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The Dialectic of Duplicity: Treaty Conflict and Political Contradiction

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The Dialectic of Duplicity: Treaty Conflict and Political Contradiction†

GUYORA BINDER*

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I. INTRODUCTION

"Speak, God."[1]
"I know you're lonely for words that I ain't spoken, but tonight we'll be free, all the promises'll be broken."[2]

A. *The Argument*

God promised Abraham a multitude of nations, but just one land for them to live in.[3] That covenant has been kept with a vengeance. The promised land of biblical lore is claimed by three sovereignties: Israeli, Jordanian and Palestinian.[4] Yet such conflicts are endemic to the world we have inherited. Every claim to sovereignty rests upon a collective history; yet, if history is what distinguishes communities it is also what relates them to one another. Thus the national destinies that in theory are autonomously determined, in practice intertwine. In an increasingly interdependent world, every national charter is written on the back of some other people's promissory note; every promised land is mortgaged to the hilt.

International law appears to offer an escape from this wilderness—but this vision is a mirage. The modern international legal

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1. R. UNGER, KNOWLEDGE AND POLITICS 295 (1975).

2. Springsteen, *Thunder Road, recorded on* B. SPRINGSTEEN, BORN TO RUN. Courtesy and copyright. 1975 CBS Inc. Published in the U.S.A. by Columbia Records. All rights reserved.

3. *Genesis* 17:4-8.

4. Israel claims sovereignty over not only the territory contained within the 1949 armistice lines and East Jerusalem, but over the West Bank as well. This claim is based on two factors: ancient possession, and the fact that no other nation has a better claim. On this view, the Arab Palestinian State contemplated by the U.N. Partition no longer exists, and the Jordanian occupation of the West Bank was the result of aggressive conquest. *See* Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 297 (1968); Murphy, *To Bring an End to the State of War: The Egyptian Israeli Peace Treaty*, 12 VAND. J. OF INT'L L. 897, 927 n.151 (1979); Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344 (1970); Speech by Itzchak Shamir, Israeli Foreign Minister, before the Knesset (Sept. 8, 1982), *reprinted in* 21 I.L.M. 1158 (1982).

The P.L.O. claims sovereignty to all of the same territory pursuant to the Palestinian National Charter of 1968, *reprinted in* J. MOORE, THE ARAB ISRAELI CONFLICT: READINGS AND DOCUMENTS 1085 (1977). The case for this claim, based on the self-determination of the residents, may be found in an essay by the P.L.O.'s official observer at the U.N. Cattan, *Sovereignty over Palestine, reprinted in* J. MOORE, *supra*, at 11.

In 1950, Jordan annexed the West Bank, but with the understanding, imposed by its Arab League treaty partners, that the territory was to be held in trust for its residents. *See* Murphy, *supra*, at 920.

system rests on a paradox—its legitimacy derives from the sovereignty of nations; yet, its function is the constraint of such sovereignty. This means that precisely where international law speaks loudest it says the least. Where, as in the Middle East, conflicting claims to sovereignty converge, every doctrinal claim implies its own negation. The legal order, for example, may defend sovereignty,[5] but cannot thereby infringe it;[6] states should abjure the use of force,[7] but may not give up the right of self-defense.[8] Far from resolving political conflicts, international law translates them into doctrine. This essay will trace one such doctrinal conflict from its appearance in the context of a recent political conflict to its roots in the contradictory nature of international politics generally. The doctrinal conflict we will consider concerns the validity and relative applicability of conflicting treaties. We will discover that authorities on international law hold two deeply opposed views on this question. The older view, that the latter of two conflicting treaties is void, has been articulately defended and is easily grasped. The newer view, that such a treaty is valid, has been less articulately defended and remains ambiguous as to whether the earlier of two conflicting treaties is enforceable. This essay will offer an explanation for the ambiguity of this view and for its coexistence with the older view. Developing such an explanation will require us to explore the role of nationalism and internationalism in the discourse of international law, and the sources of nationalism and internationalism in international politics. This escapade will suggest that international law can chart the wilderness of international politics but can indicate no escape from it.

B. *The Argument Outlined*

Our journey will begin with the Arab-Israeli conflict. The participants in the Camp David peace process proposed to resolve this conflict by delivering the promised land simultaneously to

5. U.N. CHARTER art. 1, para. 1, arts. 39, 42. *See infra* note 87 for the text of these two articles.

6. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. CHARTER art. 2, para. 7.

7. *Id.* at arts. 2-4.

8. *Id.* at art. 51. *See infra* discussion of the relationship between these passages in text accompanying notes 75-97.

each of its claimants. The *Framework for Peace in the Middle East* according to President Carter, establishes

> [t]he principles . . . which will govern a comprehensive peace settlement. It deals specifically with the future of the West Bank and Gaza, and the need to resolve the Palestinian problem in all its aspects. The framework document proposes a five year transitional period in the West Bank and the Gaza during which the Israeli military government will be withdrawn and a self governing authority will be elected with full autonomy. . . . The Palestinians will have the right to participate in the determination of their own future, in negotiations which will resolve the final status of the West Bank and Gaza, and then to produce an Israeli-Jordanian peace treaty. These negotiations will be based on all the provisions and all the principles of . . . Resolution 242. And it provides that Israel may live in peace within secure and recognized borders.[9]

On March 26, 1979 Egypt and Israel began the implementation of this plan by concluding a treaty of peace.[10] By a side letter to this treaty they offered their commitment to arrange a six year transition to peace.[11] More than six years later this transitional regime has not even been established. The Israeli military government has not been withdrawn and no autonomous self-governing authority has been elected in the occupied territories. As of this writing no negotiations have taken place regarding the " final status" of these territories, or involving the Palestinian Arabs.[12] By now it is clear—the Camp David peace process produced, not a comprehensive solution, but a separate peace.

In fashioning a separate peace, Egypt and Israel sidestepped the difficult political question of Palestinian nationality. In thus fleeing the political question, however, Egypt and Israel stumbled upon an equally intractable doctrinal question. That Egypt's separate peace violated its prior commitments to its Arab allies was

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9. 17 I.L.M. 1463 (1978).

10. Treaty of Peace, Mar. 26, 1979, Egypt-Israel, 18 I.L.M. 362-93 (1979).

11. Letters and Memoranda concerning the Egyptian-Israeli Treaty of Peace, *reprinted in* 18 I.L.M. 530 (1979). By the terms of this letter, Egypt and Israel committed themselves to begin negotiations within a month of ratification of the Peace Treaty (both sides ratified by mid April). They allowed themselves one year in which to complete negotiations for the establishment of self rule. One month after any elections agreed upon in these negotiations, the transitional self-governing authority would be established, and the five year transition period would begin.

12. A brief review of the course of negotiations in the first three and one half years following the signing of the peace treaty may be found in President Reagan's address on "United States Policy for Peace in the Middle East." Televised Address to the Nation by President Reagan (Sept. 1, 1982), *reprinted in* 21 I.L.M. 1199 (1982).

relatively clear;[13] but whether such an agreement can be legally valid, is unclear to this day.

This question, concerning the legal effect of conflicting treaty obligations, will be the second step on our itinerary. Because international law is largely built on treaties, instances of treaty conflict are an embarrassment to the unity and validity of international law. They suggest that international law may itself develop contradictory rules. A review of the practice of states and international tribunals in instances of treaty conflict will reveal a pattern of avoiding the question of the validity of conflicting treaties.[14] A review of the doctrinal tradition, however, will reveal contradictory approaches to the problem of treaty conflict. One group of authorities views the latter of the two conflicting treaties as void ab initio; another group might view them as breaches of prior commitments, but nevertheless would give them legal effect.[15]

Subsequent explorations will show that any attempt to resolve this conflict by reference to more fundamental principles of international law merely exposes more fundamental contradictions. The first view mentioned is derived from a conception of treaties as a source of property rights,[16] while the second view derives from a conception of treaties as, at most, a source of more limited liability rights.[17] These opposed conceptions of treaty rights emanate in turn from contradictory conceptions of the relationships between sovereignty and the international legal order. If treaty rights are rooted in a transcendent international legal order, then they may constrain sovereignty;[18] if, however, they are dependent upon the will of the signatories they may at most create obligations.[19] The former view is generally associated with the claim that sovereignty is conferred on states by the international legal order; the latter view is generally associated with the claim that sovereignty is created by particular communities.[20] Proponents of a powerful international legal order generally assume that a

13. *See infra* notes 26-116 and accompanying text.

14. *See infra* notes 117-70 and accompanying text. The few exceptions to this pattern are, however, instructive. *See infra* text accompanying notes 127-34.

15. *See infra* notes 171-232 and accompanying text.

16. *See infra* notes 233-94 and accompanying text.

17. *See infra* notes 295-351 and accompanying text.

18. *See infra* notes 233-94 and accompanying text.

19. *See infra* notes 295-540 and accompanying text.

20. *See infra* notes 541-69 and accompanying text.

proliferation of international commerce will require greater cooperation among states. Proponents of national sovereignty in turn assume that the survival of their own states, in the face of such a proliferation of international commerce, would require greater competition with other states. The world of the internationalists is simple and harmonious; the world of the nationalists is complex and agonistic.[21]

The tension between national sovereignty and international order pervades not only existing international legal doctrine, but our collective capacities to imagine a more legitimate world. Our efforts to create legitimate domestic institutions seem to require the nurturing of vital political communities. Yet such communities cannot be completely autonomous. On the one hand, the effort to escape foreign domination is likely to be futile; on the other hand, the effort to realize the common will may entail the domination of others. International efforts to protect marginal communities and resolve disputes between communities, however, may simply reinforce the political and cultural domination of the most powerful nations.[22]

There is a growing body of legal scholarship which identifies contradictions structuring legal doctrine. Some authors treat these contradictions as historically contingent—that is, as aspects of a consciousness which is now dominant but may be transcended. Others seem to treat them as inherent in human experience.[23] In

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21. *See infra* notes 541-629 and accompanying text.

