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CHANGING THE PREMISE OF INTERNATIONAL LEGAL REMEDIES: THE UNFOUNDED ADOPTION OF ASSURANCES AND GUARANTEES OF NON-REPETITION

*Scott M. Sullivan**

Marbury v. Madison *forever changed the way legal academics and practitioners viewed the powers of the U.S. federal judiciary. The International Court of Justice (ICJ), in its recent* LaGrand *decision, has challenged other international institutions as well as individual nations through a* Marbury-*esque unilateral declaration it hopes will similarly affect its power and efficacy in the context of international law and relations with states.*

This article examines the rise and ultimate ICJ acceptance of assurances and guarantees of non-repetition as a fundamental shift from well-established remedial norms of restitution and repair to a paradigm of prospective relief. How does this change affect current notions of proper international action within the domestic realm? Further, what effects will this shift have on state action and legal legitimacy?

After thorough analysis, the article contends that the unfounded acceptance of this new prospective relief taints both international institutions and legal principles. The presence of this taint—coupled with the serious legal and political implications of the implementation of this potentially harsh prospective remedy—impedes rather than facilitates the progression and efficacy of international law.

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INTRODUCTION

In June 2001, the International Court of Justice (ICJ) announced a decision that prompted an international public discussion because of its bearing on America's use of the death penalty, the merit of provisional measures, and the latent tension between two allied world powers. The state of Arizona's execution of a German national despite the frantic cries of his government and the gentle prodding of federal officials merged the politically-charged debate on capital punishment into a full frontal assault on consular relations generally, and the efficacy of the International Court of Justice specifically. The Court responded to this perceived assault in its *LaGrand* (Germany v. United States) judgment of June 2001.[1] Newspaper headlines proclaimed that the Court's judgment elevated the level of respect for international law and

[1] LaGrand Case (F.R.G. v. U.S.), I.C.J. (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last visited Jan. 22, 2003).

represented world condemnation of the American death penalty.[2] Undoubtedly, the debate stirred by *LaGrand* on these issues will continue and public intellectuals and legal academics will scrupulously examine the Court's judgment.[3] However, the most revolutionary consequence of *LaGrand* is its drastic implication for remedial powers of courts applying international law—an implication at which the world media has not raised an eyebrow.

International law is based on the creation of obligations among states, but does not traditionally address how such obligations should be met and administered on a national level, within domestic laws.[4] The introduction of assurances and guarantees of non-repetition (AGNRs) as a tool of international courts not only infuses international law with the ability to directly instruct effects within national law, but vests this profound power in judicial institutions unsuited for the task.

The *LaGrand* judgment changes the dynamic of international law in a manner similar to the way the United States Supreme Court delineated its power to strike down federal legislation in *Marbury v. Madison*:[5] quietly and surreptitiously. In *LaGrand*, the ICJ embraces a new legal remedy, court-issued AGNRs, without examining their legal basis or providing guidance for application. Moreover, *LaGrand* duplicates *Marbury*'s tactics by declining to exercise the new remedy in a way that would trigger vigorous state protest.

This article argues that AGNRs do not fit the mainstream conception of customary international law, nor are they valid under more expansive theories. Through interdependent reasoning and process, the ICJ and the International Law Commission (ILC) joined forces to create new law that neglects both the principles of customary international law and the practicality and theory of state compliance. This formation leaves AGNRs with no legitimate legal foundation and extends the power base of international law—traditionally limited to the remedial restoration of harms—into the active anticipation and prevention of future violations. Further, the artificial elevation of

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[2] *See* Peter Finn, *World Court Rebukes U.S. Over Execution of Germans*, WASH. POST, June 28, 2001, at A20; Imre Karacs, *U.S. Found Guilty of Flouting Law on Death Penalty Laws*, THE INDEPENDENT (LONDON), June 28, 2001, at 16; Press Release, Amnesty International, The USA Must Obey International Court Decision on Prisoners' Rights (June 28, 2001) (on file with author).

[3] This is especially true in the relationship to the binding nature of provisional measures, a widely debated issue in legal academia. In contrast, due to U.S. federalism and unwillingness to sign human rights treaties, the issue of condemnation of the death penalty is more likely to elicit interest among non-lawyers rather than mark a new era of jurisprudence in the area of capital punishment.

[4] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 819 (1997); *see generally* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES and MATERIAL 153 (3d ed. 1993).

[5] Marbury v. Madison, 5 U.S. 137 (1803).

AGNRs undermines the ICJ's and ILC's legitimacy, fracturing the backbone upon which the international legal system relies for compliance. This harm is accentuated by the bodies' insufficient guidance on the application of AGNRs, resulting in impossibly large applicability and no evidence of remedial efficiency.

Section I of this article examines the significance of AGNRs in their historical context and the recent ICJ judgment in *LaGrand*. It explains the meaning of AGNRs both historically and under the new legal framework established by the ILC and ICJ, respectively. Additionally, it discusses both theoretical and practical applications of these meanings.

Section II analyzes the artificial elevation of AGNRs from a discrete diplomatic practice to a potentially large-scale remedy wielded by international courts. It demonstrates the court-ordered AGNRs' unsubstantiated reliance on the foundation of "progressive development," insufficient historical precedent, and inappropriate ties to the cessation of present harms.

Section III critiques the new prominence of AGNRs and illustrates how the ILC and ICJ stood on each other's shoulders in advocating a legal remedy unsupported by law.

Finally, Section IV addresses the multiple problems created by the ICJ's adoption of AGNRs. First, there are practical problems relating to the broad language used by the court, which may result in indeterminacy and boundless application. This underscores the Court's failure to clearly articulate the use of AGNRs in a given pattern of facts, including those of *LaGrand*. Further, Section IV examines how the Court's decision in *LaGrand* compromises the legal principle of AGNRs, the institutional integrity of the ICJ, and compliance with international law generally.

I. The History and Significance of Assurances and Guarantees of Non-Repetition (AGNRs)

The practice of diplomatic AGNRs has been present in the world of international relations since the 19th century and continues to the present day. Diplomatically, the practice is straightforward. One nation notifies another that it believes a current practice violates a tenet of international law. In addition to the cessation of that violation, if it is a continuing one, the non-infringing state would ask the infringing state for a promise that the activity will not happen again or for a specific action that would actively reduce the likelihood of another violation. For example, in 1901, in response to pressure from Great Britain, the Ottoman Empire made a formal assurance that British postal services would be able to operate freely in its territory. During the Boer War (1899-1900), Germany requested Britain to issue instructions

to its Navy not to molest German merchant ships outside recognized war zones in accordance with the customary international law of prize.[6] Of these practices, the Ottoman assurance of free movement within its empire is akin to an "assurance of non-repetition" (ANR), while the issuance of instructions to the British navy by the government regarding policy toward German merchants would be considered a "guarantee of non-repetition" (GNR).

More recently, in 1986 Afghanistan called for the issuance of AGNRs when it made a diplomatic request to the United States and "other imperialist powers" asking them to create a policy of non-intervention against the Soviet-backed Afghani government. It stated, "The key to the solution is the total cessation of these interventions and the provision of international guarantees on their cessation and non-repetition."[7]

In 1997, Chechen nationalists, in peace negotiations with the Russian government, also asked for an AGNR when they insisted through diplomatic and public channels that for a cease-fire to be effective, Russia must agree to "a guarantee that there can be no repetition of the solution of controversial problems by force."[8] The Chechens characterized the conflict with Russia as a violation of international law and equated such a guarantee as the lynchpin for securing its independence.[9]

In both the Afghanistan-U.S. and Chechnya-Russia incidents, the infringing parties declined to adhere to the Afghani and Chechnyan requests, and thus no guarantees were issued.[10]

Compared to assurances and guarantees issued in the course of diplomacy, court remedies bearing similarities to AGNRs are few. AGNRs are not remedies under customary international law because the primary goal of international dispute resolution is to remedy past wrongs and/or enjoin current wrongs. In addition, as opposed to a diplomatic assurance or guarantee, a court ordered AGNR would impose a new legal obligation upon the infringing state. The AGNR would require new action that, if not complied with, would give rise to new legal consequences unrelated to the satisfaction of the original obligation. The new obligation thus burdens not only the infringing state, but also the court that issued the AGNR.

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[6] *See* C. John Colombos, A Treatise on the Law of Prize, §6, at 7, §§151-154, at 164-67 (1926).

[7] *Kabul Press Conference on Partial Withdrawal of Soviet Forces from DRA*, BBC Summary of World Broadcasts, Oct. 22, 1986.

[8] *Top Official Interviewed on Chechen Peace Prospects, First Use of Nuclear Arms*, BBC Summary of World Broadcasts, May 12, 1997.

[9] *Id.*

[10] *Id.*

The *Trail Smelter* case is one of the few examples of the use of measures similar to AGNRs by an international legal tribunal, although it focuses on a past wrong as opposed to preventive judicial action.[11] In the case, the United States complained that a Canadian mining and smelting company just north of the U.S. border was polluting the Columbia River valley through sulfur dioxide emissions.[12] The U.S. and Canada engaged in legal arbitration that resulted in a finding for the U.S. that required Canada to pay compensation. Additionally, the tribunal mandated that the smelting company must maintain equipment to measure environmental conditions, including sulfur dioxide concentration, in areas where the U.S. claimed the pollution was occurring.[13] The measures were designed to reduce emissions to a level equal to or below guidelines set by the tribunal. Equipment readings and resulting pollution information were ordered to be given to both nations' governments on a monthly basis and, if levels rose above set guidelines, compensation could again be awarded to the United States.[14]

In its codification efforts of state responsibility the ILC defines assurances of non-repetition (ANRs) as generally verbal in nature and consisting of a state's assertion that it will not engage in the prohibited activity in the future.[15] In comparison, guarantees of non-repetition (GNRs) offer a more substantial commitment and demand more tangible action that manifests in a change of policy or law, rather than mere verbal assurances. For example, the infringing state may be forced to commit to preventive measures requested by the injured state calculated to reduce the likelihood of a repeat breach.[16] In relationship to the application and role of AGNRs, the ILC notes that when such a remedy is sought, the primary concern is the "continuation and repair of the legal relationship affected by the breach."[17] As a result, the administering court's concern is the future impact of the order in light of this goal.

