingly interventionist and ambitious in its aims and objectives. It has become one of the most important structuring elements of international society. Nonetheless, the expansionist and interventionist international law model gives rise to a number of problems that are affecting its legitimacy and causing some to question its effectiveness. Skeptics challenge: Whatever happened to implementing the aims of the Millennium Declaration or of the Declarations on the Decade of International Law, on the Elimination of Violence against Women, on the New International Economic Order? Whatever happened to the grandiose objective formulated by the WHO in 1978 at Alma-Ata to ensure “health for all by the year 2000?” What about implementing the Kyoto Protocol, putting into operation the International Criminal Court, or fighting against poverty?

To ask these questions repeatedly implies condemnation of the gaping chasm that inevitably exists between law and reality. Nonetheless, we should raise them while taking due account of recent developments. Contemporary international law is characterized by a process of socialization of such wide amplitude that it cannot simply be perceived as a simple avatar, a quick fix, or a solution to certain shortcomings of classical liberal law. It needs to be looked at as it is, in all its positive nature, with its specificities and unique problems.<sup>60</sup> It should not be reduced to a purely negative expression of a bio-competency, because it is also a positive instrument of solidarist regulation. The questions are thus: Where are its limits? To which difficulties does it give rise?

### A. *The Difficulties of Welfare-Inducing Law*

Contemporary law has been challenged on various levels. Overt interventionism in some social or economic areas may upset certain delicate balances, or slow down necessary adaptations as a consequence of the constraints or unacceptable rigidities it may imply. This is the case of some policies applied to developing countries that have, in recent years,

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59. For further discussion, see PIERRE BOURETZ, *La force du droit*, in LA FORCE DU DROIT: PANORAMA DES DÉBATS CONTEMPORAINS 9, 18 (1991).

60. See EWALD, *supra* note 7, at 437.



been critically re-evaluated.<sup>61</sup> There is also a distinct danger that the inflationary proliferation of rules will damage the law and create uncertainty as to the boundary between law and non-law, which could in turn endanger its crucial predictability and stability.

This correlates with Prosper Weil's observation that there is so much soft law today that it is impossible to distinguish between the legal and the illegal in international law.<sup>62</sup> And even though one can, notwithstanding Mr. Weil's criticism, defend the idea of soft law, it is certainly not without its difficulties. The proliferation of rules of all sorts is harming the credibility of those rules. Law has started to "produce uncertainty," and is becoming difficult to discern. The result is dangerous opacity. International law is running the risk of becoming lost from the view of the ordinary citizens who are precisely the regulatory object of international law. They stand bewildered before an incomprehensible body of international regulation, perceived by some as being oppressive. The ever-more invasive presence of international law in domestic systems is considered legal imperialism in certain parts of the world, as it is the result of a situation of inegalitarian coercion in which international agreement on rules is pure façade.

Public opinion often weighs heavily on foreign policy. But the question of the perception of international law affects new as well as older international actors, including the States themselves. There may be a shared sentiment of incapacity when it comes to dealing with the proliferation of rules that define the finalities of contemporary international law. This may favor the role of experts, of legal professionals such as ourselves, but it is not commendable. It does not resolve the issue of perception or the inability of other actors—and at times even of the professionals themselves—to access rules, and lends credence to the idea that know-how has been confiscated by an elite. David Kennedy figures among those who have shown that the predominant role of experts is detrimental to political decision-making and to the law itself.<sup>63</sup> The problem lies not so much in the elaboration or application of rules, but in the fact that this elaboration and application relies on the "true knowledge" of "priestly experts." The danger is that the latter will exercise unlimited

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61. This well-known criticism comes most notably from economists and is most often directed at the famous SAPs (Structural Adjustment Programmes) imposed by lenders, the World Bank and the IMF. See PIERRE RALLE & DOMINIQUE GUELLEC, *LES NOUVELLES THÉORIES DE LA CROISSANCE* (1995); Dani Rodrick, *L'intégration dans l'économie mondiale peut-elle se substituer à une stratégie de développement*, 1-2 *REVUE D'ÉCONOMIE DU DÉVELOPPEMENT* 233, 237-38 (2001).

62. See Prosper Weil, *Vers une normativité relative en droit international* 86 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 5-47 (1982).

63. See JOHN HATCHARD & AMANDA PERRY-KESSARIS, *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 17-26 (2003).

social control based on the link between knowledge, power, and existing rules.

Yet it does not stop there. Since law is omnipresent, it is also a lot more vulnerable and subject to criticism, to defaults and shortcomings. As it develops, it becomes more fragile. The more the law is applied to different social, economic, ecological, ethical, and cultural areas, the more its execution becomes inconsistent. Accordingly, the welfare-inducing and bio-political aspect is not, at present, leading it to become an instrument of total social control, but has simply made it cover so many areas that it has become incapable of regulating them correctly. For instance, the more numerous the conventions on women's rights, journalists, child soldiers, etcetera, the greater the danger of ineffectiveness or non-execution. For example, the International Convention for the Protection of All Persons from Enforced Disappearance was recently adopted by the UN General Assembly on December 20, 2006, in response to increased kidnappings in countries such as Nepal, Chechnya and Columbia. The Convention puts in place an important preventive and protective regime, and categorizes forced disappearances as continuous crimes. It also provides for the creation of a Committee Against Forced Disappearances and for resort to the Secretary General of the United Nations.