22. *See infra* notes 621-29 and accompanying text.

23. Much of the work of critical legal scholars is devoted to identifying contradiction within a realm generally acknowledged to be historically contingent: that of legal discourse. *See, e.g.*, Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Other scholars, not self-consciously identified with the Critical Legal Studies movement, have focused on doctrinal contradiction as well, most notably George Fletcher. For a description of his methodological perspective, see Fletcher, *Two Modes of Legal Thought*, 90 YALE L. J. 970 (1981). What distinguishes the critical scholars is their claim that doctrinal contradiction is causally linked to more fundamental contradictions of social life. In most cases, these more fundamental contradictions are themselves viewed as historically contingent upon a particular form of society. Thus, as stated by Kennedy: "The [fundamental] contradiction is an historical artifact. It is no more immortal than is the society that created it or sustains it." Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 221 (1979). For Kennedy and Kelman, the contradictions of doctrine seem ultimately referrable to a mode of thinking identified by Roberto Unger as "Liberal Thought." R. UNGER, KNOWL-

my view, the contradiction between nationalism and internationalism is historically contingent; yet I feel that the gravitational pull of history toward this contradiction is almost irresistible. Our notions of political community condition not only our sense of our own histories, but our vision of what history itself could be. Since the romantic epoch, history has functioned as an important medium for fusing individuals into communities.[24] If we truly conceived of our existence as communal rather than individual, however, history might acquire a different political function. History then might be seen not as the experience which differentiates communities, but as the medium which binds them together.

C. *The Outline Explained*

The rhetorical structure of this essay is deliberately perverse: it proceeds from particular conclusions to fundamental premises. The result is that the exposition may seem unnecessarily elliptical. Points are presented as paradoxical which are subsequently explained within one of the two competing frameworks of thought described above. Other points are established on the basis of premises which are subsequently relativized.[25] I could have re-

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EDGE AND POLITICS 1-144 (1975). *See* Kelman, *Trashing*, 36 STAN. L. REV. 293, 305, 345 (1984); Kennedy, *Blackstone's Commentaries*, *supra*, at 210. For Marxists such as Freeman, the contradictions of doctrine and philosophy alike can be explained in terms of the struggle of opposed material interests. *See* Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L. J. 1229 (1981). All three of these scholars, however, have also acknowledged the influence of Al Katz. *See* Freeman, *supra* at 1231; Kelman, *supra*, at 305; Kennedy, *supra*, at 210. Katz' work seems to suggest that contradiction is inherent in human experience. *See* Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383-84 (1979) (unity, duality, mediation, analysis and synthesis are fundamental forms of human thought rooted in human experience beginning with birth as "simultaneously a moment of separation and symbiotic unity"). *See also* A. Katz, Foucault for Lawyers (unpublished manuscript available in State University of New York at Buffalo Law School Library) [hereinafter cited as A. Katz, Foucault]. (Legal and sociological norms are both means of managing, denying and repressing irreducible difference). Katz, writing in the deconstructive tradition of Foucault and Derrida, views "difference" as at once the source and nemesis of meaning within any cultural framework. Thus the contradictions of any particular ideology are historically contingent; but contradiction is an inherent feature not only of ideology, but of historical experience. *See infra* text accompanying notes 560-569 and 653-660 for an elaboration of this problem.

24. *See infra* text accompanying notes 630-60.

25. *See infra* notes 171-232 and accompanying text (citing authority for the claim that treaty conflict is illegal, only to show that the claim is meaningless; then explaining the apparent meaninglessness of the claim in terms of the diametrically opposed interpretations of it given by its academic supporters).

versed the order of presentation—begun with an elaboration of the contradictions structuring our collective vision of the future of the international order, proceeded to demonstrate how these contradictions entail contradictory approaches to the relationship between national sovereignty and international legal institutions, and finally claimed that these in turn entail opposing resolutions of the treaty conflict problem. Such a method of exposition would have lent a reassuring sense of groundedness to what follows. Nevertheless, I have preferred perversity for four reasons:

First, the alternative would be misleading. Our contradictory collective aspirations for the international system do not logically entail the particular doctrinal forms that have emerged within international legal discourse. By now it has become a cliché of critical legal studies that the results derived from contradictory premises are indeterminate. While fundamental contradictions in international politics may be a necessary condition for doctrinal contradiction in international law, they cannot provide sufficient explanation for the particular forms of contradiction that have evolved. Providing such an explanation would involve a much more complicated story than the one I have told here.

Second, the alternative would trivialize my subject. Starting from the premise that our thinking about the international system is riven with fundamental contradictions, we would be led to expect doctrinal contradiction in every area of substantive international law. From the perspective of such a starting point, the selection of any particular doctrinal subject area is arbitrary. On the other hand, identifying the fingerprints of contradiction in every area of international legal doctrine would require an investigation of epic proportions.

Third, perversity is endemic to the enterprise as I conceive it. I intend this essay to constitute a critique in the Kantian sense: that is, an investigation of the conditions which render the problem of treaty conflict, as it emerges in the discourse of international law, possible. Such a project necessarily entails reasoning backwards from conclusions to premises. Given this approach, the path of the argument is neither indeterminate nor arbitrary. If I am right in thinking that some vision of international society is a necessary, though not a sufficient condition for the development of international doctrine, then the movement from a specific doctrinal conflict to an underlying contradictory vision is character-

ized by more necessity than its converse. None of this is to suggest that my conclusions are logically compelled or "objective"—they reflect, as any interpretive effort must, a great deal of intuition and guesswork. Nevertheless, they provide what I hope will be a satisfying answer to a determinate question: why the problem of treaty conflict is irresolvable within the framework of international legal doctrine.

Fourth and finally, perversity makes for a better story. Treaty conflict, no less than any other doctrinal wrangle, is ultimately banal. The struggle between equally appealing visions of the international order that its investigation reveals, however, is interesting and important. I have chosen the gradual transcendence of the banal rather than the inexorable entombment of the interesting, in part out of a tactical concern with holding the interest of a reader, in part out of a vulgar generic preference for suspense over tragedy.

II. TREATY CONFLICT AND THE CAMP DAVID NEGOTIATIONS

A. *A Definition of Treaty Conflict*

A treaty is an agreement between two international actors which creates obligations defined by international law.[26] The application of this concept, therefore, requires that an agreement be valid in international law, at least for some purposes. Moreover, it seems to presuppose the existence of a valid system of international law.[27] Treaty conflict occurs when a state concludes a treaty which creates international obligations the performance of which would be inconsistent with the performance of an international obligation to a third state under a previously concluded treaty.

It should be noted that this definition of treaty conflict excludes the creation of international obligations inconsistent with earlier obligations to the same party. This situation arises frequently in international relations and is sometimes classified as a form of treaty conflict.[28] I exclude it from this discussion, however, because it lacks the problematic sine qua non of treaty conflict—the simultaneous existence of two mutually exclusive obligations. In most municipal legal systems, new treaties supersede prior inconsistent treaties as valid law.[29] In concluding a subse-

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26. This definition is a combination of the following two definitions: (1) "[T]reaties are agreements, of a contractual character, between States, or organisations of States, creating legal rights and obligations between the parties." 1 L. OPPENHEIM, INTERNATIONAL LAW § 491, at 877 (1963); (2) " 'Treaty' means an international agreement concluded between States in written form and governed by international law. . . ." Vienna Convention on the Law of Treaties, *reprinted in* S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 108 (1970). Some commentators have defined treaties as international agreements *intended* to create obligations in international law: "A treaty is a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law." A. MCNAIR, THE LAW OF TREATIES 4 (1961). "A 'treaty' is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves." *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. (Supp.) 653, 657 (1935). I have declined this approach for heuristic reasons. The definition I have chosen makes it easier to see the real dificulty that treaty conflict poses for any effort to conceive of international law as a coherent system.

27. *See infra* text accompanying notes 135-36.

28. *See* G. HARASZTI, SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES 294-300 (1973).

29. There are two principal methods by which states incorporate treaties in national law. Many states, including the commonwealth, incorporate treaties into national law through supplementary legislation. Most states, however, including the United States, incorporate treaties into national law automatically without the necessity of any additional

quent inconsistent treaty, therefore, a state voices its assent to the termination or modification of the earlier treaty. If all parties to the earlier treaty consent to the termination or modification of an obligation imposed by the earlier treaty, however, this obligation ceases to exist from the standpoint of international law.[30] As a result, the obligations created by treaty cannot, as a matter of international law, conflict with any obligations existing under a previous treaty between the same parties.