When such a remedy is requested by the injured state, it comes in the form of a request that the violating state implement safeguards or remove obstacles in the way of attaining compliance. The goal of repairing the legal relationship is inextricably tied to the inherent concern of repetition. Given the relationship between the nations, the AGNR may run the spectrum of

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[11] Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (1938).

[12] *Id.* at 1922.

[13] *Id.* at 1918-19, 1924-33.

[14] *Id.* at 1934-36.

[15] *Report of the International Law Commission,* U.N. GAOR, 53d Sess., Supp. No. 10, at 221 U.N. Doc. A/56/10 (2001) [hereinafter ILC Commentary on State Responsibility].

[16] *Id.* at 162.

[17] *Id.* at 216.

simple verbal assurances to very specific instructions or requirements of conduct. In the case of ANRs, simple promises of better protection for persons and property may be sufficient when foreign nationals are concerned.[18]

In 2001, the ICJ's adoption of the ILC's interpretation expanded AGNR use from diplomacy to international courts. As a result, a tool of diplomacy used to cajole and threaten other states into compliance was transformed into a legal instrument capable of creating additional binding obligations on states against their consent.

II. The Artificial Elevation of Assurances and Guarantees of Non-Repetition

The transformation of AGNRs into legal tools lacks a proper foundation. Instead, it relies on doctrinal bootstrapping created by the ILC and adopted by the ICJ. Two main developments are responsible for this transformation: 1) the ILC undertaking of codification of State Responsibility, and 2) the implicit adoption of the ILC argument for AGNRs by the ICJ in *LaGrand*. Both events elevated the power of the ICJ, making it better situated to order remedies that overhaul the traditional structure of international responsibilities. This section examines the ILC codification work and ICJ judgment in *LaGrand* as they evolved separately, became intertwined, and played key roles in bootstrapping the power of legal remedies in customary international law.

A. *International Law Commission: Its Authority and the Codification of State Responsibility Doctrine*

The ILC derives its influential power over codification through its founding resolution passed by the 1947 General Assembly pursuant to Article 13(1)(a) of the UN Charter.[19] Under the process of codification, the ILC claims as successes its work in the creation of the Law of the Sea Conventions of 1958, the Convention on Diplomatic Relations of 1961, the Convention on Consular Relations of 1963, the Vienna Convention on the Law of Treaties of 1969, and the Convention for the Protection of Diplomats of 1973.[20] Since 1973, the ILC continued its work with less effect. In the in-

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[18] *See* ILC Commentary on State Responsibility, *supra* note 15.

[19] This part of the UN Charter empowers the General Assembly to make recommendations promoting international cooperation, progressive development of international law, and the codification of international law. Much of this language is essentially repeated in the statute creating the ILC. U.N. Charter art. 13, para. 1(a).

[20] Gerhard Hafner, *The International Law Commission and the Future Codification of International Law*, 2 ILSA J. Int'l & Comp. L. 671, 671 (1996).

terim, the Convention on the Representation of States and two conventions on State Succession took place with neither entering into force.[21] More recently, the ILC prepared and adopted a Draft Code of Crimes against the Peace and Security of Mankind[22] that was ultimately eclipsed by the framework of the Rome Statute that formulated the International Criminal Court (ICC).[23]

The statute creating the ILC also empowered it with the ability to pursue "progressive development" of international law.[24] This schism of responsibility between codification and "progressive development" reflects the deep divide between those who desired the ILC to be a neutral body, with the primary task of piecing together the current state of law, and those who regarded it as a more politically charged body working to push law forward to embrace emerging trends.[25] Ultimately, the UN bridged the divide by narrowing its definition of codification, while allowing the ILC to cast progressive movements into "draft conventions" that reflect its perception of modern trends within the law.[26] The Committee defined "codification" as "the more precise formulation and systemization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine."[27] They outlined "progressive development" as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."[28] Despite the attempt to delineate and thus separate the two areas of responsibility, legal commentators, as well as the

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[21] *Id.*

[22] Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on Its Forty-eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996).

[23] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1996) *available at* http://www.un.org/law/icc/statute.

[24] G.A. Res. 151, 32 U.N. GAOR, Supp. No. 45, at 214-15, U.N. Doc. A/32/45 (1977) (ILC formed for "the promotion of progressive development of international law and its codification"); Statute of the International Law Commission, G.A. Res. 174(II), art. 1, U.N. Doc. A/519 (1947).

[25] *Report of the Committee on the Progressive Development of International Law and Its Codification*, U.N. GAOR 6th Comm., 2nd Sess., Annex 1, U.N. Doc. A/AC.10/51 (1947). *See also* Herbert W. Briggs, THE INTERNATIONAL LAW COMMISSION 129-41 (1965).

[26] Rosemary Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43, 79 (1997).

[27] Statute of the International Law Commission, art. XVII, U.N. Doc. A/CN.414 (2002) *available at* http://www.un.org/law/ilc/texts/statufra.htm.

[28] *Id.* at art. XV.

ILC itself, have gauged it too difficult to completely separate codification and "progressive development."[29]

Despite continued protest among states about the mixing of "progressive development" of new law and codification of existing practice, the ILC's conventional practice reveals that its goals have been mixed, with a substantial portion of its codification efforts being guided by its view of "progressive development."[30] Notably, ILC work under the auspices of the Code of Crimes against the codification-driven Peace and Security of Mankind also resulted in draft rules for an international criminal court inspired by progressive development.[31]

The UN General Assembly first declared elements of state responsibility as proper work for the ILC in 1949. In its first manifestation, the ILC addressed a narrow segment of state responsibility regarding injuries to aliens.[32] This small-scale approach was ultimately rejected with the appointment of Roberto Ago as special rapporteur who directed a more comprehensive set of work. Ago expanded the project to encompass a clarification of the underlying framework for state responsibility without any discussion of the substantive rules that would trigger its protocol. Ago believed the creation of the articles should adhere to a strict distinction between "the principles which govern the responsibility . . . for internationally wrongful acts" and "the task of defining rules that place [original] obligations on States, the violation of which may generate responsibility."[33] In essence, the articles of state responsibility were designed to create a structure of norms to clarify when an internationally wrongful act has occurred and what the legal consequences of that act may be. These norms culminate in the remedial structure to be applied, including satisfaction, reparations, and countermeasures.

Part of the remedial structure created by the ILC focuses on the diplomatic use of AGNRs in resolving disputes. The state responsibility article dealing with AGNRs was the only new remedial structure, the very existence

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[29] *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int'l L. Comm'n 255, U.N. Doc. A/3159.

[30] State protest is evident in multiple documents solicited by the ILC in which governments outline comments and observances on ILC projects; *see* B. Graefrath, *The International Law Commission Tomorrow: Improving its Organization and Methods of Work*, 85 Am. J. Int'l L. 595 (1991) (discussing the role of progressive development in the current codification effort).

[31] This type of progressive development work is necessary when creating new institutions like an international criminal court. James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404, 405 (1995).

[32] U.N. Codification of State Responsibility (Maria Spinedi & Bruno Simma eds., 1987).

[33] *Report of the Commission to the General Assembly*, [1970] 2 Y.B. Int'l L. Comm'n 306, U.N. Doc. A/8010/REV.1.

of which in customary international law was questioned.[34] Its inclusion as Article 30 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in November of 2001,[35] moved it from a distinct diplomatic practice into a proposed part of customary international law.[36] The wording is as follows:

> Article 30
> Cessation and non-repetition.
> The State responsible for the internationally wrongful act is under an obligation:
> (a) To cease that act, if it is continuing;
> (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[37]

B. *The International Court of Justice: Limits of Power and its Decision in* LaGrand

The ICJ Statute empowers the Court to apply international conventions that establish rules of customary international law, general principles of law, treaties and the often criticized provision of writings of the "most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[38] Additionally, the Court is empowered to act as the international tribunal to resolve disputes when explicitly assigned that task by treaty. When deciding a case under a relevant treaty, the Court is empowered to consider both the remedies included in the treaty and those under general customary international law. While ICJ judgments are not granted binding status through doctrinal precedent, they are de facto binding because they prescribe the legal principles on which a case stands.[39] Thus, if a similar case were to arise, it is likely that the ICJ would recognize the same principles and rule in a similar manner. The ruling would be further facili-

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[34] *See State Responsibility: Comments and Observations Received from Governments*, International Law Commission, 50th Sess., U.N. Doc. A/CN.4/488 (1998).

[35] The article including AGNRs was included in previous drafts by the ILC and was actually argued as part of a different draft in the *LaGrand* case. The ILC had substantial discussions related to the placement of AGNRs in the Draft Articles, and, most significantly, whether it should be coupled with cessation or not. *Comments Received by Governments*, International Law Commission, 53d Sess., at 36, U.N. Doc. A/CN.4/515 (2001).