There are currently several hundred international human rights instruments in existence.<sup>64</sup> Yet violations, circumvention of rules, exceptions, and derogations are increasing proportionate to the multiplication of international legal rules. This corresponds to simple mathematical logic, but the greater issue lies in the increased sentiment of ineffectiveness and of false certainty as to the strength of the law. It is not conducive to law or society to increase prohibitions in the area of human rights when they are still far from enforceable. In fact, it weakens law and society. To evoke another example, Article 25 of the Universal Declaration of Human Rights provides that "everyone has the right to an adequate standard of living." Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights recognises "the fundamental right of everyone to be free from hunger." The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, emphasises that extreme poverty and exclusion are incompatible with human dignity. Accordingly, the Copenhagen Declaration on Social Development and the Programme of Action

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64. See UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION [UNESCO], *Droits de l'homme: les principaux instruments internationaux, état au 31 mai 2004* (May 31, 2004) (prepared by Vladimir Volodin), available at <http://unesdoc.unesco.org/images/0013/001377/137770m.pdf>.

adopted at the World Summit for Social Development in March 1995, the World Summit on Sustainable Development, held at Johannesburg in September 2002, and the declaration adopted on the occasion of the tenth anniversary of the World Summit for Social Development in February 2005 all reaffirmed that the fight against extreme poverty must remain an utmost priority for the international community. The Millennium Development Goals formed part of the Millennium Declaration adopted by the UN General Assembly in 2000. The resolutions on human rights and extreme poverty adopted each year by the UN Human Rights Commission link the issue of extreme poverty to that of the indivisibility of rights, and note the inability of the most impoverished to exercise civil and political rights.<sup>65</sup>

Despite these measures, extreme poverty remains a global challenge that faces around 800 million individuals who survive on an income less than one dollar a day.<sup>66</sup> What is the use of international law? The phenomenon of pan-legalism, whereby more and more areas are being subjected to and regulated by international law, is creating the dangerous illusion that any problem can be solved by means of international regulation. Often ethical, social, or economic solutions are more appropriate. Today, international law is overused and as a result its credibility has suffered.

Contemporary law suffers from the same problem that afflicts the welfare State: it attempts to accomplish unachievable ends. One of these aims is to liberate international society "from want and from risk."<sup>67</sup> The desire to be free from risk and to enjoy security has already been addressed by classical international liberal law, which aims primarily at order and stability. However, this desire has now acquired a new dimension. It encompasses the physical security of individuals; the prevention

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65. The last resolution was passed on April 14, 2005.

66. See U.N. Conference on Trade & Development, Geneva, Switz., 2002 *Economic Development in Africa From Adjustment to Poverty Reduction: What is New?*, UNCTAD/GDS/AFRICA/2 (2002) (observing that in the cases of 27 African countries that applied poverty reduction strategies, after two decades of structural adjustment, poverty has increased, growth is most often slow and erratic, rural crises have worsened and deindustrialisation has hampered growth perspectives). The 1990s saw a rapid decrease in the number of people in the world living on less than a dollar per day, the number having gone from 1.3 billion in 1990 to 1.16 billion in 1999. See WORLD BANK, *WORLD DEVELOPMENT INDICATORS 2003* at 5. However, this progress has been achieved mainly in China and in India. In fact, the number of people living in poverty has gone from 6 to 24 million in Eastern Europe and Central Asia, from 48 to 57 million in Latin America, from 5 to 6 million in the Middle East and in Northern Africa, and from 241 to 315 million in Africa. *Id.* The report indicates that by 2015, if the current rhythm of economic growth is maintained, the number of people living in extreme poverty will probably diminish in all regions of the world except sub-Saharan Africa, in the Middle East and in North Africa, where projected growth rates are not sufficient to stem the onslaught of poverty. *Id.*

67. See ROSANVALLON, *supra* note 13, at 33–35.

of major technological, epidemical and ecological disasters; compensation for natural catastrophes; the necessity to combat international instability; and the current dangers of terrorism through collective action. These are legitimate expectations based on the notions of interdependence and of the "involuntary community of risks," but their achievement requires an exponential increase in the amount of legal interventions.

In addition to this first aim, there is another, entirely legitimate desire: to be free from want.<sup>68</sup> Contemporary welfare-inducing international law strives to assure wellbeing and to satisfy needs in very concrete ways, by remedying weaknesses in State action and through the guarantee of basic living conditions and to bring about economic and social prosperity the world around. In this context, one notes that there is an implicit and perhaps unconscious objective of exercising a bio-competency.<sup>69</sup>

The limitless nature of this aim is all too apparent. Eliminating want in order to ensure survival is an achievable aim, even if it requires determining the meaning of survival (which is a relative term) and harnessing political goodwill. To improve the health of human beings is also a measurable objective, although it has no real limit. Satisfying a need for collective wellbeing in a more general way, though, is hardly commensurable.<sup>70</sup> Similar issues arise when new risks of planetary proportions materialize, leading the pursuit of wellbeing to become interwoven with a fight against large-scale risks and giving rise to the same unlimited spiral. Combating civilizational risks "represents an *unlimited endeavour*, insatiable, eternal, which auto-extends itself."<sup>71</sup> As for the need to achieve wellbeing, it too seems to be largely exponential and auto-referential. The logic of welfare-inducing, interventionist international law, and priestly bio-competency, has given rise to an "always more" logic that knows no bounds and that could undermine the law's legitimacy due to its loss of efficiency, of sense, and of significance in the eyes of the members of international society.<sup>72</sup> The law is creating novel expectations that are sometimes over-inflated and to which the law is sometimes incapable of responding. The turn toward the ethical, taken in conjunction with economic globalization, has undoubtedly reinforced

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68. ROSANVALLON, *supra* note 13, at 34.

69. See FOUCAULT, NAISSANCE, *supra* note 16, at 323.

70. See ROSANVALLON, *supra* note 13.

71. BECK, *supra* note 23, at 42; see BECK, *supra* note 23, at 103 ("[S]ociety in its entirety is determined by the risks it creates, and thus produces the very social conditions and the political potential which can pose a threat to it and challenge the foundations of modernisation as we know it.")