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legislative action. *See* V. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW 2 (1982). Both treaties and statutes are referred to in the U.S. Convention, Article VI, Section 2, as the "supreme law of the land." A subsequent inconsistent statute has the power to render a treaty null as a matter of domestic law, to the extent of the conflict. Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); Reid v. Couvert 354 U.S. 1 (1957); RESTATEMENT OF FOREIGN RELATIONS LAW § 128.1 (1965). Similarly a subsequent inconsistent treaty has the power to render a prior statute invalid. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* § 124.1. Thus, treaties and statutes can function quite similarly in states employing the automatic incorporation system. Nevertheless, it should be noted that even under the automatic incorporation system, there is an important limitation to the validity of treaties as domestic law. In the United States, and most other countries employing this system, treaties enter automatically into force as domestic law only to the extent that they are "self-executing." V. LEARY, *supra*, at 54. As Chief Justice Marshall wrote in Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829):

> A treaty . . . is . . . to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.

In application, this doctrine is deeply ambiguous. *See* V. LEARY, *supra*, at 55-65; Feo, *Self Execution of United States Security Council Resolutions Under United States Law*, 24 U.C.L.A. L. REV. 387, 394-95 (1976); Schacter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 645 (1951). As a result, American courts have sometimes failed to invalidate statutes on the basis of subsequent inconsistent treaties. *See* Sei Fujli v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952). American courts might respond similarly in the event of a conflict between prior and subsequent treaties.

30. United Nations Draft Articles on the Law of Treaties, Article 30.3, *reprinted in* S. ROSENNE, *supra* note 26, at 208. This is not to say that the conclusion of treaties inconsistent with existing treaties between the same parties is unproblematic. Where the parties do not specify their intent either to modify or terminate a previous treaty, it is unclear whether the effect of a subsequent inconsistent treaty is to replace the previous treaty in its entirety or merely to modify specific provisions while leaving others in force. *See* G. HARASZTI, *supra* note 28, at 295-97. *See also* 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 304-07 (1927); Aufricht, *The Supersession of Treaties in International Law*, 37 CORNELL L. Q. 661-62 (1952). Nevertheless, this problem is not one of resolving a conflict between existing legal obligations, so much as determining the legal obligations created or recognized by the subsequent treaty. The problem of treaty supersession is, in other words, a problem of treaty interpretation. Once the intent, actual or fictional, of the parties has been determined, the problem has been resolved. *See* G. HARASZTI, *supra* note 28, at 295.

While the above definition of treaty conflict excludes situations sometimes identified as treaty conflicts, it includes situations which some authors have been reluctant to treat as genuine instances of treaty conflict. The obligations created by treaty are often contingent upon events. The most obvious examples of such obligations are provisions for mutual defense,[31] the complete execution of which are, at least in part, dependent upon acts of aggression by third parties. Some authors argue that the creation of such contingent obligations cannot give rise to treaty conflict unless circumstances actually arise to which the obligation is applicable.[32] Others argue that even potential inconsistency between the obligations of one party to different treaties places the validity of both treaties in question.[33] The contours of this debate will be explored below,[34] but because it is intimately related to the larger dispute over appropriate responses to treaty conflict, we must, at least temporarily, classify potential conflicts as properly part of our subject.

B. *The Camp David Treaties*

The problem of treaty conflict stumbled onto the stage of world politics during the negotiations that took place pursuant to the historic Camp David agreements between Israel, Egypt and the United States. These agreements posed at least potential conflicts with a number of prior Egyptian obligations. On the one hand, these conflicts almost prevented the implementation of the Egyptian-Israeli treaties because of Israeli doubts as to the treaties' legal validity;[35] on the other hand, they effectively removed Egypt from its traditional leadership role in the Arab League treaty system.[36]

The Camp David agreements consisted primarily of two docu-

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31. Third party aggression is not necessarily a sufficient condition for the activation of an obligation to aid a partner to a mutual defense treaty; often such an obligation can only be triggered by a request from the victim state. On the other hand, some mutual defense arrangements create obligations which must be performed well in advance of armed conflict, e.g., joint contingency planning, or the stationing of troops in a partner's territory.

32. A. McNair, *supra* note 26, at 222; *but see id.* at 548-49.

33. *See, e.g.*, R. Roxburgh, International Conventions and Third States 33 (1917).

34. *See infra* text accompanying notes 175-99.

35. *See infra* text accompanying notes 50-51.

36. *See infra* text accompanying note 116.

ments, signed September 17, 1978, entitled *Framework for Peace in the Middle East* and *Framework for the Conclusion of a Peace Treaty Between Israel and Egypt.*[37] A revised version of the latter was agreed upon at Blair House on October 21, 1978;[38] after further negotiations, a peace treaty was signed on March 26, 1979.[39]

The *Framework for Peace in the Middle East* was, of course, binding only on the signatories, but established guidelines for a general solution of the Arab-Israeli dispute to which, it was hoped, all parties to the dispute would ultimately adhere. It consisted, in essence, of the following five principles: (1) A commitment to respect the sovereignty and territorial integrity of all parties;[40] (2) Consistency with the additional principles enunciated in United Nations Resolution 242;[41] (3) Replacement of the Israeli military government in the West Bank and the Gaza Strip with a provisional system of self-rule as to domestic matters, limited to five years in duration;[42] (4) Negotiations involving Egypt, Israel, Jordan and representatives of the Palestinian people regarding final disposition of these territories and the establishment of peaceful relations among all parties;[43] and (5) The requirement that any solution recognize the "legitimate rights and just requirements" of the Palestinian people.[44]

The *Framework for the Conclusion of a Peace Treaty Between Israel and Egypt* bound Egypt and Israel to conclude a peace treaty within three months. This treaty would conform to the following four conditions: (1) Israeli withdrawal from the Sinai peninsula in phases; (2) Freedom of navigation through the Suez Canal for Israeli shipping; (3) Recognition of the Gulf of Aqaba and the Straits of Tiran as international waterways; and (4) The establishment of normal diplomatic relations upon final withdrawal of all Israeli troops from the Sinai.[45]

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37. 17 I.L.M. 1466 (1978).

38. *See* 37 CONG. Q. 556 (1979).

39. Treaty of Peace, Mar. 26, 1979, Egypt-Israel, 18 I.L.M. 362-93 (1979).

40. Framework for Peace in the Middle East, *supra* note 37, preamble. "Peace requires respect for the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force." *Id.*

41. *Id.* para. 1.

42. *Id.* § A, para. 1.

43. *Id.* § A, paras. 1(b), 1(c), 4.

44. *Id.* § A, para. 1(c).

45. 17 I.L.M. 1470 (1978).

The substance of a peace treaty implementing this framework was agreed upon at Blair House on October 21, 1978.[46] However, on December 13, 1978, a few days before the agreed upon deadline for conclusion of a peace treaty, negotiations between Israel and Egypt broke down. Prime Minister Begin of Israel objected to two proposed side letters interpreting the Blair House agreement.[47] Each of these letters had the effect of rendering the stability of an Egyptian-Israeli peace contingent upon a comprehensive solution to the Arab-Israeli dispute. Begin was insistent that Egypt conclude a separate peace.

The first proposed side letter protested by Begin concerned the so-called "linkage" problem—a dispute over the degree of actual dependence between the two agreements signed at Camp David.[48] The *Framework for Peace in the Middle East* implicated a settlement of some kind between Israel and the Palestinian people; the *Framework for the Conclusion of a Peace Treaty Between Israel and Egypt,* however, did not. Thus the term "linkage" came to stand for the insistence upon such a settlement as a prerequisite to any final peace between Israel and Egypt.[49] If the two Camp David agreements were to be read as one, Israel's good faith in negotiating with Jordan and the Palestinian people would be assured by its desire to preserve its treaty with Egypt; but, the security of that treaty would then be contingent on the cooperation of these parties. Accordingly, Israel objected to any suggestion that the two agreements were in any way linked.

The second side letter proposed by Egypt concerned the rela-

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46. The Blair House Conference, lasting from Oct. 12 to 21, 1978, is described in M. DAYAN, BREAKTHROUGH 199-221 (1981), and C. VANCE, HARD CHOICES 232-38 (1983).

47. *See* C. VANCE, *supra* note 46, at 240-42. *See also* M. DAYAN, *supra* note 46, at 249-51.

48. C. VANCE, *supra* note 46, at 240.

49. The "linkage" problem surfaced during the Blair House conference and plagued the negotiations throughout:

> As the treaty negotiations proceeded, our conclusion that linkage of the implementation of the treaty to the autonomy talks would be the most difficult issue proved correct. The Egyptians wanted 'synchronization' between the two negotiations in order to respond to Arab criticisms that they were signing a separate peace with Israel. This took the form of Egyptian pressure for Israel to agree, in a side letter, to a specific date for completion of the autonomy talks and the holding of the elections for the self-governing body. The Egyptians insisted that the two be coterminous with the interim withdrawal from the Sinai . . . . The Israelis were granitelike in their resistance.

C. VANCE, *supra* note 46, at 233. *See also* M. DAYAN, *supra* note 46, at 212.

tionship between the Blair House agreement and other treaty obligations of the signatory powers.[50] It was Begin's objection to this side letter that brought the problem of treaty conflict to the fore. The Israeli negotiators feared that Egyptian commitments to its partners in the treaty system of the Arab League might interfere with Egypt's commitment to peace with Israel, especially in the event that the Camp David peace process would not culminate in a comprehensive solution.[51]

C. *Prior Egyptian Commitments*

The Camp David agreements represented the climax of a major shift in Egyptian policy, causing consternation both within Egypt and elsewhere in the Arab world. Since the Egyptian revolution of 1952, Egypt had sought a leadership role among Arab nations by giving voice to a pan-Arab nationalist movement, at times even proposing to merge with other Arab states.[52] Of great symbolic importance in this enterprise was Egypt's central role in expressing Arab hostility toward Israel, in consequence of which Egypt had borne the brunt of every Arab-Israeli war. Within the vision of pan-Arab nationalism, Palestine is properly an Arab land, while Israel is an outpost for European imperialism, introduced into the Middle East by western powers.[53] The Middle

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50. C. VANCE, *supra* note 46, at 241-42. This issue, also, emerged during the Blair House negotiations, *id.* at 234; *see also* M. DAYAN, *supra* note 46, at 212. It was not resolved until March 12, 1979. *See* M. DAYAN, *supra* note 46, at 268-78.