[36] Christian J. Tams, *Consular Assistance and Rights and Remedies: Comments on the ICJ's Judgment in the LaGrand Case* (2001) *available at* http://www.ejil.org/journal/curdevs/sr24.html.

[37] ILC Commentary on State Responsibility, *supra* note 15, at 216.

[38] Statute of the International Court of Justice, 2002 S.I.C.J. art. 38, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II

[39] Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT'L. L. REV. 845, 921 (1999).

tated by the logical ease of making two consistent judgments. If not included in customary international law, the Court may not decide a dispute or assign a remedy not included in the treaty. Properly summarized,

> The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the existing law. It does not 'create' new rules of law either for the parties to a given dispute or for the international community at large.[40]

The issue of ensuring that the Court acts within the confines of its ascribed judicial function has been substantially explored in assessing the latitude of its power to give advisory opinions. In contrast to AGNRs, the ICJ Statute does grant the Court power to give advisory opinions.[41] Despite this explicit delineation, it was argued in the Nuclear Weapons Case[42] that 1) limitations in the UN Charter restrict the Security Council's ability to seek an advisory opinion, and 2) an advisory opinion would require the Court to engage in policymaking akin to legislation in order to issue a coherent judgment.[43] The Court rejected these arguments and, in determining the scope for its decision, held that issuing an opinion on the legality of threatening the use of or using nuclear weapons was within its judicial purview. The Court defended the legality of its advisory opinion, stating, "the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law."[44] As to the charge that such a judgment would amount to legislation, the Court held:

> It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[45]

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[40] SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 38 (5th ed. 1995).

[41] Statute of the International Court of Justice, 2002 S.I.C.J. art. 65-66.

[42] *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8).

[43] *Id.*

[44] *Id.* at 234.

[45] *Id.* at 237.

The Court's statement demonstrates that as recently as 1996, its jurisprudence recognized that the purpose of the ICJ is to examine the *corpus juris* relative to the question presented and apply the appropriate body of law. In doing so, it is appropriate for the Court to note the apparent direction of the body of law, but until the trend has reached the point of incorporation in relevant *corpus juris*, it remains non-binding dicta. Under customary international law, *corpus juris* includes current practices of states that may potentially be hardening into customary international law and precludes the predilections of international law scholars' opinions of where the law should be. The adherence to established *corpus juris* has been accepted through numerous judicial decisions from the inception of the ICJ.[46] In *Haya de la Torre*, an asylum case, the Court held that it lacked the ability to guide Columbia in its compliance with an earlier Court judgment.[47] The Court explained its holding as follows:

> Having thus defined in accordance with the Havana Convention, the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view toward terminating the asylum, since, by doing so, it would depart from its judicial function.[48]

This doctrine is based on a belief that substantial intervention by the ICJ into national affairs may violate sovereignty and promote the possibility of backlash against other international institutions. Such a backlash, in which nations lose respect for the designated international institutions, would ultimately lead to their demise as it did with the ICJ's predecessor, the Permanent Court of International Justice prior to World War II.

Before *LaGrand*, the ICJ limited itself to assigning remedies under the Vienna Convention on Consular Relations (VCCR) and/or customary international law. Germany, in its Fourth Submission to the Court, asked the ICJ to require the United States to give it a guarantee of non-repetition. The Court's decision on this matter cemented ILC Article 30.

The facts of the case were as follows: Karl and Walter LaGrand were two German nationals who had resided in the United States since their arrival as young children in 1967.[49] On January 7, 1982, they were arrested in Arizona for involvement in an attempted bank robbery in Marana, Arizona. In

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[46] The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 31, 57 (June 12).

[47] Haya de la Torre (Colum. v. Peru), 1951 I.C.J. 71, 83 (June 13).

[48] *Id.*

[49] Arizona v. LaGrand, 734 P.2d 563, 565 (Ariz. 1987).

the course of the robbery, one bank employee was murdered and another seriously injured. In 1984, both were convicted of first-degree murder, attempted murder, attempted armed robbery, and two counts of kidnapping.[50] The death sentence was imposed on both men 11 months later. The case proceeded to the Supreme Court of Arizona, which denied post-conviction relief in January 1987. Another petition for post-conviction relief was denied in state court, and was upheld by the Supreme Court of Arizona in 1990 and the United States Supreme Court in 1991.[51]

The LaGrands were not properly informed of their relevant rights under the VCCR at any time during conviction, sentencing, and the first set of appeals.[52] Similarly, none of the proper authorities informed the German consulate of the charges facing the LaGrand brothers or of their imminent sentencing.[53] Instead, the LaGrands were informed of the right to consular assistance by a third party and informed the German consulate of their situation in June 1992.[54]

In 1995, the LaGrands sought to have their convictions and sentences set aside in federal district court based, among other things, on the fact that U.S. authorities, in violation of the VCCR, failed to notify the German consulate of their arrest. The petition was denied by the federal court, which found that the argument based on the U.S. violation of the VCCR was procedurally barred due to failure to raise the claim in Arizona state court.[55] The U.S. Court of Appeals for the Ninth Circuit ultimately affirmed the decision on January 16, 1998.[56]

The Supreme Court of Arizona scheduled the execution of Karl LaGrand on February 24 and the execution of Walter LaGrand on the March 3. Karl LaGrand's final federal appeals were denied and he was executed as scheduled.[57] The day before the scheduled execution of Walter LaGrand, Germany sought the ICJ's intervention by asking for interim protection pending the consideration of the case before the Court. Germany's petition was granted and the ICJ issued an interim measure asking the U.S. government to

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[50] *Id.*

[51] State v. LaGrand, 734 P.2d 563 (Ariz. 1987), *cert. denied*, 484 U.S. 872 (1987).

[52] Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT'L L. REV. 857, 859 (2002).

[53] *Id.* at 867.

[54] *Id.*

[55] LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1999).

[56] *Id.*

[57] William J. Aceves, International Decision: LaGrand (Germany v. United States), 96 A.J.I.L. 210, 210 (2002).

"take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."[58] Despite the interim order, Walter LaGrand was executed.[59]

In the ultimate proceedings in the International Court of Justice, the U.S. argued primarily that AGNRs are not an acceptable remedy to be considered by the ICJ under international law.[60] Further, to the extent the Court might find an AGNR attractive, the U.S. had already gone to great lengths to reduce the likelihood that a similar violation would occur in the future.[61] Included in these efforts were the mass production of guidance pamphlets for law enforcement, training programs, and potential punishment for law enforcement that did not follow Vienna Convention guidelines. In support of the original claim for a GNR and the revised request of an ANR, the German government argued that AGNRs were recently embraced by the ILC Draft Articles on State Responsibility, U.S. repetition was a realistic possibility, and the executed defendants suffered too severe a harm to be solved solely by an apology.[62]

In its judgment, the ICJ tentatively sided with Germany, noting that, "an apology is not sufficient in this case," or in any other case where Vienna Convention rights are infringed resulting in "prolonged detention or . . . severe penalties."[63] In making its pronouncement, the court did not clearly explain its justification for using AGNRs under customary international law. Instead, it simply declared that in a case with risk of repetition present, an apology does not provide an appropriate remedy.[64]

III. A CRITIQUE OF *LAGRAND*: THE EFFECT OF THE RISE OF AGNRs

Customary international law imposes obligations on states but does not specify how those obligations shall be met within the domestic realm. International courts are empowered to find violations of international law and

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[58] Case Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.), 1999 I.C.J. Order of Provisional Measures para. 29 (Mar. 3).

[59] *The World in Brief*, WASH. POST, March 4, 1999, at A16.

[60] LaGrand Case (F.R.G. v. U.S.), I.C.J. Oral Pleadings paras. 5.1-.43, 7.1-.15 (Nov. 14, 2000, at 3 p.m.), http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-29.html (last visited Jan. 22, 2003).

[61] *Id.* at paras. 7.16-.27.

[62] LaGrand Case (F.R.G. v. U.S.), I.C.J. Oral Pleadings (Nov. 16, 2000), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-30.html (last visited Jan. 22, 2003).

[63] LaGrand Case (F.R.G. v. U.S.), I.C.J. para. 123 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last visited Jan. 22, 2003).

[64] *Id.*

remedy them, but the *LaGrand* decision, by embracing the ILC Article 30 on AGNRs, opens the door to changing this doctrine and does so with no legal foundation.

The previous section set out the two pillars of justification for AGNRs: the ILC codification of state responsibility and the ICJ judgment in *LaGrand*. This section explores the fragility of those pillars, demonstrating that the only foundation for the actions of each institution is the legitimacy of the other. Both the ILC and ICJ are required to take account of and, to different degrees, base their work on existing customary international law to ensure legitimacy. However, the only basis the ICJ uses in finding AGNRs as a legitimate remedy is the ILC codification of state responsibility, while the basis for codification of AGNRs in Article 30 is the ICJ decision in *LaGrand*. The result is a fatally flawed foundation that undercuts AGNR viability and is harmful to the legitimacy of international law. Further, the formulation set out in *LaGrand*, again based on Article 30 of the ILC Draft Articles on State Responsibility, provides very little guidance and results in a system that is both counterproductive to its stated goals and poorly allocates resources. In setting out these arguments, I consider the foundations relied upon by both the ILC and ICJ and discuss the weaknesses of those foundations.