72. BECK, *supra* note 23, at 38.

the utopian idea of a welfare-inducing international law that is capable of anything, since globalization has sparked the hope of new economic prosperity. However, as Daniel Cohen has observed quite succinctly, the main problem with globalization is that “it is not keeping its promises,”<sup>73</sup> at least not for the moment.

One can hardly ignore its virtually mystifying aspect: the expectations that need to be satisfied by means of welfare-inducing law are boundless, and the responses that are undertaken are unsatisfying. Welfare-inducing international law strives to bring wellbeing to populations, but sometimes attempts to do this by treating them as regulated bodies rather than as populations that are free to govern themselves. It is not sufficiently shaped by the collective decision-making and deliberation one usually finds in politically free collectives.

These observations should not be misunderstood. They seek neither to conceal the positive aspects and successes of contemporary international law, nor to shed doubt on the necessity of the fights against poverty, disease, and the suffering that millions of individuals in the world confront. The aim is solely to draw attention to the difficulties that attach to the welfare-inducing, bioethical, and interventionist finality of this law, and to re-evaluate its possibilities. Is the purpose of its finality merely to legitimise the existence of new powers? Or put differently: Is the law’s legitimacy not deeply affected by the partial ineffectiveness it suffers from in certain areas? Could its application on the basis of a principle of exclusion or inclusion not harm it? Will judges, currently “guardians of values,” end up becoming the “final guardians of promises?”<sup>74</sup> And will the indefinite extension of international law lead to its decline?

### B. *Conceptions of Effectiveness and Legitimacy*

To briefly illustrate a current tendency: In March 2006, the general directors of civil aviation of the member States of the ICAO decided to publish the results of the organization’s Universal Security Audit Programme (USAP) on its website. The objective was to evaluate to what degree the application of the Organization’s rules was effective, and to identify their security defaults. A situation report is due to be presented at the next ordinary session of the Assembly of the ICAO, in autumn 2007.<sup>75</sup> The subject is obviously of crucial importance, since terrorism in

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73. DANIEL COHEN, *LA MONDIALISATION ET SES ENNEMIS* 256 (2004).

74. GARAPON, *supra* note 3.

75. See Jacobo Rios Rodriguez, *OACI Conférence des Directeurs généraux de l’aviation civile sur une stratégie mondiale pour la sécurité de la navigation aérienne*, 59 SENTINELLE (2006), available at <http://www.sfdi.org/actualites/a2006/Sentinelle%2059.htm#oaci>.

international aviation is a grave threat to civilian security, and the audit adopted by the ICAO, an organization founded in 1944, demonstrates a current trend toward reinforcing the effectiveness of international legal rules. In the present context, the question we should be interested in is to what extent this current search for effectiveness is or is not connected to the idea of legitimacy of international rules.

It would exceed the scope of this work to address all aspects of this problem, and would require operating Thomas Franck's complex distinction between the different types of legitimacy that attach to various situations or rules.<sup>76</sup> Moreover, it is only natural that the debate on the legitimacy of international institutions and rules persists. As mentioned above, this is the result of international law having evolved into substantive law. In a decentralized international society such as ours, where actors, activities, and interests are diverse and plentiful and where universal institutions are threatening to become unproductive by virtue of an increase in tasks and administrative networks, no institution, group of States, or even a global community of States can truly purport to incarnate the general interest of the international community.<sup>77</sup> In a society that possesses multiple networks in competition with one another, it is unavoidable that various legitimacies should exist, given the parallel proliferation of the principles and instances of legitimacy.

That said, it appears necessary to emphasise that the question of the legitimacy of contemporary international law is subject to a double inflection of paradoxical nature. Discourse on the legitimacy of rules has now acquired dual character.

On the one hand, there is a claim to absolute legitimacy, to "value" legitimacy as M. Weber would say. The set of common values that has not been in doubt and that represents a tenet of modern-day international law possesses an aura of legitimacy some would not dare put in question. On the contrary, others subject it to the most rigorous scrutiny. What comes to mind are human rights and democracy. These rights are *a priori* immune to utilitarian discourse because they represent an interest in their own right that cannot be of utilitarian nature. Even though extending their benefit to everyone ensures a minimum of wellbeing for everyone, their value is above all deemed to be intrinsic, whereby they cannot be sacrificed to utilitarian ends. Legal practice in this respect is among the most contentious of modern times since it concerns one of the most fundamental aspects of the new "togetherness" of international society. Most

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76. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 25–46 (1995).

77. See generally Nathaniel Berman, *Passions et ambivalences: le colonialisme, le nationalisme et le droit international* (forthcoming May 2008), with introduction by Emmanuelle Jouannet.

of the current major conflicts, domestic as well as international, feed off this discourse or directly integrate it, regardless of the position that is ultimately taken.

Human rights were thus invoked to justify colonization as well as decolonization.<sup>78</sup> Yet rather than lapsing into easy criticism, one must never cease to inquire into their legitimacy. Human rights are illustrative of a type of legal discourse that is hardly susceptible to criticism,<sup>79</sup> since it claims absolute “value” legitimacy. There are certain immediate consequences: to delay the application of these rights is to deal with the devil. The absolute value that human rights tend to be accorded sometimes renders doubt “criminal.”<sup>80</sup> These present words may trigger outcries, cause indignation, and give rise to reproach, as certain situations really are intolerable. Moreover, it is often observed that those who contest human rights are those who violate them for their own benefit. For example, Burma’s Aung Sang Suu Ky does not defend a western conception of liberty. Similarly, even Rigoberta Menchu who works for the cause of the rights of indigenous peoples does not defend this concept.<sup>81</sup> Many lawyers assert that human rights are, first and foremost, a legal category and not an ideology or religion, and that these rights need to be dissociated from their moral dimension as well as from ideological manipulation. Though this is a fundamental point, one should not forget their general ethical value, considering that this ethical nature produces effects that would not be explicable otherwise. The ethical value of rights does not seem to be dissociable from their legal status, which is why they remain subject to certain limitations, and always will be. In addition, by reason of the underlying ethical status of rights, they are ever more often accorded the role of transcendent collective landmarks within an international society that actually de-sanctified itself long ago. Contemporary international society takes on the civilized role of classical society by soliciting the symbolic function of rights much in the same way modern western democracies have.