51.

> If our peace treaty did not have priority over Egypt's commitments to her earlier treaties with the Arab States, she would have to go to the help of Syria, for example, if that country launched an attack on the Golan Heights. To this, the President replied: 'But the Egyptians don't claim that' and he turned to Khalil for confirmation. Khalil remained silent, refusing to endorse Carter's statement. He would give no undertaking that Egypt would not join Syria in such an event.

M. DAYAN, *supra* note 46, at 265.

52. Egypt instigated and hosted the first summit conference of Arab leaders, resulting in the formation of the Arab League. However, this may have only reflected Egypt's desire to keep a watchful eye on developments that would otherwise have taken place without her. R. MACDONALD, THE LEAGUE OF ARAB STATES 34-38, 74-76 (1965). Egypt actually did merge with Syria from 1958 to 1961, to form the United Arab Republic. *Id.* at 100. For an analysis and critique of Egyptian foreign policy from the standpoint of pan-Arab nationalism, see Heikal, *Egyptian Foreign Policy*, 56 FOREIGN AFF. 714 (1978).

53. R. MACDONALD, *supra* note 52, at 85-94. The sense in which Israel's creation was perceived as a threat to pan-Arab nationalism is revealed by the following passage:

East itself is viewed as a cultural entity defined by its indigenous population, rather than a geopolitical entity defined in terms of its proximity to natural resources and sea lanes of strategic impor-

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> Its creation in the very heart of the African-Asian land bridge dealt a severe blow to Arab hopes of unity by cutting off the Arabs of Asia from those of Africa. Certainly, too, the fact that Israel's creation entailed the dismantling of a Palestinian home and the denial of the Palestinians' rights did nothing to endear this new entity to the Arabs. Their hostility was further confirmed by Israel's relations with countries like Britain and the United States, the one identified with traditional colonialism, the other accused of neocolonialism.

Heikal, *supra* note 52, at 718. The objection to Israel's presence is aesthetic: it is an impurity introduced from outside, a tactic in the struggle of one hegemonic force against its successor. Israel is conceived as a barrier to communication between Egypt and the Levant; the implications of Israel's presence for the Palestinian Arabs are mentioned almost as an afterthought. Such a pan-Arabist position, viewed from the perspective of Palestinian nationalism, falls victim to the same critique as Zionism:

> A considerable majority of the literature on the Middle East . . . gives one the impression that the essence of what goes on in the Middle East is a series of unending wars between a group of Arab countries and Israel. That there had been such an entity as Palestine until 1948, or that Israel's existence—its "independence," as the phrase goes—was the result of the eradication of Palestine: of these truths beyond dispute most people who follow events in the Middle East are more or less ignorant, or unaware.

E. SAID, THE QUESTION OF PALESTINE 5 (1980). Contrast Said's own perceptions of Zionism as a Western imposition:

> The Zionist fuses with the white European against the colored Oriental . . . and also—because he 'understands the Eastern mind from within' —represents the Arab, speaks for him, explains him to the European . . . . Zionism's conflict with the Arabs in Palestine and elsewhere in the region was seen as extending, perpetuating, even enhancing . . . the age-old conflict between the West and the Orient, whose main surrogate was Islam. This was not only a colonial matter, but a civilizational one as well . . . . Israel was a device for holding Islam—and later the Soviet Union or communism at bay.

Id. at 28-29. "The element that made it possible to connect these aspirations of Jewish shopkeepers, peddlers, craftsmen, and intellectuals in Russia and elsewhere to the conceptual orbit of imperialism was one small detail that seemed to be of no importance: Palestine was inhabited by another people." *Id.* at 38 (quoting M. RODINSON, ISRAEL: A COLONIAL SETTLER STATE? 38 (1973)). Of course, what Said's account suggests is that the relationship between Zionism and colonialism is in fact richer than Rodinson claims. Zionism's appeal to the West was that it confirmed the foreignness which they already attributed to the Jews in their midst; by placing them in a foreign land, as dependents of the British crown and French capital, it colonized the Jews. In a sense the leaders of Zionism could offer the colonial powers an entire population of substitute orientals, already colonized in advance. Said reveals an oppressive reduction not only of Palestinian Arabs but of Jews as well, with his insight that the latter represented the former to the West. For additional Palestinian views, see Cattan, *Sovereignity Over Palestine* and Nakhleh, *The Liberation of Palestine is Supported by International Law and Justice* in J. MOORE, *supra* note 4, at 11, 121. For a discussion of the relationship between Zionism and Palestinian nationalism, see text accompanying notes 646-52.

tance to the great powers.[54] Accordingly, Egyptian policy toward Israel was, at least until after the 1973 war, shaped more by its relations with other Arab nations, than by its relations with the great powers.[55] As a result, when Egyptian policymakers began to contemplate diplomatic solutions to the Middle East conflict, they had in mind a comprehensive solution that would be reached in concert with Egypt's Arab allies.[56] Thus, Egyptian President Sadat's unilateral decision to establish peaceful relations with Israel violated settled expectations throughout the Arab world, inspiring a raft of hostile newspaper editorials[57] and dissent within the Egyptian foreign policy establishment itself.[58] Egypt appeared to be abandoning its commitment to pan-Arab nationalism.

This commitment, however, had been expressed not only by means of public statements, but through binding treaty obligations as well. These obligations may be divided, for purposes of analysis, into two related categories: (1) commitments to maintain

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54. Heikal interprets much of the recent history of the Middle East in terms of:

> a long and bitter feud in the area between two rival systems, whose struggle for predominance continues to this day. . . .
>
> 1. *The Middle Eastern System*[:] This system saw the Middle East in geographical terms, as a vulnerable land mass lying close to the Soviet Union. Wholly preoccupied with the Soviet threat, the architects of the system held that the countries of the area must organize themselves against this threat by joining in an alliance with others who were concerned for the region's security . . . .
>
> 2. *The Arab System*[:] [B]ased on a different outlook toward the region, this system saw the Middle East not as a hinterland lying between Europe and Asia—a simple geographical expansion—but as one nation having common interests and security priorities distinct from those of the West. According to this logic, the countries of the area, which enjoyed unity of language, religion, history and culture should—indeed could—create their own system to counter any threat from whatever source.

Heikal, *supra* note 52, at 719.

55. *Id.* at 718-25. Heikal argues that after 1973, American influence over Israel induced Egypt increasingly to orient its policy toward America in order to secure the release of the occupied territories. *Id.* at 725-27. For the classic argument that events in the Middle East are best understood—even by the great powers—in the terms indigenous to the region, see Binder, *The Middle East as a Subordinate International System,* 10 WORLD POL. 408 (1958).

56. Bassiouni, *An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty,* 12 CASE W. RES. J. INT'L L. 3, 10 (1980).

57. Murphy, *supra* note 4, at 898.

58. Heikal had served as Editor-in-Chief of the semi-official Egyptian newspaper Al Ahram, a member of the Arab Socialist Union, and advisor to President Sadat before his disillusionment with Sadat's foreign policy. *See* Heikal, *supra* note 52. *See also* M. HEIKAL, AUTUMN OF FURY: THE ASSASSINATION OF SADAT (1983).

collective security with existing Arab governments; and (2) commitments to advance the national aspirations of the Palestinian people.

The Blair House agreement, consistent with the *Framework for the Conclusion of a Peace Treaty Between Israel and Egypt,* ended the state of war between the two nations,[59] and committed them to avoid not only aggression,[60] but the use of force as well.[61] Compliance with these provisions could prevent Egypt from fulfilling its obligations under the Alexandria Protocol of 1944, the Pact of the League of Arab States of 1945, and the Joint Defense and Economic Cooperation Treaty Between the States of the Arab League of 1950. These treaties call for mutual defense in the event of aggression against one of the signatories,[62] joint military

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59. Treaty of Peace, Mar. 26, 1979, Egypt-Israel, art. I, para. 1, 18 I.L.M. 362-67 (1979). The finalized peace treaty was substantially similar to the Blair House agreement.

60. "They recognize and will respect each other's sovereignty, territorial integrity and political independence." *Id.* art. III, para. 1(a). "They recognize and will respect each other's right to live in peace within their secure and recognized boundaries." *Id.* para. 1 (b).

61. "They will refrain from the threat or use of force, directly or indirectly, against each other and will settle all disputes between them by peaceful means." *Id.* art. III, para. 1 (c):

> Each Party undertakes to ensure that acts or threats of belligerency, hostilty, or violence do not originate from and are not committed from within its territory, or by any forces subject to its control or by any other forces stationed on its territory, against the population, citizens or property of the other Party . . . .

Id. para. 2.

62.

> In case of aggression or threat of aggression by a State against a member State, the state attacked or threatened with attack may request an immediate meeting of the Council.
>
> The Council shall determine the necessary measures to repel this aggression. Its decision shall be taken unanimously. If the aggression is committed by a member State, the vote of that State shall not be counted in determining unanimity.