A. *The International Law Commission's Draft Articles on State Responsibility*

The ILC Articles on State Responsibility "seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts."[65] The traditional account of customary international law holds that a principle reaches customary international law status through a two-part process: first, via widespread and uniform state practice, which, secondly, becomes ultimately regarded by states as having the binding force of law (often referred to as *opinio juris*).[66] The notion of *opinio juris* attempts to decipher the motivation of the state in its decision to recognize a principle as a requirement under international law. The principle "hardens" into part of customary international law when there is a finding that the nation believed it was bound to follow the principle as a notion of law.[67] This formulation is based in the *North Sea Continental Shelf* cases where the ICJ, in discussing

[65] ILC Commentary on State Responsibility, *supra* note 15, at 59.

[66] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1986).

[67] Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116-17 (1999).

whether an Article of the 1958 Geneva Convention on the Continental Shelf had become customary international law, said that in order for it to have attained such status it would "be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[68] In this case, the Court recognized the reciprocal nature of international obligations as key to the resolution of conflict and creation of international law.

There does not exist, however, enough state use of AGNRs to consider them customary international law or as part of an emerging trend in the law. To the extent that the state practice element is fulfilled, it is unlikely that nations have begun to view the imposition of AGNRs as binding customary international law. There is also no modern trend that would justify court usage of AGNRs under the ILC's mandate of progressive development.

While the ILC can consider the progressive movement of international law, its standard for assessing progressive development has been finding modern trends in the law, not open ended political goals.[69] The ILC is not required to differentiate proposals it considers "progressive development," but often does so to counter arguments that portions of its work are not supported by customary international law.[70] In the case of AGNRs, if the ILC had shielded such work as part of its progressive development mandate, it would have weakened its argument of prior widespread ratification of AGNRs by abandoning the binding legal nature of customary international law found in codification.[71] The ICJ would not have been able to apply AGNRs as a recognized remedy without explicit state consent in a treaty.

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[68] North Sea Continental Shelf (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

[69] Generally, "progressive development" efforts are intended to prod movement of the law and are not taken from scratch. Ultimately, a goal of the "progressive development" aspect of ILC work is that the proposals eventually become part of customary international law. *See* Daniel N. Hylton, ***Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations***, 27 VAND. J. TRANSNAT'L L. 419, 447 & n.188 (1994).

[70] Article 41 (particular consequences of a serious breach of an obligation under this chapter) and Article 48 (invocation of responsibility by a State other than an injured State) are the only articles specifically recognized as derived from progressive development as opposed to codification in the ILC State Responsibility Articles. U.N. GAOR 56th Sess., Supp. No. 10, at 53, U.N. Doc.A/56/10 (2001); *id.* at 56.

[71] Many governments commented on the large degree of progressive development within the ILC draft, although not explicitly including Article 30 in their assessment. These countries included: Austria, France, Ireland, Japan, Mongolia, Netherlands, Republic of Korea, Switzerland, and the United States. U.N. GAOR, 56th Sess., Supp. No. 18, at 51, U.N. Doc. A/56/10 (2001); *see* U.N. GAOR, International Law Commission, 50th Sess., U.N. Doc. A/CN.4/488 (1998); *see also* Comments and Observations Received from U.N. GAOR International Law Comm., 50th Sess., U.N. Doc. A/CN.4/4515 (1998).

This is so because if a provision is recognized as a progressive development it implicitly does not reflect current law; if not a part of current law, it cannot be applied without consent. As such, the ICJ does not recognize ILC-created provisions based on "progressive development" as binding law.[72] This argument was recognized by the U.S. in oral argument:

> While it may be entirely appropriate for the International Law Commission, in fulfillment of its mandate for the progressive development of international law, to identify obligations that may not be reflections of current law, it would not be appropriate for this Court to impose such an obligation on a State appearing before it that has not accepted such an obligation.[73]

Further decisions by the ICJ have tweaked the traditional customary international law standard while keeping its formal elements and basic theory intact. A relevant example is the reduced importance of state practice and the increased reliance on the Court's analysis of whether states have acted due to a sense of legal obligation. This is demonstrated in the ICJ's reasoning that the presence of customary rules "can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."[74] Thus, if the state appears to be acting out of obligation it demonstrates the widespread nature of the practice.[75] Other cases have confirmed this trend by finding the existence of multilateral treaties and international agreements as nearly dispositive on the existence of customary international law without examination of actual practice.[76]

Historically, customary international law has been applied to basic norms and widely accepted notions of international principles regarding the law of war and the treatment of aliens. More modern approaches to custom-

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[72] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 22-33 (July 25); on the general issue of ICJ distaste for judicial adoption of progressive development, *see* Michael Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, 1995 CAN. Y.B. INT'L L. 185.

[73] LaGrand Case (F.R.G. v. U.S.), I.C.J. Oral Pleadings para. 5.19 (Nov. 14, 2000, at 3 p.m.), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-29.html (last visited Jan. 22, 2003).

[74] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 299 (Oct. 12).

[75] There is an obvious circularity in this argument. If *opinio juris* demonstrates practice, practice would just as probatively demonstrate *opinio juris* in many cases. This reasoning seems to ignore the real possibility that States often act out of "courtesy, convenience, and tradition" as noted by the ICJ in *North Sea Continental Shelf*. Also if there are evidence problems in finding practice, there are obviously more problems in ascertaining motive for governmental decisions and whose motivations in the government would be most relevant. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3 (Feb. 20).

[76] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US), 1986 I.C.J. 14 (June 27).

ary international law also include human rights norms that have garnered broad acceptance and which have often been committed to textual instruments. More recently, these basic norms that serve as the cornerstone of customary international law have become more accommodating, with potential extension to government-assured paid holidays as part of customary international law.[77] However, a real assessment of the legitimacy of a practice under customary international law should examine whether the elements of a traditional creation of customary international law exist and the impact of recognizing these new norms. In making this assessment it is important to critically examine the elements of customary international law formation to find what satisfies these elements. Ultimately, if AGNRs do not satisfy the test, then neither the ICJ's nor any other international tribunal's use of them is legitimate without explicit reference in the applicable treaty.

In its earlier work, the ILC recognized that while it was interested in AGNRs as a proper remedy under codification, there existed little customary international law basis for it.[78] During its discussion of the proposal to codify AGNRs, commission participants noted that while it may not be uncommon for governments to give assurances of behavior similar to ANRs, it was far from clear that such a statement could be considered undertaking a legal consequence related to state responsibility.[79] Further, the state practice seemed to be most dominant in the 19th century and, thus, would be difficult to characterize as either codification or recognition of the progressive development of the law.[80] The ILC also recognized that there had been no cases where courts had clearly required AGNRs.[81]

In basing the validity of AGNRs on customary international law, the ILC commentary mentions several instances in which governments or tribunals have engaged in diplomatic practice resembling the ILC definition of AGNRs. Besides the *LaGrand* case, the ILC mentions the following: a presidential speech by Lyndon Johnson demanding the Soviet Union provide adequate security for the U.S. embassy in Moscow; the "Dogger Bank" incident of 1904 where the UK requested "security against . . . recurrence;" an ex-

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[77] John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029, 1030 (1999).

[78] Implicitly, comments within the ILC regarding the lack of state practice or *opinio juris* on AGNRs hints that Article 30 is more "progressive development" than codification. However, since the ILC included historical examples in its commentaries to Article 30 in an apparent attempt to justify it under customary international law, my analysis will continue in that vein.

[79] *Report of the International Law Commission*, U.N. GAOR 52nd Sess., Supp. No. 10, para. 88 at 29, U.N. Doc. A/55/10 (2000).

[80] *Id.*

[81] *Id.*

change of notes between China and Indonesia in 1966 regarding consular security in Jakarta; a 1901 case where the Ottoman empire made a formal assurance that certain foreign postal services would operate freely in its territory; an incident of seizure of German ships during the Boer war (1899-1900) where Germany told Britain that it must issue instructions not to seize German merchant ships not in a war zone; and the "Doane" incident where assurances against repetition were made in 1886.[82] Additionally, the ILC offers a handful of examples from the Human Rights Committee (HRC) where the HRC has requested repeal or modification to domestic law.[83]

However, it should be noted that the historical examples used by the ILC are not court-issued AGNRs but demonstrate only diplomatic use. The request of assurances or guarantees by another nation is appropriate in diplomacy but does not equal the Article 30 proposal by the ILC that courts wield such tools as an international remedy. Rather, only numerous examples of courts issuing remedies very similar to Article 30 AGNRs, and those remedies being followed, would suffice to create customary international law.

Even if taken as doctrinal reflections of AGNRs, the ILC examples of diplomatic use of AGNRs do not reveal either sufficient state practice or evidence of *opinio juris* necessary to create customary international law. It may be common for diplomats to use assurances that a violation will not occur in the future, or even go so far as to change domestic policy, but they do so for purposes of leveraging in diplomatic relations—not obligation under law. Rather than demonstrating *opinio juris*, such actions more likely reflect coincidence of interest or coercion.[84] The ILC's examples of the Ottoman Empire assuring operation of the British post and of the "Dogger Bank" case came at a high point of British imperialist power. The Boer War request to respect the international law notion of "free ship, free goods" and the embassy security dispute between the USSR and the US were between equal powers with the ability and inclination to provide reciprocity. In contrast, the Afghani request for U.S. assurances of non-intervention and the Chechen request for Russian non-repetition of internationally wrongful fighting were not respected because the elements of coincidence of interest or effective coercion were absent. If *opinio juris* existed in these practices, there would be several examples of AGNR requests being followed in the absence of reciprocal interests or coercion.

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[82] ILC Commentary on State Responsibility, *supra* note 15, at 219, 221-22 nn.470-71 and 474-75.