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78. There was, in fact, an indirect link between the civilisatory mission and human rights as recognised by domestic law. *See, e.g.*, Jules Ferry, Address to the French Chamber of Deputies (July 9, 1885) (explaining that “the declaration of human rights was not written for the benefit of the blacks of Equatorial Guinea,” although there did exist a “duty on the part of superior races to colonise inferior races” in order to civilise them and render them capable of benefiting from human rights).

79. It is actually the humanitarian world itself that subjects human rights to the most thorough scrutiny, scrutiny which is often more thorough than that which comes from external observers; and this has been confirmed by many a study published in recent years by professionals, jurists, human rights activists or humanitarian activists.

80. GAUCHET, *supra* note 30, at 357.

81. Rigoberta Menchu, LA CROIX (1998) (“The 1948 Declaration does not proclaim any identity rights for my indigenous brothers from Guatemala, which is why we must opt for a multicultural perception of human rights.”).

Legal discourse sometimes risks becoming absolute and ethical—and not truly legal—thereby introducing a dangerous moral utopia based on a veritable sanctification of rights. Is it not obvious that very often when we speak of rights, we are actually referring to values of international society? But from where does the idea of the value of rights derive if not from their ethical and symbolic dimension, which remains unaffected by their legal status? This is precisely the reason why they create a sense of “value” legitimacy. As a result, international moral discourse has become inflated, particularly with respect to human rights. This might be explained by the fact that the line of divide between the new substantive law and ethical values is quite permeable, but this fact is regrettable to the extent that it favors politics over law and is not based on a real criterion of effectiveness.<sup>82</sup> This generates political behaviour that is overly based on novel expectations and on international discourse that addresses intentions rather than consequences. Politicians, international civil servants, and heads of State are developing a tactical compensatory attitude that inevitably generates an *over*-investment in rights that is sure to disappoint in the long run. It may even have devastating effects when it comes a lack of concrete consequences.

The end result of all of this is incomprehension, deep frustration with and discredit of human rights; in other words, de-legitimation. What is presented as universal can actually be perceived as the imperialism of virtue, much criticized by Yves Dezalay and Bryant G. Garth.<sup>83</sup> Human rights can also be re-appropriated and profoundly distorted precisely by those accused of having violated them. For example, Fidel Castro proclaimed “human rights, that’s me,” and Mouammar Khadafi created the Khadafi human rights prize. These two examples of caricatural distortion actually illustrate that human rights have no value in those two respective countries. And notwithstanding the atrociousness of the political manipulations of various dictators, this is the core of the problem. In fact, it is important to recall what Claude Lévi-Strauss intended to show in *Tristes tropiques*<sup>84</sup> with regard to tools: a society, a domestic

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82. See JOSEPH YACOB, LES DROITS DE L’HOMME SONT-ILS EXPORTABLES ? GÉOPOLITIQUE D’UN UNIVERSALISME 5 (2005); see also MYRIAM REVAULT D’ALLONNES, FRAGILE HUMANITÉ 204 (2002).

83. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); Yves Dezalay & Bryant Garth, *L’impérialisme de la vertu*, LE MONDE DIPLOMATIQUE, May 2000, at 8, available at <http://www.monde-diplomatique.fr/2000/05/DEZALAY/13790>. See generally ENJEUX ET PERSPECTIVES DES DROITS DE L’HOMME, 163–72 (Jérôme Ferrand & Hugues Petit eds., 2003) (explaining that universalization of Western notions of fundamental rights does not necessarily need to be perceived as a negative form of Western imperialism).

84. See CLAUDE LÉVI-STRAUSS, TRISTES TROPIQUES 172 (1955).



community, an ethnic group, or a tribe cannot truly integrate tools if it has not sincerely embraced them as a value; if it has not, it will leave them to wither rather than integrate them. The same is true of modern-day human rights. The point is easily missed when their value is masked by a representation of their nature in purely legal terms. Whereas the abstract character of rights poses no problem, the difficulty lies in the values they express, and in the fact that they cannot truly function unless they are valorized by those to whom they are to be applied. All that is not perceived as a value belonging to a group will be rejected and subverted by the latter. We thus see international law as the scene of a parody in which principles are declared universal while being subjected to ironic reproduction and complete de-legitimation. This “mock realism,” as Nathaniel Berman has shown, is the twisted consequence of the apparent appropriation of legal principles labelled “common” by all, but which have not truly been “embraced” by certain cultures and States. Herein lies a trap: It is difficult to condemn this parody “without contradicting oneself,” as it is not an issue of principles of a system being replaced by other principles, but of manipulation of mainstream rhetoric with the aim of destabilizing it from within.<sup>85</sup>