Pact of the League of Arab States, Mar. 22, 1945, art. 6, 70 U.N.T.S. 237, 254 [hereinafter cited as Pact of the League of Arab States].

> The Contracting states consider any [act of] armed aggression made against any one or more of them or their armed forces to be directed against them all. Therefore, in accordance with the right of self-defense, individually and collectively, they undertake to go without delay to the aid of the State or States against which such an act of aggression is made, and immediately to take, individually and collectively, all steps available, including the use of armed force, to repel the aggression and restore security and peace. In conformity with Article 6 of the Arab League Pact and Article 51 of the United Nations Charter, the Arab League Council and the U.N. Security Council shall be notified of such act of aggression and the means and procedure taken to check it.

planning and action in the event of a threat of hostilities involving any of the signatories,[63] and cooperation in matters of foreign policy.[64] In addition, Egypt had signed mutual defense treaties with Syria and Jordan which may or may not have remained in force at the time the Camp David treaties were signed.[65] That the outbreak of hostilities between Israel and Egypt's Arab League partners could place Egypt under conflicting obligations is fairly clear; but even in the absence of a general Middle East war, Egypt's obligations under the Blair House agreement could run afoul of its various treaties with the states of the Arab League. First, Egypt may have violated its obligations to cooperate with its Arab partners in matters of foreign policy merely by pursuing peace unilaterally. Second, Egypt has compromised its ability to engage in

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Joint Defense and Economic Cooperation Treaty between the States of the Arab League, June 17, 1950, art. 2, *reprinted in* R. MACDONALD *supra* note 52, at 328 [hereinafter cited as Joint Defense].

63.

> At the invitation of any one of the signatories of this Treaty the Contracting States shall hold consultations whenever there are reasonable grounds for the belief that the territorial integrity, independence, or security of any one of the parties is threatened. In the event of the threat of war or the existence of an international emergency, the Contracting States shall immediately proceed to unify their plans and defensive measures, as the situation may demand.

Joint Defense, *supra* note 62, art. 3. "The Contracting States, desiring to implement fully the above obligations and effectively carry them out, shall cooperate in consolidating and coordinating their armed forces, and shall participate according to their resources and needs in preparing individual and collective means of defense to repulse the said armed aggression." *Id.* art. 4.

64. " The object of the League will be to control the execution of the agreements which the above states will conclude . . . to coordinate political plans so as to ensure their cooperation, and protect their independence and sovereignty against every aggression by suitable means . . . ." The Alexandria Protocol, Oct. 7, 1944, art. 1, *reprinted in* R. MACDONALD, *supra* note 52, at 315 [hereinafter cited as The Alexandria Protocol].

> [E]very state shall be free to conclude with any other member state of the League, or other powers, special agreements which do not contradict the text or spirit of the present depositions.
>
> In no case will the adoption of a foreign policy which may be prejudicial to the policy of the League or an individual member state be allowed.

Id. at 316. Egypt can hardly escape the consequences of this last clause by claiming that far from making a separate peace, it was acting on behalf of the League to generate a comprehensive solution: "The treaties and agreements already concluded or that may be concluded in the future between a member state and any other state shall not be binding on other members." Pact of the League of Arab States, *supra* note 62, art. 9, at 256.

65. Egypt entered into joint defense pacts with both Syria and Jordan in 1967. Both pacts were valid for five years and both were renewed in 1972. It is not clear whether they are still in force. *See* Bassiouni, *supra* note 56, at 20-21.

joint military planning in anticipation of such hostilities, through its commitment not to use force against Israel. Third, Israel and the Arab League states may already be belligerents. Egypt aside, none of the Arab League participants in the many Arab-Israeli wars have ever formally recognized an end to hostilities between themselves and Israel.[66] In addition, the Israeli occupations of the West Bank and the Golan Heights may be considered continuing acts of aggression against Jordan and Syria, respectively.[67] Thus Egypt may be considered to be under a continuing obligation to join in hostilities against Israel at the request of either country or pursuant to an appropriate decision by the Arab League.

The second area of conflict between the Camp David agreements and the Arab League treaties concerns the Arab League's commitment to the Palestinian cause. The Alexandria Protocol and the Pact of the League of Arab States commit the signatories to the following goals respecting Palestine: cessation of Jewish emigration, preservation of Arab lands, and the independence of Palestine as an Arab state.[68] Palestine, a British mandate at the time of these agreements, included all of what subsequently became Israel, as well as the West Bank and the Gaza Strip; the Alexan-

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66. The Security Council has taken the position that the armistice is of a permanent character and that it is therefore appropriate to act *as if* the state of war has been ended. It has not, however, confirmed that the state of war *actually has* ended. Israel has taken the latter position and yet refuses to recognize the armistice lines as permanent borders, or accept Jordan's subsequent annexation of the West Bank. *See* Murphy, *supra* note 4, at 927 n.151.

67. *See* Bassiouni, *supra* note 56, at 21 n.34.

68.

> The Committee is of the opinion that Palestine constitutes an important part of the Arab world and that the rights of the Arabs in Palestine cannot be touched without prejudice to peace and stability in the Arab world.
>
> The Committee also is of the opinion that the pledges binding the British Government and providing for the cessation of Jewish immigration, the preservation of Arab lands, and the achievement of independence for Palestine are permanent Arab rights whose prompt implementation would constitute a step toward the desired goal and toward the stabilization of peace and security.

The Alexandria Protocol, *supra* note 64, § 5(a), at 317-18 (*A Special Resolution Concerning Palestine*).

> At the end of the last Great War, Palestine, together with the other Arab States, was separated from the Ottoman Empire. She became independent, not belonging to any other state. . . .
>
> Her existence and her independence among the nations can, therefore, no more be questioned *de jure* than the independence of the other Arab States.

The Pact of the League of Arab States, *supra* note 62, at 260 (*Annex on Palestine*).

dria Protocol makes Arab opposition to the formation of a Jewish state in this territory explicit.[69] Subsequent decisions of the League Council affirmed the League's commitment to Arab Palestinian sovereignty over this territory, rejected any partition, and decreed that, "following its liberation, Palestine should be handed over to its owners so that they may rule it in the way they wish."[70] The Arab League has invited Palestinian participation in its Council since 1950,[71] and has recognized the Palestine Liberation Organization (P.L.O.) as the "sole legitimate representative of the Palestinian people" since the Rabat summit of 1974.[72] The P.L.O., however, adheres to the Palestinian National Charter of 1968 which calls for the formation of a unitary Arab state in the

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69.

> The Committee also declares that it is second to none in regretting the woes which have been inflicted upon the Jews of Europe by European dictatorial states. But the question of these Jews should not be confused with Zionism, for there can be no greater injustice and aggression than solving the problem of the Jews of Europe by another injustice, i.e., by inflicting injustice on the Arabs of Palestine of various religions and denominations.

The Alexandria Protocol, *supra* note 64, § 5(A), at 318.

70. On April 13, 1950, in response to indications that Jordan intended to annex the West Bank, The League Council adopted the following resolution:

> First: To reaffirm the decision taken by the Political Committee on April 12, 1948, with the unanimity of Member States, which provides that the entrance of the Arab armies into Palestine for its rescue should be regarded as a temporary measure without occupation or partition significance, and that following its liberation, Palestine should be handed over to its owners so that they may rule it in the way they wish.
>
> Second: To consider this decision as effective and expressive of the present policy of the Arab States in this respect.
>
> Third: Should any Arab State violate this decision, it shall be considered as having repudiated its obligations as well as the provisions of the Pact in accordance with Article 2, paragraph 1, of the Pact, and the *Special Annex on Palestine*.
>
> Fourth: In the event of such violation, the Political Committee shall be convened and take the necessary measures in accordance with the Provisions of the Pact.

H. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES 34-35 (1975). Shortly thereafter, Jordan proceeded with the annexation and the Political Committee ruled that this action violated the above resolution. Ultimately, Jordan agreed to declare that it held the West Bank in trust for the Palestinian people and would accept any final disposition of the territory agreed upon by all other members of the League. *Id.* at 39-40. These events are discussed by Murphy, *supra* note 4, at 920 n. 119, 921, and by Bassiouni, *supra* note 56, at 20 n.32.

71. Murphy, *supra* note 4, at 920 n.119.

72. *Id.* at 906.

mandate territory, rather than a partition.[73] Thus the Arab League is committed to supporting the P.L.O. in its quest to replace Israel with a Palestinian state. Recognition of Israel and acceptance of Israeli occupation of the West Bank are inconsistent with this policy and violate the Pact of the League of Arab States.[74]

D. *Egypt's Attempted Resolution of the Conflicts*

As awareness of these conflicts emerged during the negotiation process, Egyptian spokespersons attempted to resolve them

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73. Palestinian National Charter of 1968, art. 1, July 1-17, 1968, *reprinted in* J. MOORE, *supra* note 4, at 1086-91. "Palestine is the Homeland of the Arab Palestinian people . . . ." *Id.* art. 1.

"Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit." *Id.* art. 2.

"The Palestinian Arab People possess the legal right to their homeland and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and free will." *Id.* art. 3.

"Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people . . . assert their right to a normal life in Palestine and to exercise their right to self determination and sovereignty over it." *Id.* art. 9.

"The liberation of Palestine, from an Arab viewpoint, is a national duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine. Absolute responsibility for this falls upon the Arab nation peoples and governments." *Id.* art. 15.