[83] *Id.*

[84] *See* Goldsmith & Posner, *supra* note 67 (an incisive examination of customary international law principles affected by coincidence of interest or coercion).

Due to the lack of evidence satisfying the traditional test of customary international law, the ILC's adoption of its proposed article regarding AGNRs was illegitimate. This is because there are serious questions, recognized within the ILC, as to whether AGNRs can be considered legal consequences of an internationally wrongful act.[85] The ILC's concerns focused on whether such a remedy could be considered a part of customary international law and a debate over the efficacy of imposing additional obligations on nations that could potentially lead to another breach. This secondary breach would be a breach of a remedy, which would have to be enforced through the imposition of yet another remedial measure.[86] When first considering the proposal, the ILC passed the issue to the ICJ for reinforcement before adoption took place. It did this by suspending adoption of Article 30 until after the ICJ made its judgment on Germany's submission for AGNRs in *LaGrand*.[87] Following the ICJ decision, Article 30 was accepted in the final form of the draft articles.

B. The International Court of Justice's Decision in LaGrand

In *LaGrand*, the ICJ, by embracing the ILC argument for recognition of AGNRs as part of customary international law, goes beyond past jurisprudence and the limitations set out in its founding statute. In order to rule on Germany's fourth submission requesting ANRs, the ICJ first looked to find this power under the Vienna Convention of Consular Relations (VCCR) Optional Protocol.[88] The absence of any particular provision in the VCCR or any other major treaty regarding AGNRs as viable judicial remedies means that if the use of AGNRs were to be legitimate, it must receive its legitimacy through customary international law. The ICJ found the necessary jurisdiction in *LaGrand* by relying on a general rule that in the absence of explicit language on the subject of remedies, the Court is empowered with the ability to decide such issues under customary international law.[89] In its assessment

[85] James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963 (2001).

[86] This second concern was crystallized by Special Rapporteur Crawford in his assessment that it would be difficult to impose sanctions based on a breach of failure to provide AGNRs when so ordered. *See* James Crawford, Special Rapporteur, *Third Report of the on State Responsibility*, International Law Commission, U.N. GAOR 52nd Sess., at 26 para. 58, U.N. Doc. A/CN.4/507 (2000) [hereinafter Third Special Rapporteur Report].

[87] Tams, *supra* note 36, at n.81.

[88] LaGrand Case (F.R.G. v. U.S.), I.C.J. paras. 46-48 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last visited Jan. 22, 2003).

[89] *Id.* at paras. 35-63.

of customary international law, the court relied on Germany's argument that the ILC Draft Articles on State Responsibility should be a guide.

The Court found a difference between AGNRs and mere actions designed to prevent breaches[90] by stating that a general effort to avoid a breach is a "general assurance of non-repetition," and as such did not satisfy Germany's request for a *specific* assurance of non-repetition of the procedural errors leading to the execution of the LaGrand brothers.[91] The ICJ made this distinction by finding that the U.S. declarations showing a desire to comply in the future were different than specific measures enacted to actively prevent such breaches. Thus, declarations of willingness to comply could satisfy general assurances of non-repetition but would not constitute a more specific guarantee.[92] While denying Germany's original submission of a specific assurance or guarantee of non-repetition, the court concluded that the U.S. was required to "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways."[93]

As the *LaGrand* case progressed, Germany changed its original written submission for specific guarantees of non-repetition into a less controversial, but theoretically similar demand for assurances of non-repetition, which was then argued orally in front of the court.[94] The German argument advocating the use of AGNRs closely mirrored the development of the proposal within the ILC framework. First, it was noted in general argument that the ILC changed the classification of AGNRs from remedial to preventive remedies and, thus, equated them with requests for cessation:

> [W]ith regard to assurances and guarantees of non-repetition, the proposals made by the Drafting Committee effected a certain change: while the draft adopted at first reading referred in Article 46 to such guarantees as one particular form of reparation, the guarantees are now combined together in draft Article 30 with the duty of the responsible State to cease its breaches. In doing so, the Drafting Committee followed the view of Special Rapporteur James Crawford, and others, that assurances and guarantees of non-repetition perform a distinct and autonomous function; they

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[90] The U.S. argued that its efforts to ensure compliance (pamphlets, education, etc.) should be seen as appropriate satisfaction for Germany.

[91] LaGrand Case (F.R.G. v. U.S.), I.C.J. para. 124 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last visited Jan. 22, 2003). *See also* Tams, *supra* note 36, at 17.

[92] *See* LaGrand Case, *supra* note 91, at para. 124.

[93] *Id.* at para. 125.

[94] Notably, the oral argument for Germany on its demand for assurances of non-repetition was made by Bruno Simma, an accomplished international law scholar, and, unsurprisingly, a member of the ILC.

> are future-oriented and serve a preventive rather than a remedial purpose.[95]

This argument warrants two observations. First, it distinguishes the change made from the written pleadings, which depended on Article 46 (the predecessor to Article 30). In arguing for the use of the ILC draft as a basis for legal legitimacy, Germany had to make note of this change. Otherwise it would have been irrelevant to note that it was not coupled with cessation. This is cemented in the further comment that this change in the draft actually provides legal grounding for the proposition of AGNRs by tying them to cessation. In fact, Professor Simma, arguing for Germany, cites this argument as the "legal foundation [of AGNRs] which was accepted by the International Law Commission."[96] Pursuant to this reasoning, if cessation is a legally accepted principle, then under Germany's argument, AGNRs ought to be considered part of cessation and thus part of customary international law.

However, while members of the ILC certainly did believe that coupling the ideas together was more theoretically coherent, there appear to be few other customary ties between the two notions. Cessation may relate to future activity so far as the international wrong is continuing, but the concept of AGNRs extends beyond not only the actual facts of the case, but beyond the parties in litigation. This is supported by the ILC's commentaries that explain that cessation specifically applies to "continuing" wrongful acts.[97] In contrast, AGNRs extend into factual situations not considered at the time of their issuance and circumstances that have not yet taken place.

Germany asserted that AGNRs are "firmly anchored in international law," but failed to provide any argument that the elements of customary international law were satisfied. Instead, Germany remarked that "[i]t is remarkable to see how [the ILC's] proposal to expressly restate assurances and guarantees of non-repetition as a distinct consequence of breaches of international law adopted by the ILC, was quickly followed by State practice."[98] This statement was backed by citing one case before the ICJ,[99] an amicable

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[95] LaGrand Case (F.R.G. v. U.S.), I.C.J. Oral Pleadings sec. VIII para. 10 (Nov. 13, 2000, at 3 p.m.), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-27.html (last visited Jan. 22, 2003).

[96] *Id.* at sec. VII para. 22.

[97] ILC Commentary on State Responsibility, *supra* note 15, at 221.

[98] LaGrand Case (F.R.G. v. U.S.), I.C.J. Oral Pleadings sec. VIII para. 23 (Nov. 13, 2000, at 3 p.m.), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguscr/igus_icr2000-27.html (last visited Jan. 22, 2003).

[99] *Id.* (citing Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 12, 16, 17 (Sept. 25)).

settlement before the European Court of Human Rights,[100] and a list of cases decided in front of the Inter-American Court of Human Rights.[101] Germany concluded by noting that "neither in their comments on the ILC draft articles adopted at first reading in 1996, nor in the recent Sixth Committee debates, [did] any government [suggest] the deletion of the draft article embodying our assurances and guarantees."[102]

By neglecting even to attempt to find foundation for AGNRs in customary international law, Germany failed to provide the ICJ with any valid basis for embracing the controversial remedy. Instead Germany hung its entire case for AGNRs on the ILC's Article 30 proposal. The fact that governments have subsequently utilized ILC proposals to bolster their cases and acquire actions of other governments does not give legal validity to AGNRs but instead demonstrates the opposite—that they were not a true part of state practice prior to ILC codification, nor were they considered part of international law. If they had been so considered, why would governments just now start to seek them in front of international tribunals?

Similarly, the argument that governments had not requested the deletion of Article 30 is both irrelevant and misleading. The fact that a body like the Sixth Committee does not actively object to a specific portion of a draft articles does not mean that it either ascribes to the reasoning used by the ILC in justifying the article or that it thinks that it is part of customary international law. The Sixth Committee and General Assembly are not required to follow customary international law. They may believe that the policy behind AGNRs is wise and thus that it should be a part of state responsibility. However, that does not mean that they think such policy is part of customary international law, or that they are required to investigate the legal status of AGNRs. Instead, that function is for international courts like the ICJ and, to a more limited extent, bodies like the ILC. Therefore, the opinion of the Sixth Committee is generally irrelevant in assessing whether a proposal is consistent with customary international law. Additionally, Germany's argument that the Sixth Committee's silence implies consent is rejected by international law. In the issue of reservations to treaties, bodies like the Human Rights Committee have held that the failure of countries to object to a particular reservation does not equal acquiescence to that position, much less advocacy of it.[103] Also, the purpose of receiving comments and observations from

[100] *Id.* (citing Denmark v. Turkey, 2000-IV Eur. Ct. H.R. 1, 8-10 para. 21 (2000)).

[101] *Id.* (citing Castillo Petruzzi et al., Case 52, Inter-Am. C.H.R. para. 222, ser. C (1999); Tamayo, Case 42, Inter-Am. C.H.R. para. 164, ser. C (1998)).