Interventionist and sectorized substantive law is prompting a general transformation of its own legitimacy, paradoxically moving away from value legitimacy and instead focusing directly on the issue of effectiveness.<sup>86</sup> The disorderly and fragmented global expansion of international legal rules leads some to doubt that rules can be legitimate merely by virtue of their legal status. The effectiveness of law is therefore becoming a “cause of legitimacy and cause for its caution,” due to the profound transformation of legal rationale into instrumental and functionalist rationale. International rules, elaborated with the aim of attaining a specific social result, are expected to bring about precise and effective results. It is no longer a framework for conduct based on a general, ideal state of affairs to which States must adhere, but an instrument for the implementation of international politics aimed at achieving economic, social or sanitary objectives. At the same time, legitimacy no longer flows from the mere legality of a rule or from the values it incarnates, but actually from its effectiveness. This reflects onto the entire international legal system. Formerly, international law and the United Nations enjoyed what could be termed a presumption of legitimacy, a principled legitimacy that derived from the fact that they were at the service of

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85. See generally Nathaniel Berman, *Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and “Peaceful Change,”* 65 *NORDIC J. INT’L L.* 421, 421–79 (1996) (providing a different context for Berman’s analytical methods).

86. See CHEVALLIER, *supra* note 40, at 90.

States and the international community. Today, the new functionalist logic and repeated systemic crises have caused a crisis of legal legitimacy, and international law and its institutions must first demonstrate their effectiveness before being deemed legitimate and adhered to. Law is judged on the basis of its results, and no longer on the basis of the consensus that enabled its elaboration.

Legitimacy is no longer “acquired” as it was in the context of the post-1945 consensus, but must be “conquered.”<sup>87</sup> This is a result of the influence of Anglo-Saxon pragmatism and realism, since the ideal that dominated the continental view for a long time was that a legally protected general interest could not be measured in terms of effectiveness.<sup>88</sup> Legal idealism is gradually being superseded by the necessity of coherent, rational, and socially useful legal practice. The rule of justice is thus defined by a criterion of effectiveness. Equality, for example, is no longer legitimized by its simple abstract proclamation, which, precious as it may be, has frequently been criticized as hollow and ineffective. The new logic of equality that was set in motion by the New International Economic Order but that is present in other areas such as that of the environment, labor standards, and even economic law, now takes into account the situation of inequality between individuals, peoples, or States. The underlying idea used by international society as a point of orientation is not necessarily equality, but inequality. Justice and the legitimacy of rules are not as much perceived in terms of the equality they may proclaim, but as techniques based on inequality, positive discrimination, correction, and adaptation. Correspondingly, the new concept of equality is no longer a limit to power, but an interventionist tool requiring an assessment of its effectiveness. The principle of equality does, of course, remain, but the issue has shifted in the sense that all are equal but different. The legitimacy/effectiveness dichotomy is thus inverted, as the legitimacy of the legal principle of equality depends on its effectiveness in taking into account these differences. Article 3 of the 1992 United Nations Framework Convention on Climate Change is an explicit example of this subtle inversion that inevitably gives rise to tension. The Convention requires states to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

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87. CHEVALLIER, *supra* note 40, 64.

88. CHEVALLIER, *supra* note 40, at 63.

The incorporation of effectiveness into the sphere of legitimacy has positive, but also certain negative effects. It requires taking account of the value of institutions and projects, evaluating the consequences of legal rules and acts, generating further initiatives and responsibilities, and going beyond mere lip service to law. It is an evaluative concept that concentrates on the reception and implementation of legal rules. It thus has an essentially critical function. It also raises some serious questions.

First, values are increasingly placed on the slippery slope of purely economic rationale. A strictly economic approach to law is dangerous when it transforms law into a consumer item or when it makes economic rationale the sole criterion for evaluating the efficiency of international rules and institutions.<sup>89</sup> It also ignores that legal rationale must be distinguished from economic rationale. Secondly, it is somewhat pernicious to consider that only the rules that are applied effectively and efficiently should be legal, since linking the existence of legal rules to the concrete effectiveness would render them malleable, uncertain, and unpredictable.<sup>90</sup> Law contains safeguards that cannot always be respected, since “the fate of law is to remain partially ineffective.”<sup>91</sup> In addition, the different levels of application of international law and its segmentation into subsystems are subject to differing imperatives. The concept of effectiveness is evidently not the same regarding the general functioning of the system as it is when it comes to evaluating a commercial contract or investment. The effectiveness of rules differs depending on the contexts and ends to which those rules aspire. It can come into play in a context of instrumentality as well as in a context of symbolism. A rule can be adopted “either in order to modify a given state of affairs and to achieve a specific aim (instrumentality), or to affirm some other (symbolic or unexpressed) finality, the attainment of which is not, however, truly desired.”<sup>92</sup> In this vein, can the International Criminal Court be appreciated merely in cost-benefit or efficiency terms? Should it not be appreciated in light of the desire to set up an international instance of criminal justice and to put an end to the impunity of heads of State? As has been emphasised by Mireille Delmas-Marty, given its universal nature, the Court reflects a sense that corresponds to that of no other mixed, international, temporary, or domestic jurisdiction, and “it is by sanctioning prohibited

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89. Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1 (1996), Ejan Mackaay, *La règle juridique observée par le prisme de l'économiste: Une histoire stylisée du mouvement d'analyse économique du droit*, 1 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 43 (1986).

90. DENYS DE BÉCHILLON, *Qu'est-ce qu'une règle de Droit?* 62 (1997).

91. *Id.* at 61.

92. DELMAS-MARTY, *supra* note 9, at 170–71.

action that a community constructs its common identity and memory.”<sup>93</sup> Thirdly, the danger inherent in the logic of effectiveness is that it will lead to a situation where the means are given disproportionate importance and are not sufficiently coupled with goals; where the focus will be on the means, to the detriment of the aims.