"The liberation of Palestine from an international point of view, is a defensive action necessitated by the demands of self defense." *Id.* art. 18.

"The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland." *Id.* art. 19.

"The Arab Palestinian people . . . reject all solutions which are substitutes for the total liberation of Palestine . . . ." *Id.* art. 20. J. MOORE, *supra* note 4, at 1085. There is some ambiguity as to whether the liberation of Palestine would involve the displacement of Jewish residents. Article 6 of the Charter says that "[t]he Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." This would exclude the overwhelming majority of Israeli Jews. Article 20 holds that: "Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation to which they belong." Article 15 insures "freedom of worship and visit to all, without discrimination of race, color, language, or religion." The attribution of sovereignty to "Arab nationals who, until 1947, normally resided in Palestine," and their descendants, however, would suggest that at the very least, Jews who had emigrated in the last century and their descendants would be denied citizenship. *Id.* art. 5. For an alternative approach see *Toward a Democratic Palestine*, in J. MOORE, *supra* note 4, at 794.

74. *See supra* note 40; *see also* CAMP DAVID: A NEW BALFOUR DECLARATION? (F. Zeachey ed. 1979) (Palestinian reactions to the Camp David agreements); F. SAYEGH, CAMP DAVID & PALESTINE (1978).

by reinterpreting both treaties in terms of transcendent principles drawn from other sources in international law. The side letter to which Begin responded attempted to resolve the conflict between Egypt's commitment not to use force against Israel and its mutual defense arrangements with Jordan and Syria. The letter, as refined by American mediators, interpreted the Blair House agreement to exclude the use of force by either party against the other *unless the latter were deemed the aggressor in a conflict with third parties.*[75]

This interpretation has a plausible foundation in international law. The Joint Defense and Economic Cooperation Treaty between the States of the Arab League was organized as a collective security arrangement pursuant to Article 51 of the United Nations Charter.[76] Article 51 holds that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." If one understands this provision to establish an inalienable right of collective self-defense, then one might argue that the Blair House agreement *could not limit* Egypt's capacity to respond to Israeli aggression against other Arab states.[77] There are four ways that this position might be defended; each is problematic.

1. *Application of Article 103.* The simplest, and least satisfying, approach is to say that limitations on the right of collective self-defense violate the United Nations Charter. Article 103 of the Charter holds that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Collective self-defense, however, is not an obligation under the Charter (except at the behest of the Security Council);[78] it is only a right.[79] Thus Article 103 does not compel the Egyptian inter-

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75. C. VANCE, *supra* note 46, at 241.

76. *See supra* note 62.

77. *See* Murphy, *supra* note 4, at 922.

78. *See infra* note 87.

79. Consider Kelsen's analysis of the Kellogg-Briand pact of 1928 under the Charter. This pact required the renunciation of war as an instrument of national policy and thus placed a restriction on the right of collective self-defense. Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, 94 U.N.T.S. 57. Kelsen argues:

> If it is assumed that the Briand Kellogg Pact is still in force in relation to the

pretation of the treaty.

2. *Subordination of Treaties to the U.N. Charter.* The Charter has often been viewed as constitutive of the post-war international legal system.[80] If one interprets this claim to imply that the Charter is an exhaustive source of international law, then the authority of treaties as a source of law derives from the Charter, rather than vice versa. The sanctity of treaties, enunciated in the preamble to the Charter,[81] becomes a creature of positive law, subject to the limitations imposed by its legislators. Article 51 can then be read as a limitation on the power of treatymaking, denying validity to any treaty insofar as it alienates the right of collective security. The problem with this argument is that it overstates the importance of the Charter in international law. Even the claim that the Charter has any privileged status as against other treaties is controversial.[82] The claim that it has exhaustive authority is belied by the language of the preamble itself, Article 95 of the Charter, and Article 38 of the Statute of the International Court of Justice.[83]

> former enemy states, it does not follow that Article 103 of the Charter applies, that is to say, that Articles 107 and 53 of the Charter prevail over the prohibition of the Pact. For Article 103 is applicable only in the event of conflict between 'obligations' of the Members, and Articles 107 and 53 do not impose obligations but only confer rights upon the Members. The latter may or may not exercise these rights, and may, by obligations under other engagements, be prevented to exercise them. Article 103 does not provide that the 'Charter' prevails; it stipulates only that the 'obligations' under the Charter do prevail. Hence, the Pact of Paris may be interpreted to constitute a restriction to the rights conferred upon the Members by Articles 107 and 53.

H. KELSEN, THE LAW OF THE UNITED NATIONS 121 (1951).

80. *See* 1 L. OPPENHEIM, *supra* note 26, § 166; Waldock, *General Course on Public International Law*, 2 RECUEIL DES COURS 20-38 (1962).

81. "We the peoples of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . have resolved to combine our efforts to accomplish these aims." U.N. CHARTER preamble.

82. *See* G. HARASZTI, *supra* note 28, at 297-301.

83. The language of the preamble, cited *supra* note 81, implies the existence of sources of international law prior to ratification of the Charter, and that the Charter's function is the *maintenance* of the authority of these sources.

Article 95 of the Charter provides that "[n]othing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals . . . concluded in the future." It is fair to say that such language recognizes the authority of other agreements, and does not establish it.

Article 38 of the Statute of International Court of Justice (incorporated into the Charter by Article 92) provides that:

3. *Application of a "Peremptory Norm."* Article 53 of the Vienna Convention on the Law of Treaties provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[84] While such norms (referred to as "jus cogens") are notoriously difficult to identify,[85] they are generally derived by designating certain policies embodied in rules of international law as fundamental.[86] One might employ this method to read Article 51, in conjunction with those articles of the Charter conferring powers on the Security Council to requisition military aid from all United Nations members in response to aggression,[87] in support of a fundamental policy favor-

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Lauterpacht takes the position that the authority of law-making treaties such as the Charter derives from the authority of treaties in general as a source of international law. 1 L. OPPENHEIM, *supra* note 26, § 18.

84. Article 53 continues: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." S. ROSENNE, *supra* note 26, at 290.

85. A. MCNAIR, *supra* note 26, at 215; 1 L. OPPENHEIM, *supra* note 26, § 505. Because the sanctions for violation of jus cogens are so severe, however, some have argued that they should be interpreted restrictively. *See* C. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 44-45, 53-55 (1976) (arguing that they should be confined to those principles which are not only generally adhered to, but those which are generally recognized as fundamental).

86. C. ROZAKIS, *supra* note 85, at 58-73. The sources of jus cogens may be either customary or conventional. A. MCNAIR, *supra* note 26, at 214-16. The most common example of a treaty violating jus cogens is an agreement to wage war against a third state. 1 L. OPPENHEIM, *supra* note 26, § 505; C. ROZAKIS, *supra* note 85, at 49 n.8. McNair holds the Kellogg-Briand pact renouncing war, *supra* note 79, to constitute a jus cogens. A. MCNAIR, *supra* note 26, at 216.

87. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER, art. 2, para. 4.

"The Security Council shall determine the existence of . . . aggression and shall make

ing collective security. The difficulty with this approach is that it proves too much. Jus cogens is not a principle for the interpretation of treaties, but a criterion for their validity:[88] if the treaty as written violates a peremptory norm of international law it is void, ab initio. The jus cogens doctrine is the international analogue to the civil law principle of *boni mores* (good morals).[89] These doctrines are enforced by harsh remedies because their violation implies an illegal purpose.[90] The mere alienation of a right of collec-

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recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* art. 39.

"[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.* art. 42.

"All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." *Id.* art. 43.

88. *See supra* note 84 and accompanying text. Compare with Article 31 of the Vienna Convention which provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (Not in derogation of its object and purpose if illegal.) S. ROSENNE, supra note 26, at 214. See also paragraph 3(c) of Article 31, which provides that "[t]here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties." *Id.* On the importance of distinguishing between the restrictive interpretation of treaties and their invalidation on grounds of jus cogens, see G. HARASZTI, *supra* note 28, at 157-58.

89. C. ROZAKIS, *supra* note 85, at 1-3. "The concept of jus cogens was of course known to the great majority of the members of the International Law Commission . . . . For most of them, the concept of jus cogens—or some corresponding notion having the same function—was already an institution of their domestic private law." *Id.* at 47. Section 138 of the German Civil Code provides that "a juristic act . . . contra bonos mores is void." BÜRGERLICHES GESETZBUCH [BGB] art. 138 (W. Ger.). For an extensive discussion of the application of this doctrine in German contract law, see Dawson, *Unconscionable Coercion: The German Version,* 89 HARV. L. REV. 1041 (1976). Article 1133 of the French Civil Code provides that "[a] cause is illicit when it is prohibited by law or when it is contrary to good morals or to the *ordre public.*" CODE CIVIL [C. CIV.] art. 1133 (Fr.). Article 1108 provides that "[a] licit cause for the obligation" is "essential to the validity of the agreement." *Id.* art. 1108.

90.

> [A] treaty is contrary to international law and void if its object or execution involves:
>
> a) the use or threat of force in contravention of the principles of the Charter of the United Nations;
>
> b) any act or omission characterized by international law as an international crime; or
>
> c) any act or omission in suppression or punishment of which every State is

tive self-defense, however, seems too innocuous to inspire such condemnation. Moreover, where collective self-defense measures are mentioned in the Charter, they are always justified as a means to the end of "international peace and security."[91] The members are admonished to seek, wherever possible, the peaceful resolution of disputes.[92] This would suggest that unconditional peace treaties be favored over mutual defense pacts. Any other policy would systematically preclude the negotiation of separate peaces, with the result that conflicts would inevitably broaden. If comprehensive solutions are the only legal possibilities, one might argue, the world's diplomats might as well hang up their spats.