[102] *Id.*

[103] Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 436 (2000).

governments is not to have them examine if each provision properly reflects customary international law. The governments, while encouraged to give feedback, are not the crafters of the draft articles as they would be in the case of a treaty. Governments may have had a myriad of reasons for commenting or remaining silent that had nothing to do with their opinion of AGNRs as part of customary international law.

Second, there have been several expressions of doubt about the validity of AGNRs. In 1998, Germany noted in its comments to the ILC regarding then Article 46 (which included AGNRs), that, "[s]ome doubt exists . . . as to whether the injured State has, under customary international law, the right to 'guarantees of non-repetition'. . . . To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate."[104] In the same report, Uzbekistan commented that the article on AGNRs should assess what types of AGNRs a state could be entitled to obtain.[105] In the next compilation of comments from governments regarding the Draft Articles of State Responsibility the United States advocated deletion of the AGNRs section, "as it reflects neither customary international law nor State practice."[106]

Although not explicitly relied upon in *LaGrand*, a classic argument in favor of application of AGNRs is that they essentially do not ask the violating state to do anything that they did not agree to do in the first place and that, as a result, they are amenable to customary international law and an assessment of the burden that this obligation would entail was already accepted by the state before the issuance of an AGNR. This argument fails to recognize the forward-looking obligation-imposing nature of AGNRs and the degree of specificity necessary to be effective. Unlike cessation, AGNRs do not deal with stopping a continuing violation of international law, but rather force prospective changes within domestic law in order to avoid the possibility of a future violation. This change from repairing past harms to avoiding future ones is likely to be both over-inclusive and under-inclusive. It is over-inclusive because, although not mandated in *LaGrand*, under the ILC framework an effective AGNR could easily result in a mandated change under domestic law that is neutral on its face, but may nevertheless result in a violation of international law. For example, in *LaGrand* a procedural default

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[104] *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR, International Law Commission, 50th Sess., at 103, U.N. Doc. A/CN.4/448 (1998) *available at* http://www.un.org/law/ilc/sessions/50/doclist.htm.

[105] *Id.* at 113.

[106] *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR, International Law Commission, 53d Sess., at 36, U.N. Doc. A/CN.4/515 (2001) *available at* http://www.un.org/law/ilc/sessions/53/53docs.htm.

(failure to demonstrate prejudice resulting from the lack of consular notification) precluded re-trial of the LaGrand brothers. Obviously, a repeal of the procedural default doctrine leading to this preclusion would be drastically over-inclusive—many people not covered by the VCCR would be able to use the changed law to their advantage.

Additionally, requiring a change in procedural default by changing legal definitions of "cause" or "prejudice" would also not ensure that violations of this kind would not occur in the future. In *LaGrand*, a more relaxed definition of "cause" or an elimination of the "prejudice" standard would have resulted in a different outcome. However, in its judgment, the ICJ simply noted that national courts are required to *consider* the violations of the right to consular assistance, not to *guarantee* a particular result from that consideration.[107] Under this rule, it is still possible for national courts to read the requirements of procedural default as to make the impact of such an assessment negligible. If this were done, the state would likely still be in violation of Article 36 of the VCCR. As a result, the ICJ would need to continue to monitor and mold any AGNR to ensure that the order fit comfortably with the obligations of the treaty within the application of domestic law.

The Court's finding that the U.S. was required to allow review and reconsideration and that an apology was not enough seems to be a tentative endorsement of the view that AGNRs are a stronger remedy than mere cessation. In ruling that the *LaGrand* case represented a situation of a severe penalty and that such a penalty could not be remedied by mere apologies, the Court appears to be assessing the "nature of the obligation and breach" as recommended by the ILC. In so doing, it is saying that in run-of-the-mill cases of violation of the Vienna Convention, AGNRs may not be an appropriate remedy, but in the case of a "serious" breach, the Court may require a more specific AGNR (although it declined to do so in *LaGrand*).

In summary, with the *LaGrand* judgment, the ICJ utilized the legal basis concocted by the ILC in making its decision on Germany's Fourth Submission regarding AGNRs. What the Court failed to do was to provide any guidance or commentary about how such orders will or should be utilized in the future. This lack of guidance, coupled with reliance on the work of the ILC for the legal establishment of AGNRs leaves an open question regarding how such a potentially far-reaching remedial measure should be used. This burden is even greater since the traditional markers of customary international law are not present.

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[107] LaGrand Case (F.R.G. v. U.S.), I.C.J. para. 91 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last visited Jan. 22, 2003).

IV. IMPLICATIONS OF AGNR ADOPTION UNDER THE ILC/ICJ FRAMEWORK: THE TAINT OF ILLEGITIMACY WITH NO ROAD MAP

The lack of guiding instructions in the ICJ judgment creates an additional obstacle to any potential benefits from devices designed to avoid the breach of international obligations. In this section I examine the difficult problems presented by the unwillingness of the ICJ to create clearer guidelines for future application of its powerful new tool.

The adoption of AGNRs leads to substantial problems with legitimacy and taints the institutions that elevated it. I examine the negative consequences of AGNR adoption by reviewing its relation to international legal compliance in both vertical and horizontal legal structures. Legal thought regarding legitimacy as an instrument for attaining heightened efficacy and compliance of international law can be used as a lens through which to view the adoption of AGNRs.[108] I conclude that poor policy and illegitimate adoption of AGNRs will lead to less effective international institutions and legal rules.

A. *ILC Guidance for Application*

The ILC draft Articles of State Responsibility make it clear that AGNRs are not always appropriate. They also offer very little other guidance as to the circumstances that would be appropriate for their use. The ILC commentary explaining their application notes:

> [A]ssurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if the circumstances so require" at the end of subparagraph (b). The obligation of the responsible State with respect to [AGNRs] is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.[109]

The commentary notes factors that must be considered when determining whether to apply AGNRs, including, "when appropriate," the "nature of the obligation and of the breach," and "if the circumstances so require." This language is not particularly clear, but surrounding language indicates that the

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[108] In particular the scholarship of Thomas Franck, *infra* notes 121 and 125, and Harold Hongju Koh, *infra* note 115, on the subject. To a lesser extent, the work of Lewis Henkin, *infra* note 116, and from the realm of international relations, the research by the Chayes,' *infra* note 128.

[109] *Id.* at 165.

ILC intended that AGNRs be used to combat repetitive breach and avoid irreparable harms, both of which are damaging to international relationships between states.[110]

Most noticeably absent from the ILC's analysis is any explicit reference to the burden imposed on the infringing state in order to carry out requested AGNRs.[111] The ILC formulation of AGNRs to aid in the reparation of the states' legal relationship focuses solely on the impact on future infringement. The burden of implementing an AGNR could be enormous, especially when judicially crafted, even when the legal relationship between the parties on any given issue is only mildly damaged. Even worse, enforcement burdens could result in the reluctance of the infringing state to take part in international treaties that may subject it to AGNRs in the future.[112]

International treaties, and international law generally, are largely based on a consent model that allows for parties to agree to international obligations willingly and withhold consent from agreements they find objectionable. Any implementation of AGNRs has the potential to upset the delicate balance inherent in the consent-based model. While limited infringement would most likely be tolerated in circumstances where its costs were substantially lower than the costs associated with fighting it, the more substantial the infringements would engender more distrust and distaste for the process. More importantly, unwise AGNR use would result in an additional international obligation without consented to and could potentially cost a state substantial political capital, economic resources or both. As for poorer nations, the lack of language taking into account the burden imposed is likely to promote their belief that their limited financial needs are not being considered. Moreover, these burdens pose disproportionate negative effects on poor nations. In contrast, wealthier nations are in a better position to shirk any additional obligations imposed under the rubric of AGNRs because no clear enforcement mechanism or even formulation of theoretical consequences of breaking AGNRs exists. As to this problem of consequences, Special Rapporteur James Crawford noted

> It may be asked what the consequences of a breach of that obligation [of AGNRs] might be. For example, could a State which had tendered full reparation for a breach be liable for countermeasures because of its

[110] Third Special Rapporteur Report, *supra* note 86, at 26.

[111] The word "explicit" is used because it is conceivable that the ILC intended to give some weight to this factor in its "nature of the obligation and the breach" language. Theoretically, one could argue that an incredible burden makes compliance difficult, if not impossible and thus would make non-repetition similarly difficult—thus affecting the "nature of the obligation and breach."

[112] The U.S. reluctance to fully enter into many international agreements can already be traced to the type of domestic influence of international courts that AGNRs would tend to promote.

failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely.[113]

B. *Historical Use*

Given the ICJ's failure to effectively explicate the characteristics of appropriate use, historical use of AGNRs is important as a potential guide. Unfortunately, as noted above, the historical basis of court-issued AGNRs is difficult to ascertain. Although it is also clear that verbal assurances are indispensable tools of international negotiations, there have been few clear documented examples. They are generally seen as being requested when "restoration of the pre-existing situation does not protect (the injured State) enough."[114] Essentially, the AGNRs requested in historical diplomatic practice were efforts to allow the restoration of the international relationship between two states.

There are very limited examples of the utilization of AGNRs in the legal arena. Among these is a case heard before the European Court of Human Rights, *Denmark v. Turkey*, in which Turkey agreed in a friendly settlement that its police would engage in an international program of training.[115] Similarly, in the *Castillo Petruzzi* case before the Inter-American Court of Human Rights (IACHR), the IACHR found the government of Peru in violation of human rights aspects of the American Convention.[116] In *Castillo Petruzzi*, the defendant was convicted by a military tribunal of treason and sentenced to life imprisonment.[117] In its judgment, the IACHR denounced the use of "faceless" military tribunals as a violation of the American Convention. Such tribunals were violations of an impartial trial guaranteed under Article 8.1 of the American Convention because the very arm of the government charged with combating terrorism was used in assessing its detainees' guilt or innocence.[118] Further, Peru was found in violation of other portions of the American convention in its treatment of the prisoners prior to their trial.[119] In its finding that the nation's actions were violations, the IACHR affirmed ear-

[113] Third Special Rapporteur Report, *supra* note 86, at 26 para. 58.