Finally, there is a risk of creating a situation that is diametrically opposed to the aims of “value” legitimacy, such as human rights. In both cases there is a problematic relationship between the law and the facts, and between the law and morality. There will always be a wide gap between legal rules and reality. Yet to think the opposite, to think that it will henceforth be possible to implement any legal principle, that doubt is not acceptable, that the distance between law and the facts can be eliminated, be it by virtue of an absolute legitimacy or by virtue of a drive for maximum effectiveness, has negative consequences for the law itself.

### III. PROSPECTS?

We have thus far retraced the trodden path, but it appears that the price to pay for previous developments may actually turn out to be heavier than previously assumed. Although international law has never before been as expansive as at present, it is also going through a period of contestation and loss of legitimacy as well as effectiveness. This is not to regret the developments that have taken place, but to remain vigilant as to the social effects they may produce. It also leads us back to the question of the aims of international law and its capacity to fulfil them, and to the question of contemporary attitudes pertaining to the general view that I have put forward here.

It now seems impossible to turn back from the present course. To deny the new aims of contemporary law and to press for a return to minimalist liberal law would be to allow the neo-liberal powers that be to exploit the downfall of the international system for their own advantage.<sup>94</sup> Under no circumstance should we succumb to the ultraliberal refusal to tackle mutual problems in the way welfare-inducing law does, as the latter would thus become a regrettable avatar of classical liberal law. It is not, however, surprising that there is currently a resurgence, in

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93. DELMAS-MARTY, *supra* note 9, at 193.

94. This interventionist expansion of international law has been subjected to a twofold critique which I do not partake in: managerial critique combined with neo-liberal critique of the Hayekian type. The first type of critique emphasises that the inflation of rules is prejudicial to the freedom of public agents and private operators, and that the contractualisation of international law would be a better way of adapting it to globalization. This critique is supplemented by the ultraliberal critique which criticises any type of interventionism in the free global economy.

international law, of the old debate between ultraliberals, who express discontentment with too much law and bureaucracy, and moderate liberals, whose sole intent is to reform the system. Yet restoring the image of a classical but incentive-creating system would be inconsistent with the profound socio-cultural changes the contemporary international system has undergone, and with the legitimate aspirations held by millions of individuals, is therefore not an option either.

The shift toward ethical and functionalist welfare-inducing law is the product of a redefinition of politics and of the fabric of international society itself, and is accompanying the evolution of this society and structuring it accordingly. Classical society and liberal international law were based on international politics as defined solely by States. Contemporary welfare-inducing society presupposes that political power must aim at fostering communal wellbeing around the planet. But the 1945 consensus deteriorated long ago, as it was borne out of exceptional circumstances. It now needs to be reconstituted in the context of the new society. The legal values and objectives contemporary international law aspires to correspond to political priorities and certainly do not flow from a universal consciousness. They are the result of choices that were quite understandable in 1945, but that now need to be reformulated or revoked outright, as even if the same objectives undoubtedly still remain, the modalities have changed and the circle of addressees has become considerably larger.<sup>95</sup> Some have represented current phenomena in the international system as the result of a “crisis of authority” related to a double crisis of State sovereignty and of territoriality.<sup>96</sup> This is deemed to explain the inability of international law to regulate the current disorder and to create a stable order. However, just as one refers to a “global inversion” to describe the diminishing of sovereignties faced with emancipated groups and individuals, one could equally refer to an “inversion of international law” since this law is increasingly restraining States and empowering individuals, minorities, and peoples through the recognition of rights. This approach is said to be based on “the actor getting his own back on the system.”<sup>97</sup> States are no longer the sole members, actors, and subjects of international society, and individuals and NGOs are now seeking recognition under international law. Today, there are hundreds of international organizations, thousands of NGOs—including 2,719 with ECOSOC status—and hundreds of multinationals

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95. See generally Richard Falk, *Positive Prescriptions for the Near Future: A World Order Perspective*, 20 PRINCETON CENTER FOR INT’L STUD. WORLD ORD. STUD. PROGRAM OCCASIONAL PAPERS 1 (1991) (providing an exhaustive analysis of these changes).

96. See BERTRAND BADIE & MARIE-CLAUDE SMOUTS, *LE RETOURNEMENT DU MONDE* 125–35 (1992).

97. *Id.* at 240.

thriving in the 208 States and territories. These are the entities with which States, international organizations, and international politicians interact,<sup>98</sup> which is why political cohesion and the legitimacy of the existing system require that all actors adhere to shared values.<sup>99</sup> All could be different if there were greater consciousness of the fact that a legal system can be used beneficially and not simply endured passively. That being said, one should not minimize the role played by States, and should acknowledge the amicable concurrence of interstatists and cosmopolitans, voluntarists, and communitarians.

This is not to put in question the principle of interventionist welfare-inducing law, but rather to question its functioning and the limits to which it should be subject. This may appear surprising and perhaps even shocking considering the sociological state of the planet with all its inequalities and injustices, where collective and individual suffering has never been as dramatic and devastating. The neo-Marxist economists Etienne Balibar and Immanuel Wallerstein have illustrated how major conflicts of interest, monopolist and exclusionary phenomena, and the unequal development of powers have persisted due to an excess of unequal resistance from the periphery.<sup>100</sup> But this is precisely what has prompted the present essay, since the solution might actually lie in subjecting law to certain *limits*. International law may be “part of the problem,” but it is also, as has been emphasised by Philippe Sands,<sup>101</sup> “part of the solution,” so long as possible options do not go to the detriment of social or political processes or the will of the State. Without returning to classical minimalist law, we need to fight the preconception that reducing law is equivalent to regression, and that any limitation on sovereignty is a victory. How far should international law go in accomplishing its aims? Is it the miracle solution to all of the world’s problems?