4. *Application of an Implied Clause.* Article 62 of the Vienna Convention on the Law of Treaties provides that a party may terminate or suspend operation of a treaty due to a change in a circumstance essential to the consent of the parties.[93] This doctrine, the international analogue to the civil law doctrine of *clausula rebus sic stantibus*,[94] is fundamentally concerned with the enforce-

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> required by international law to cooperate.

Second Report on the Law of Treaties, [1963] 2 Y.B. INT'L L. COMM'N 52, U.N. Doc. A/CN.4/SER.A/1963/ADD. 1, *reprinted in* C. ROZAKIS, *supra* note 85, at 13.

91. *See supra* note 87.

92. Article 1 of the Charter provides that the purposes of the U.N. are

> to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. CHARTER art. 1, para. 1. Article 2, para. 3 provides that "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

93.

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

See generally G. HARASZTI, *supra* note 28, at 327-420 for an extensive discussion of this doctrine.

94. Where the principle of good morals may be invoked to invalidate contracts as sources of "objective right," in the parlance of civil law jurisdictions, *clausula rebus sic stantibus* may be invoked to prevent or modify the enforcement of "subjective rights." Section

ment of agreements, rather than their validity. Thus one might argue that while there is nothing inherently wrong with an unconditional peace agreement, the enforcement of such an agreement to frustrate efforts to aid a victim of aggression would permit an "abuse of right."

An act of aggression against an ally of Egypt would be like a breach of good faith and would therefore change a circumstance essential to Egypt's consent to the treaty. Unfortunately, aggression, like beauty, is in the eye of the beholder.[95] No scenario could illustrate this more effectively than the Arab-Israeli conflict, in which Israel justifies all of its military activity as defensive; its Arab neighbors view Israel's occupation of their territory as a continuing act of aggression; and parts of the Palestine Liberation

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157 of the German Civil Code holds that "[c]ontracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration." BGB § 157. Section 226 provides that "the exercise of a right is forbidden if it can have no other purpose than to harm some person." BGB § 226. Article 2 of The Swiss Civil Code, similarly, provides that "every person is bound to exercise his rights and to fulfill his obligations according to the principles of good faith. The law does not protect a manifest abuse of right." SCHWEIZERISCHES ZIVILGESETZBUCH, CODE CIVIL SUISSE, CODICE CIVILE SVIZZERO [ZGB, C.C., COD. CIV.] art. 2 (Switz.). Swiss and German courts have applied these clauses to rescind contracts that became onerous because of changes in economic conditions. The underlying theory is that to require performance under such conditions would manifest bad faith and therefore constitute an abuse of right on the part of the promisee. See cases and materials collected in R. SCHLESINGER, COMPARATIVE LAW 365-91 (1950); A. VON MEHREN, THE CIVIL LAW SYSTEM 1073-99 (1977). *See also* Cohn, *Frustration of Contract in German Law*, 28 J. COMP. LEGAL & INT'L LAW 15 (1946); Dawson, *Effects of Inflation on Private Contracts: Germany 1914-1924*, 33 MICH. L. REV. 171 (1934). *See infra* notes 208-17 and accompanying text.

95.

> There are great difficulties of application in real world situations arising from the occasional arbitrariness of identifying as "aggressor" the state that makes initial recourse to force. Given alignments and the patterns of group voting in the political organs of the United Nations it is not possible to entrust the power of authoritative decision fully to the organized international community. Pariah states such as South Africa, Portugal and Israel cannot expect to receive a norm-guided determination of a dispute involving a controversial use of force.

Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 50 n.69 (1969). *See also*, Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977) (critiques definition of aggression adopted by U.N. General Assembly). For trenchant examples indicating the indeterminancy of judgments of aggression, particularly in the context of invocations of the right of collective self-defense, see N. LEECH, C. OLIVER & J. SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM (1981). Where sovereignty is in dispute, these examples indicate, intervention in support of one disputant party will be perceived as aggression.

Organization view the very existence of Israel as a mutilation of Palestinian sovereignty.[96] Suffice it to say that in any such conflict each side will not only accuse the other of aggression, but will also believe its own accusations. Given the subjectivity which inevitably attends these judgments, to render treaty rights contingent upon them would, arguably, annihilate those rights entirely.

This was the view of the Israeli negotiators who, accordingly, refused to accede to the Egyptian-American interpretation of the Blair House agreement.[97]

A second Egyptian approach to the problem of reconciling the Camp David agreements with the Arab League treaty system involved interpreting both as consistent with the terms of Resolution 242.[98] The peace treaty recognized the "urgent necessity" of

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96. *See* Murphy, *supra* note 4, at 922-23; *see also supra* note 73. For the legal argument against Israeli sovereignty, see Cattan, *supra* note 4, 11-44. For an enlightening discussion of patterns of armed conflict in the Middle East, see Yost, *The Arab Israeli War: How it Began*, in J. MOORE, *supra* note 4, at 293. Yost argues that neither side desired war in the 1967 conflict.

97. *See* M. DAYAN, *supra* note 46, at 219.

98. On November 22, 1967 the Security Council adopted the following resolution:

The Security Council

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissability of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all member states in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the charter,

1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

a) For guaranteeing freedom of navigation through international waterways in the area;

b) For achieving a just settlement of the refugee problem;

c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary General to designate a *special representative* to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a

establishing "a just, comprehensive and lasting peace in the middle east in accordance with Security Council resolutions 242 and 338." In addition, it mentioned the signatories' continued adherence to the *Framework for Peace in the Middle East,* which repeated the terms of Resolution 242.[99] This is the basis of the Egyptian position that the peace treaty and the *Framework for Peace in the Middle East* are linked—that Egypt's establishment of peaceful relations with Israel is contingent upon Israel's fulfillment of the conditions specified in Resolution 242 and the *Framework for Peace in the Middle East.* Since these documents both call for Israel's withdrawal from the occupied territories, Egypt has argued that, far from compromising its commitment to defend its allies against Israeli aggression, the peace treaty fulfills that commitment—and by peaceful means.[100] Of course, Israel has not yet withdrawn from any additional occupied territory or shown any inclination to do so. Moreover, according to the Israeli interpretation, Resolution 242 does not necessarily require withdrawal from this territory. They point out that it does not specify withdrawal from *all* territory, but that it does mandate "secure and recognized borders."[101] This, conclude the Israelis, means that they must withdraw only to borders which they consider secure, and only *after* such borders are recognized by their neighbors.[102] This view is reflected in the *Framework for Peace in the Middle East* which provides for withdrawal to such boundaries, after negotiation.[103] Egypt's Arab League partners, however, view Resolution 242 as requiring immediate Israeli withdrawal from all occupied territories.[104]

> peaceful and accepted settlement in accordance with the provisions and principles of this resolution.

22 U.N. SCOR (1382d mtg.) at 8, U.N. Doc. S/Res/242 (1967).

99. *See* Bassiouni, *supra* note 56, at 21; Murphy, *supra* note 4, at 919. *See also supra* note 9 and accompanying text.

100. *See* Bassiouni, *supra* note 56, at 18, 21; Murphy, *supra* note 4, at 921.

101. *See supra* note 98.

102. For a vigorous exposition and defense of this view see Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973,* 69 AM. J. INT'L L. 272 (1975). Rostow argues that the Israeli position is supported by the diplomatic history of the resolution's drafting.

103. Camp David Agreement, Sept. 17, 1978, Egypt-Israel, Preamble, 17 I.L.M. 1467 (1978) [hereinafter cited as Camp David Agreement].

104. Murphy, *supra* note 4, at 925. Note, however, that neither Syria nor the P.L.O. had accepted the validity of Resolution 242 as of the time of the Egyptian-Israeli peace treaty. *See id.* at 926.

Egypt also invokes Resolution 242 and the *Framework for Peace in the Middle East* to refute the claim that it has violated Arab League policies of support for Palestinian sovereignity. Resolution 242 calls for a "just settlement of the refugee problem."[105] The *Framework for Peace in the Middle East* provides that the West Bank and the Gaza Strip will be granted "full autonomy"[106] for a five-year period and that any ultimate disposition of the territory must "recognize the legitimate rights" and "just requirements" of the Palestinian people.[107] Egypt reads all of these provisions to require Palestinian statehood, and thus argues that the entire "peace package" advances Palestinian interests as far as possible within the constraints of Resolution 242.[108] The P.L.O., however, has never accepted Resolution 242 insofar as it requires recognition of Israeli sovereignty; and, it has noted the absence of any explicit requirement for Palestinian statehood or self-determination in the *Framework for Peace in the Middle East.*[109] It has been noted that the phrase, "legitimate rights," may imply that some rights claimed by the P.L.O. are illegitimate.[110] Of particular concern is the right of self-determination, the legitimacy of which some American and Israeli commentators have denied.[111]

In short, Egyptian efforts to reconcile the peace treaty with Egypt's obligations to the Arab League treaty system convinced neither the Israelis nor the Arab League. As a consequence, Israeli negotiators became concerned as to which treaties would be valid in the event of a conflict. For reasons to be explored at length below, an extensive survey of scholarly commentary proved inconclusive.[112] Israel sought to escape this doctrinal thicket by adopting a technique employed by the framers of the United Nations Charter—they simply wrote the priority of the peace treaty

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105. *See supra* note 98.