[114] *Id.* at 162.

[115] *See* Denmark v. Turkey, 2000-IV Eur. Ct. H.R. 1, 8-10 para. 21 (2000).

[116] Castillo Petruzzi et al., Case 52, Inter-Am. C.H.R. para. 93, ser. C (1999). Additional charges of violations of the Vienna Convention on Consular Relations were originally brought but either dismissed as moot or disposed of in preliminary objections, *id.*, and thus, not dealt with thoroughly in the final judgment.

[117] *Id.* para. 1.

[118] *Id.* para. 125 & 130.

[119] Examples of the other violations of the treaty were Article 5 (conditions of confinement) and Article 7.5 (30 day detention without judicial hearing insufficiently prompt).

lier case law declaring that Peru needed "to adopt such measures as may be necessary to ensure that violations such as those established in the instance case never again occur in its jurisdiction."[120] While not going into specific details as to the "necessary" measures, the Court followed its declaration in relation to the American Convention stating that Peru, "is to adopt the appropriate measures to amend those laws and ensure the enjoyment of the rights recognized in the Convention to all persons within its jurisdiction, without exception."[121] At the very least this would require the domestic reform of some of its anti-terrorism legislation that authorizes the kind of military tribunals utilized in *Castillo Petruzzi*. Conceivably, it would also involve substantial overhaul of legal procedures and aspects of the prison system that were also deemed violations. In response to the judgment by the IACHR, Peru made known its intention to immediately withdraw from the jurisdiction of the IACHR.[122] Apparently this was an attempt to avoid prospective judgments against the state and avoid any legal reform implicated by the Court's ruling.[123] The Court held that Peru's withdrawal was ineffective and that the IACHR would continue to rule on cases brought against it. The Court ruled that the only way to avoid jurisdiction by the Court was to withdraw from the entirety of the American Convention or at the very least give substantial notice before withdrawal would take effect.[124]

There is at least one overriding lesson in the application of AGNRs that can be derived from cases such as *Trail Smelter* and *Castillo Petruzzi*—that the assessment of the burden should be a clear factor in determining whether AGNRs should be applied. In *Castillo Petruzzi*, the IACHR was undoubtedly correct in its assessment that the actions of the Peruvian government went beyond the limits intended by the American Convention. Unfortunately, the remedy of the Court requiring reformation of all laws that could lead to the repetition of the violation was both breathtakingly broad and invasive. This may not have been the sole factor affecting Peru's decision to withdraw from the Court's jurisdiction (and potentially the American Convention), but it was certainly an aggravating factor. In order to faithfully comply with the Court's order, the Peruvian government would have been forced to begin a substantial change of its laws and compromise what it viewed as a noble effort to eradicate terrorist threats to both the government and its people.

[120] Castillo Petruzzi et al., Case 52, Inter-Am. C.H.R. para. 93, ser. C (1999).

[121] *Id.*

[122] Douglass Cassell, *Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?*, 20 Hum. Rts. L.J. 167, 168-69 (1999).

[123] *Id.* at 168 n.10.

[124] *Ivcher Bronstein*, Case 54, Inter-Am. C.H.R. para. 40, ser. C (1999).

The *Trail Smelter* case involved a more limited and specific set of AGNRs that dealt with an important, but not security-driven, issue. The burden of requiring a company to compile statistics and share them with both the Canadian and U.S. governments may involve a somewhat untraditional infringement on a nation's conception of sovereignty, but is unlikely to create substantial costs to the government in either financial resources or political capital. Compared to the IACHR's action, it is much more subtle and less invasive, and can be ascribed to the goal of maintaining a legal relationship. The *Trail Smelter* remedy was also easier to comprehend, enact, and accept because it dealt with a much more tangible problem that was fairly easily addressed. The problem was the amount of contamination produced by one actor, thus, only one major actor necessarily was involved in remedying the problem. The legal problem created by the *Trail Smelter* AGNR might have been in it being too specific, and thus not leaving the method of compliance to the violating government. This aspect of it was likely remedied by the fact that it was a relatively minor infringement into sovereignty.[125] In contrast, the *Castillo Petruzzi* order that all actions should be taken to avoid violation in the future would require an overhaul of national security measures.

Ultimately, the codification effort appears to have ceded the idea of providing any guiding language as to when the use of AGNRs would be "appropriate," leaving international judicial bodies free to find situations where "circumstances so require" AGNR implementation. This was made clear by Crawford's note that "there must be serious doubt as to whether any form of words could give much guidance in advance of the assurances or guarantees appropriate in any given case."[126]

In *LaGrand*, the ICJ never addresses these difficult issues of application. The court does not specify the content of the duty or its implications within the confines of the *LaGrand* case, or beyond.[127] The result is indeterminacy for states, lessened respect for the principle of AGNRs the Court is attempting to establish, and heightened concerns over the Court's legitimate purpose and confidence in its judgment as a whole.

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[125] Relatively minor requirements like those levied in *Trail Smelter* are exactly the type of small "chipping away" actions that international institutions de facto are able to exercise to advance their goals. The cost of fighting such a minor infringement largely exceeds the costs of acquiescing.

[126] Third Special Rapporteur Report, *supra* note 86, at 26 para. 59.

[127] *See* Christian J. Tams, *Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility*, 27 YALE J. INT'L L. 441, 442 (2002).

C. *Illegitimacy as Hindrance to Development of AGNRs and as Taint to International Institutions*

The result of the ICJ's doctrinal aggrandizement of AGNRs is two-fold. First, specifically relating to their embrace as a remedy of the future, AGNRs could serve as a powerful weapon in directly influencing specific state practices within domestic law. Secondly, the illegitimacy of this new weapon, created by of judicial activism, could just as easily indicate a greater sphere of power acquired by the ICJ as erode the foundation of consent by nations and undermining the Court's current power.

The impact of the *LaGrand* decision on international remedies specifically, and international law generally, will ultimately be determined by its efficacy in making international law more powerful and responsive to changing needs. As described earlier, the perceived benefit of the adoption of AGNRs is to "modify the traditional idea that the rules of state responsibility are mainly concerned with the reparation of wrongs between injured and responsible state, and the restoration of the *status quo ante*."[128] AGNRs represent the ICJ's willingness to enter into a forward-looking approach to future compliance with international law. In assessing whether such compliance will follow, it becomes necessary to undertake an examination of why nations comply with international law.

1. Theories of Compliance in International Law

Numerous theories attempt to explain why states comply with international law.[129] The compliance question haunts all areas of international law because its resolution affects the framework of law to maximize efficiency and predictability. Among the theories, Louis Henkin, Thomas Franck, and Harold Hongju Koh, have provided the paradigms most generally adhered to relative to this important question. Henkin's assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"[130] sets the background for an assessment of why some principles are *not* respected and what their non-compliance means.

Henkin declared that compliance resulted from a cost/benefit analysis that consistently favored international legal compliance. Decisions of non-compliance could either be traced to an unusual non-rational act or a clear,

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[128] Tams, *supra* note 36, at 22.

[129] *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997) (an intensive study relating to the development of legal theory surrounding international legal compliance tracing this development from classical times to present).

[130] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

important advantage perceived by the nation in breaching its international obligation.[131] The potential advantage assessed based on an examination of numerous factors relating to the effects of compliance in both foreign affairs and domestic policy.[132] While not explicitly tying this cost/benefit analysis to legitimacy, some of the Henkin factors are substantially related to the legitimacy of the international obligation in question. The factor of a nation's desire to possess a reputation for principled behavior[133] is directly affected by the obligation's legitimacy. Should the obligation be widely considered as illegitimately created, noncompliance is unlikely to engender scorn from other nations. Additionally, this reasoning mirrors the factors used in assessing whether there has been "internal acceptance."[134]

Thomas Franck expounded on the Henkin puzzle of international compliance absent effective enforcement in *The Power of Legitimacy Among Nations*.[135] Franck tied Henkin's observation of dependence on voluntary compliance and deliberative creation of international institutions and norms to the value of legitimacy within the institution that caused compliance. Franck defined legitimacy as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[136] The very nature of international law as a voluntary system requires a high of institutional and procedural legitimacy. In assessing a rule's legitimacy, and thus its compliance—inducing power, Franck identified four major factors: determinacy, validation and creation by appropriate processes, conceptual coherence, and conformity with the organized hierarchy of the rule system.[137] Franck argued that international obligations and rules were respected because nations "perceive the rule and its institutional penumbra to have a high degree of legitimacy."[138] Should rule or institutional legitimacy decrease, voluntary compliance would suffer in correlation. The results are "black holes in the normative fabric [of international law] . . . due to a lack of legitimacy of the rules and institutional processes by which they are made,

131 *Id.* at 49.

132 *Id.* at 49-53, 60-68.

133 *Id.* at 50-52.

134 *Id.* at 60-68 (demonstrated by delineation of habit imitation and governmental structures within compliance). Henkin's internal acceptance factor is a precursor to recent work by Koh outlined within.

135 THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

136 *Id.* at 24.

137 *Id.*; *see also* Koh, *supra* note 129, at 2628.