The answer is obviously no. Law is not a universal panacea. Politics determine international law, even if sometimes they appear to ignore it. Any discourse that glorifies international law and its virtues is usually

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98. See Pascal Lamy, Director General, WTO, Keynote Speech to the 23rd Assembly of the International Federation of Pharmaceutical Manufacturers and Associations (Oct. 11, 2006) (“We must acknowledge, too, that the public is holding their governments to account for the expectations that globalization has raised on a much wider scale—that an increasingly wealthy and prosperous world should be making faster progress toward broadly-based economic development, reducing poverty, particularly in its most extreme forms, and achieving international social and environmental goals.”).

99. François Rigaux, *La dimension normative des concepts de peuples et d'État dans l'ordre juridique international*, in *L'ÉTHIQUE DE L'ESPACE POLITIQUE MONDIAL* 33 (Klaus-Gerd Giesen ed., 1997).

100. ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASSE: LES IDENTITÉS AMBIGUËS* 13 (1998).

101. See generally PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* (2005).

accompanied by criticism of its weaknesses and perverse effects. This anthropomorphic vision of international law has the aim of turning it into a being in its own right that can be conveniently accused of defaults that are in fact those of the entities that created it, i.e. principally States, politicians, international experts such as us international jurists, but also those who would like to appropriate international law, such as NGOs, lobbies, individuals/associations, think tanks, and multinational corporations, which undoubtedly exercise political power despite hesitating to acknowledge it openly. This anthropomorphic vision needs to be rejected so that everyone can be allocated their proper role and usefulness. In fact, the present situation is interesting in that it reveals the functioning of western political modernity and its tendency to isolate the legal dimension in order to attribute an exclusive and exorbitant role to it. Yet the difficulties and tensions that have resulted illustrate the necessity of re-evaluating the two other dimensions to which international law is fundamentally connected: the political and the social. No doubt it is therefore necessary to search for a better balance, or more precisely, to be more conscious of the political and social dimensions that are concealed behind the law, and which are masked by the heightened role of all that is legal. They no longer have the same mobilizing effect they used to have, at least less than is the case of, say, legal discourse on human rights. Law does not actually provide a response to all problems, even if law is now omnipresent. In fact, the merit of contemporary deconstructivist critique is to have deconstructed the illusion of complete legal emancipation and to have attempted to rehabilitate all that is purely political in the elaboration, interpretation, and application of rules; and it is undoubtedly this critique that will enable us to accept that international law can regain strength as a political means of regulating conduct.<sup>102</sup>

What thus takes place behind the smokescreen of welfare-inducing law is a political game of inclusion and exclusion. Why has poverty not been eliminated as proclaimed? Is it because law has remained ineffective and impotent when faced with international reality? Or is it merely a tree concealing a forest of international renouncement? Reducing world poverty is a commensurable challenge and therefore a realizable objective, but it will not be possible as long as States and other actors have not set themselves truly fundamental and overriding aims for the benefit of the planet, as well as for their own domestic systems. "Poverty is an invention of civilisation,"<sup>103</sup> and it is on the latter that its eradication will depend. Studies on the phenomenon of poverty are very interesting in

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102. See BOURETZ, *supra* note 59, at 14.

103. ABRAM DE SWAAN, SOUS L'AILE PROTECTRICE DE L'ÉTAT 25 (1995).

this respect, because they show that at a given moment in the development of a society, poverty always calls for collective action (and not individual acts of charity). No sooner are substantial amounts of property constituted that give rise to inequalities and merciless confrontation between the rich and the poor, do “asymmetrical dependencies” appear as the most frequent result.<sup>104</sup> The possible defaults and dysfunctions of welfare-inducing law should not mask political deferral and inaction at the domestic and international levels, or the fact that international law has always been used in a profoundly ambiguous way: as a positive model of inclusion and simultaneously as a negative model of exclusion, as a positive model of cooperation yet also as a negative model of domination. The somewhat paradoxical yet inescapable fact is that welfare-inducing law is, as we have seen, easier to instrumentalize than strictly liberal law aimed at regulating conduct, and is thus, ironically, less social and more unjust. It can be used to accelerate necessary corrections to gaping inequalities between nations or between individuals, but can also enable superpowers and economic operators to increase their revenue and importance. Furthermore, it can be conveniently denounced by the most virulent dictatorships in underdeveloped countries on the basis that it is inefficient. It can also be used as a means of obtaining international aid, despite the fact that the sharp rise in poverty and famine over recent years has actually been due to negligence, blind collectivism, terror, or civil war.<sup>105</sup>

Here, legal interventionist and welfare-orientated discourse can be a vector of domestic or international domination, much like a powerful lever of transformation. It should also be noted that strictly legal discourse will not tell us why things are as they are and which might be the best way to change them. That is not its role, and it is therefore not a problem if law does not trump other types of discourse. Law has, however, become so entrenched in international society that the latter can no longer be conceptualized independently of it. Although it has undoubtedly always been an instrument of international social and political action, law has never played as important a role as it does today. International legal problems are no longer external problems one can simply resolve by calling international State conferences; they have become internalized by all societies, and we are gradually losing our ability to distance ourselves from them, and indeed from law itself. Yet distinguishing roles and finalities is all the more difficult when law is not in

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104. *Id.* at 36.

105. See YVES MONTENAY, *LE MYTHE DU FOSSÉ NORD-SUD, OU COMMENT ON CULTIVE LE SOUS-DÉVELOPPEMENT?* 12–13 (2003).



itself capable of effectuating change and remains dependent on politics and adaptation.