138 FRANCK, *supra* note 135, at 25.

interpreted and applied."[139] Just as a black hole digests all light and matter that venture too close, many other rules and institutions suffer from the taint of illegitimacy emanating from another area of the law.

Koh builds on the work of Franck and others to add an additional element in explaining compliance, that of "norm internalization" through transnational process.[140] Koh argues that the external creation of the international principle is important, as argued by Franck, but what cements state obedience is the internalization of that norm in the domestic realm. This internalization results from a "transnational process" of debate and adoption within the domestic sphere affirming the nation's commitment to international law within a domestic plane.[141] Interaction within national institutions results in the indoctrination of international legal principles within the domestic legal structure. This indoctrination brings to life domestic legal compliance into line with overall legal compliance.

2. The Taint of International Rules and Institutional Legitimacy Resulting from *LaGrand*

The ILC and ICJ embrace of AGNRs is vulnerable to charges of illegitimacy due to the violation of appropriate process and aggrandizement of their institutional competencies. The result of this illegitimate adoption will be a weaker World Court and lessened respect for international legal principles—beginning with AGNRs and emanating into the larger atmosphere of international law. Rigorous analysis, inducing certainty and predictability is instrumental to reinforcing the veneer of legitimacy of institutions that are largely dependent on voluntary compliance.[142] One commentator noted that thorough legal analysis by international courts, "may . . . be necessary to the

[139] Thomas M. Franck, *Why a Quest for Legitimacy?*, 21 U.C. DAVIS L. REV. 535, 546 (1988).

[140] Koh, *supra* note 129, at 2646.

[141] *Id.* at 2646-48. Koh uses the example of the unilateral change of interpretation of the ABM treaty by the Reagan administration which was ultimately repudiated by Clinton Administration policy. *Id.* This example may be weak given the recent Bush Administration nullification of the treaty, but the principle, still holds true. The ABM treaty was ultimately rejected by the Bush administration, in part, precisely because its tenets ultimately were not internalized sufficiently.

[142] *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 118-23 (1995) (arguing through the paradigm of international relations theory that evidence of international interaction and validity of legal norms is coordinated through legitimacy). This concern is heightened in international law where culture variation makes unanimity difficult and concerns over cultural imperialism is prevalent. In such circumstances, the fulfillment of democratic principles of participation and fair process facilitate perception of the imposed norm as just and valid and avoids state circumvention. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 518 (2000).

continued acceptability of the Court and the effectiveness of its judgments."[143]

Legitimacy concerns are particularly heightened in legal analysis over the content of customary international law such as in the *LaGrand* adoption of AGNRs. The theory of customary international law has consistently been questioned regarding its methodology and legitimacy.[144] Despite this reality, the ICJ provides almost no legal analysis as to how its dramatic shift to a forward-looking remedial structure is based in law. Even proponents of the doctrinal shift find it "surprising that the court apparently did not feel the need to elaborate in detail why guarantees and assurances were due, or whether it was competent to award them."[145] This absence of legal justification came despite "the paucity of previous state practice supporting such claims for guarantees and assurances [AGNRs]."[146] Instead of providing legal analysis regarding the background of its adoption of AGNRs, the ICJ created a clear conceptual endorsement of AGNRs to avoid future breach of international law.

The Court's judgment fails Franck's framework of legitimacy-inducing compliance.[147] The Court, while conceptually embracing a new remedial paradigm, does not set clear guidelines for its application beyond Vienna Convention cases specifically dealing with the death penalty.[148] Similar circumstances are likely to be particularly rare. However, as the holding depends largely on the ILC work in the area of state responsibility, potential application beyond *LaGrand's* limited circumstances is certain. Similarly, as the decision is based in customary international law rather than treaty law, potential application of AGNRs is breathtakingly broad. This broadness of its application precludes legal certainty. The resulting indeterminacy makes it difficult for states to avoid subjecting themselves to this new ICJ power. Unwittingly being forced to endure such a new remedial structure without foreseeable standards for application further erodes the respect states will give to the rule.

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143 Jonathan J. Charney, Book Note, 89 AM. J. INT'L L. 458, 460 (1995) (reviewing CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING (1993)).

144 *See* Bradley & Goldsmith, *supra* note 4; *see generally* J. Patrick Kelly, *supra* note 142 (regarding broader legitimacy concerns).

145 Tams, *supra* note 127, at 443.

146 *Id.*

147 The factors, as identified above are determinacy; validation and creation through appropriate process; and conformity within organized hierarchy.

148 *See* Tams, *supra* note 127, at 442 (recognizing vagueness in ICJ statement of means to satisfy the German request for assurances).

Moreover, the interdependent reasoning of the ICJ and ILC circumvents the appropriate processes of both institutions, thus compromising the institutional legitimacy of both organizations and bastardizing the legal norm created. The ILC was created to codify and develop international law; the necessary mixing of these goals cannot, however, justify muddying legal principles that are clearly unsupported by traditional sources of law with established norms. By waiting for the ICJ to rule in *LaGrand*, the ILC was waiting for additional foundation to base its expansion of remedies in the law of state responsibility. The ICJ's willingness to artificially bolster the ILC position, while itself clearly relying on that institution's legitimacy and work takes the Court beyond appropriate processes and serves to validate any suspicion that it was not empowered on its own to find such a remedy within established law. The fact that the ICJ altered the borders of its powers so substantially without providing sound legal justification heightens skepticism surrounding the *LaGrand* decision, as well as towards the inevitable judgments in the future which will require a high degree of legitimacy in both the legal rule applied and in the institution applying it in order to ensure compliance.

The court also ignores Koh's additional component-inducing compliance device, "norm internalization" through transnational legal process. Under the Koh framework, the internalization of legal norms facilitated by an established process by which international institutions and domestic institutions interact is key to compliance. The ICJ attempts to recast the ILC codification process into a facade of sufficient input and ultimate transnational adoption of AGNRs into established law. Under the transnational process theory, AGNRs could become an acceptable international legal rule if their adoption followed the traditional path that had begun with their consideration by the ILC. They would have been considered, rejected or accepted as potential progressive development of international law by the commission and then sent on for further elaboration and debate amongst states. States would begin to further outline the proper boundaries by which such remedies would operate and encourage adoption not only within international institutions, but within the domestic legal sphere as well. After such consideration, they would eventually begin to display some of the characteristics of customary international law and ultimately, be ripe for further recognition by the ICJ. The fact that such deliberate decision making and adoption did not take place means that the rule of forward-looking remedial structures such as AGNRs have been unnaturally and undemocratically made part of international law. Such unnatural occurrences are rarely respected as legitimate exercises of law and power.

The repercussions of ICJ legitimacy do not extend only vertically amongst international and national institutions, but also horizontally amongst international groups. The ICJ, in addition to voluntary compliance, depends at least formally on the UN Security Council and the UN General Assembly for enforcement. Legitimacy issues raised by artificial elevation of legal norms by the ICJ further complicate practical obstacles of enforcement by these branches. A nation like the United States, upon receiving an unfavorable judgment could, with justification, couch non-compliance with a questionable rule in legitimacy terms and further might can graft its concerns of legitimacy into non-compliance with more accepted legal norms.[149] These compliance-circumventing justifications ultimately can be transferred domestically, resulting in *reverse* norm internalization. Such domestic skirting of international laws indoctrinated into domestic systems cannot easily be contained to one area of law, but rather, is harmful to the entire international system.

Legitimacy concerns go beyond institutional taint to include the contamination of the legal rule. AGNRs, legitimate in themselves, may suffer even if legitimately adopted by other international organizations. Suspicion of the inadequacy of past adoption could easily transfer to suspicion of current processes of adoption by regional governance structures like the European Union. One reason behind this phenomenon is that illegitimate adoption often signals unfairness in rule application. If it is considered necessary to bypass normal processes that benefit compliance principles, parties often believe that someone may be unfairly benefiting, even if this is not the case.[150]

CONCLUSION

In this article I have demonstrated how the ILC in its Draft Articles on State Responsibility and the ICJ in *LaGrand* attempt to bypass customary international law by relying on the authority of each other. The ILC work on Article 30 was designed to move away from state consent and domestic responsibility in tailoring international obligations. Faced with the reality that AGNRs lack both consistent state practice and *opinio juris*, but unwilling to label them as progressive development, the ILC waited for ICJ adoption of

149 The latter justification is less persuasive, but is demonstrative of how the taint of illegitimacy can go beyond a specific legal norm or principle into a broader concern of institutional legitimacy.

150 An example of this phenomenon is U.S. force in Kosovo. In that situation, the U.S. redefined traditional rationalization for use of force after force had begun. Such hindsight justifications made weaker states suspicious that the U.S. was looking for application beyond its Kosovo military operations. *See* Michael J. Glennon, *Book Review: Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, 96 AM. J. INT'L. L. 489, 492 (2002).

such measures in *LaGrand*. The ICJ did so while declining to exercise the large scope of this new remedy, which kept the focus of the case on the death penalty and provisional measures.

The ICJ's and ILC's surreptitious movement toward AGNRs resulted in an illegitimate and artificial production of an international rule, which is both bad public policy and which stains both the institutions and the principle. A change in international law to a future-oriented approach empowered to interfere directly with domestic law redefines international court power under the doubtful guise of custom. The effect of the policy, poor resource allocation decided from afar with no legal basis, poor enforcement, and lack of determinative guidelines is harmful. Even more concerning is the ripple effect that such wide leaps of judicial activism, made possible by questionable process, will have on international institutions and their relationships with each other and domestic governance.