The debate on the ability of politics to bring about change on an international level is as old as international society itself, and its current prevalence indicates its re-emergence. Although many analysts have taken neo-realist, neo-institutionalist, neo-functionalist, globalizationist, or transnationalist positions on this issue,<sup>106</sup> the present trend emphasises that the scope for manoeuvre of “real international politics” is limited due to the rise in bureaucracy, corporate interest groups, legalism in international relations, transnational networks of private actors, the incapacities of fragile States, etc., as if there existed within a decentralized society (which, however, has never been centralized and thus cannot be decentralized) a sort of political center-point providing a measure of the effectiveness or legitimacy of international political action,<sup>107</sup> when in reality the concepts most often evoked—namely collective State action, “international regimes,” or global governance<sup>108</sup>—actually only recentralize politics in different manners.<sup>109</sup> Should we perhaps nuance the idea of an international political “center” or “system,” either pessimistically by reference to a new Middle Age,<sup>110</sup> or more optimistically by emphasizing the importance of the individual’s new role as an international actor,<sup>111</sup> the emergence of networks, or of orderly pluralism,<sup>112</sup> in order to enlarge our perspective on politics and better understand it? In fact, the increasing relevance of international law is not putting limitations on power, but bringing about a reorganization of power. The impression of reduced political leeway is thus deceptive, since in fact, new political powers are emerging that involve decisions affecting people and their environment. The sensation of political powerlessness or of simulacrum derives from

106. See SERGE SUR, *RELATIONS INTERNATIONALES* 17 (4th ed. 2006); see also JEAN-JACQUES ROCHE, *THÉORIE DES RELATIONS INTERNATIONALES* (5th ed. 2004); PIERRE DE SENARCLENS & YOHAN ARRIFIN, *LA POLITIQUE INTERNATIONALE. THÉORIES ET ENJEUX CONTEMPORAINS* (2006).

107. See KALEVI J. HOLSTI, *THE STATE, WAR, AND THE STATE OF WAR* 116–17 (1996).

108. See, e.g., MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* (2004); MARK DUFFIELD, *GLOBAL GOVERNANCE AND THE NEW WARS: THE MERGING OF DEVELOPMENT AND SECURITY* (2001).

109. See *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

110. ALAIN MINC, *LE NOUVEAU MOYEN ÂGE* (1993).

111. JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* (1990).

112. For some of the more innovative approaches, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); see also BERTRAND BADIE, *LA FIN DES TERRITOIRES: ESSAI SUR LE DÉSORDRE INTERNATIONAL ET SUR L'UTILITÉ SOCIALE DU RESPECT* (1995); MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES DU DROIT (II) LE PLURALISME ORDONNÉ* (2006); MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES DU DROIT (III). LA REFOUNDATION DES POUVOIRS* (2007).

the fact that politics are reduced to the activities carried out within the official international political system.<sup>113</sup>

However, whatever is the actual scale of these illusions and developments, they have instilled a sense of unease in internationalist culture, which is necessarily political as well as legal given the indissoluble links between the two. This is the result of the latent but visible state of disequilibrium between the official appearance of the classical center-points of political power—States, international organizations, etc.—where official activities appear efficient and regulatory, but often fall short of attaining the fixed objectives, and an international society that is inexorably straying from official political decisions and introducing new actors with new objectives, decision-making competencies, and political dimensions. That is not to say that States and international organizations are not the prime institutional actors on the international scene, but simply that behind the unchanged façade of the politics they engage in, new political centre-points are taking shape. Consequently, the boundary between the political and the non-political is becoming ever more indeterminate, just as the boundary between the legal and the non-legal. To paraphrase Prosper Weil, one can say that politics, much as the law, have become “diluted.” The categories of the political and the non-political, as well as those of the legal and non-legal, must be reconceptualized with a view to redefining political priorities and redefining them collectively, to the extent that this is possible. How can welfare-inducing law prevail without a strong and interventionist political center-point to ensure its application as the European States did in the post-war period from the fifties to seventies? How can one reconcile the changes in the law and international politics? Is not what initially seemed paradoxical but explicable becoming completely contradictory?

In any case, there is little point in pinning all our hopes on politics. Welfare does not seem to be induced by politics, by the law or by the State, although we have not altogether reached a dead point.<sup>114</sup> International politics does not define man’s happiness, but rather it regulates the conduct of domestic and international actors, combats misery, and prevents risks.

We are thus subjected to a continuing process of transformation that has become the very logic of contemporary liberal welfare-inducing law and its contiguous political developments. The new aims of contemporary law are associated with a strong utopia, a promise that something might be achieved by international law that has not been achieved by domestic law: that everyone may determine their own destiny; that social, economic, or

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113. BECK, *supra* note 23, at 404.

114. COMTE-SPONVILLE, *supra* note 50, at 244.

cultural identity does not have to persist within a permanent social situation. The focus is less on the impossibility of equality than on the creation of conditions required for changing situations. But law cannot, by itself, replace social connections, States, morality and ethics, all which must play their roles. It cannot replace politics, and it cannot, by itself, remedy economic inequalities, the sense of insecurity that flows from global ecological and sanitary risks, or the problems related to cultural identity or poverty. It can even end up slowing down the social and political drive by standardizing conduct or, conversely, by creating promises it cannot keep. Even if the law were capable of complete effectiveness, would it really be desirable to have a policed international society that exercises diffuse “priestly global bio-competencies” in order to bestow billions of individuals with “policed” physical and moral health? Without lapsing into a phobia of social control such as described by Michel Foucault in his time, the question is worth asking.

We are going through a rather particular period that leads us to reflect on the legitimacy and effectiveness of the international system. Has it fully deployed its effects? Can improving its effectiveness help change mentalities? Or must we attempt to redefine its finalities? Do we really understand the foundations upon which international society currently rests and the instruments it requires? Which rules do we really want? How do they work? What purpose should international law serve?

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