106. Camp David Agreement, *supra* note 103, § A, para. 1.

107. *Id.* § A, para. 1(c).

108. Murphy, *supra* note 4, at 920-21. *But cf.* E. WEIZMANN, THE BATTLE FOR PEACE 321 (1981) ("Sadat . . . repeated firmly: 'Ezer, you've got nothing to worry about—there won't be any Palestinian state' ").

109. Murphy, *supra* note 4, at 926.

110. *Id.* at 926. Note, however, that this phrase appears in article 18 of the Palestine National Charter of 1968. J. MOORE, *supra* note 4, at 1089.

111. *See* Feinberg, *The Question of Sovereignty Over Palestine,* in J. MOORE, *supra* note 4, at 45, 48-52; Rostow, Book Review, 82 YALE L. J. 829, 844-54 (1973).

112. Public Lecture by Jack Waltuch, Ass't Legal Advisor to the Foreign Office of Israel, at Yale Law School (October 1979) (speaking on the Egyptian-Israeli Peace Treaty).

into the treaty itself. Thus, article VI(5) of the treaty provides that "[s]ubject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of the Parties under the present Treaty and any other obligations, the obligations under this Treaty will be binding and implemented."[113]

As far as Egypt is concerned, however, even this language resolves nothing. Egypt relies for support on the agreed minutes which provide that "there is no assertion that this Treaty prevails over other Treaties or agreements or that other Treaties or agreements prevail over this Treaty. The foregoing is not to be construed as contravening the provisions of Article VI(5) of the Treaty."[114] Egyptian spokespersons have suggested that Egypt might well honor its mutual defense commitments to the Arab League, if requested to do so.[115]

As far as the Arab League is concerned, however, the relative validity of the two treaty systems is irrelevant. The members of the League viewed the peace treaty as a violation of Egypt's Arab League commitments and unanimously voted to suspend Egypt from the League, remove the League headquarters from Egypt, sever diplomatic relations, and boycott Egypt economically.[116] In the end, it was politics rather than doctrine that determined which treaty would be honored. By isolating Egypt politically, Israel achieved its intended separate peace. The Camp David negotiations exposed the doctrinal problem of treaty conflict, but did not resolve it; they resulted only in the closing of a bargain, not a doctrinal lacuna.

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113. 18 I.L.M. 365-66 (1979).
114. *Id.* at 392.
115. Murphy, *supra* note 4, at 923.
116. *Id.* at 898.

III. A Brief History of Treaty Conflict

The first recourse of scholars and diplomats bent on resolving a question of international law is a review of the past practice of states and international tribunals. This Chapter surveys instances of treaty conflict which have occasioned formal protest since the advent of the modern system of international law, focusing on those protests that have been invoked in arguments about the validity of conflicting treaties. This survey will show that the practice of states and international courts provides little useful precedent for determining the validity of conflicting treaties. While there has been some condemnation of treaty conflict, there has been little indication of an appropriate remedy, apparently because the international legal system has been incapable of any authoritative response. As a consequence, the question of remedies remains academic; its evolution must be treated more as intellectual than as diplomatic history.

Our review of international responses to treaty conflict will be divided into three parts: The first discussing responses of the European powers to treaty conflicts during the century between the fall of Napoleon and the advent of World War I; the second discussing the responses of international tribunals to treaty conflicts since the start of World War I; and the third discussing extrajudicial responses to treaty conflicts during the same period.

A. *Treaty Conflict and the Concert of Europe*

The modern international legal system originated with the Congresses of Vienna occasioned by the fall of Napoleon.[117]

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117. The effort to secure peace in Europe by means of a legal system began with the Peace of Westphalia in 1648.

> This marked the end of a period of violent religious wars and the disappearance of the Papacy and Holy Roman Empire as effective instruments for regulating the affairs of Europe. The intention was to create a system which would be stable and permanent, resting on a concept of a European public peace and public law. This judicial order was to rest on the political *status quo* which was assumed to represent a 'Balance of Power' or *principe d'equilibre* between the various states or groups of states.

I. Brownlie, International Law and the Use of Force by States 14 (1963). The treaties establishing the Peace pledged the parties "to defend and protect all and every article of this peace against anyone, without distinction of religion." The Treaty of Münster, art. CXXII *quoted in* Gross, *The Peace of Westphalia, 1648-1948,* 42 Am. J. Int'l L. 20, 24 (1948). This guarantee and others induced David Jayne Hill to characterize it "as an international

These Congresses fixed European borders by mutual consent of

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constitution, which gave to all its adherents the right of intervention to enforce its engagements." 2 D. HILL, A HISTORY OF DIPLOMACY IN THE INTERNATIONAL DEVELOPMENT OF EUROPE 602 (1925). Paradoxically, however, the very mechanism by which this peace was to be guaranteed, military intervention, proved its undoing.

> In the realm of universal history balance of power was concerned with states whose independence it served to maintain. But it attained this end only by continuous war between changing partners . . . . The action of the same principle safeguarded for over 200 years the sovereignty of the states forming Europe at the time of the Treaty of Münster and Westphalia (1648). When, seventy-five years later, in the Treaty of Utrecht, the signatories declared their formal adherence to this principle, they thereby embodied it in a *system*, and thus established mutual guarantees of survival for the strong and the weak alike through the medium of war. The fact that in the nineteenth century the same mechanism resulted in peace rather than war is a problem to challenge the historian.

K. POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 6 (1957). While the Peace of Westphalia may have established a stable state system, in other words, it failed to establish a truly *international* system—an institutional framework for formulating joint policy and for peacefully resolving disputes. "The next attempt, the settlement of Vienna of 1815 and the Congress of Aix-La-Chapelle of 1818, which in a sense completed the former, gave birth to that loose system of consultation between the great powers known as the concert of Europe." Gross, *supra*, at 20. "International legislation, or even international administration, if the phrases be permitted, can hardly be said to have appeared on the scene until the Congress of Vienna, with the possible exception of one or two cases in which, as at Utrecht, there was recognized a change of succession or of royal title." G. BUTLER, THE DEVELOPMENT OF INTERNATIONAL LAW 349 (1928).

The Congress of Vienna generated three important developments, each of which may be understood as an accomodation of the internationalizing influence of the French Revolution: first, a restructuring of Europe's borders and balance of power with bold, almost Napoleonic strokes:

> The opportunity of reorganizing Europe upon a more stable basis was at hand if statesmen could be found to undertake the task. The Congress of Vienna, meeting from September 1814 to June 1815, assumed . . . what was practically the role of a great law-making body. It formed new states by the union of Sweden and Norway and of Holland and Belgium, and it confirmed the action of Napoleon in consolidating the numerous German states and formed them into a loose confederation of thirty-nine members. Its chief object, however, was the restoration of the balance of power in Europe which had been so greatly unsettled.

C. FENWICK, INTERNATIONAL LAW 17-18 (4th ed. 1965). *See also* P. CORBETT, THE GROWTH OF WORLD LAW 91-92 (1971); M. NATHAN, THE RENASCENCE OF INTERNATIONAL LAW 14 (1925); *see generally* C. WEBSTER, THE CONGRESS OF VIENNA (2d ed. 1934). The second development was a codification of several areas of international law, partly inspired by the Napoleonic codifications. The subjects covered were the slave trade ("Declaration sur l'abolition de la traite des negres" (February 8, 1815)), diplomatic procedure ("Reglement sur le rang etre les agents diplomatiques" (March 19, 1815)), and navigation ("Reglement pour la libre navigation des rivieres" (March 24, 1815)). *See* M. NATHAN, *supra* at 15; 9 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 11-12 (1968). The third development, already alluded to, was the most ineffable: the creation of an enduring system of dispute resolution: "European society and the public law became heavily institutionalized. The concept of the

almost every sovereign in Europe and initiated what is somewhat exaggeratedly referred to as the "hundred years peace."[118] What marked these agreements as the birth of an international *legal system* were two factors: first, their comprehensiveness—the participation and consent of almost all the governments in Europe gave the resulting decisions a kind of transcendent legitimacy that previous treaties had lacked; second, their continuing influence as a model for international cooperation—during the course of the ensuing century, new disputes were submitted to similar congresses for resolution.[119] During this period the disputants were careful to ensure that all signatories to any treaties relevant to the dispute were included in its resolution.[120] By institutionalizing the

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concert of Europe and the Congress system raised a strong presumption against unilateral changes in the status quo." I. BROWNLIE, *supra*, at 19. *See generally* C. DUPUIS, LE PRINCIPE D'EQUILIBRE ET LE CONCERT EUROPEEN (1909); E. GULICK, EUROPE'S CLASSICAL BALANCE OF POWER (1955); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 30-41 (1962); R. MOWAT, CONCERT OF EUROPE (1930); Dupuis, *Les Antécédents De La Société Des Nations*, 60 RECUEIL DES COURS 67 (1937).

The Concert's success in keeping the peace may ultimately be attributed not so much to its institutional structure, as to the forces unleashed by the very revolution over which it purportedly triumphed. "The entirely new factor, we submit, was the emergence of an acute peace interest . . . . The backwash of the French Revolution reinforced the rising tide of the Industrial Revolution in establishing peaceful business as a universal interest." K. POLANYI, *supra*, at 7. The birth of the international legal system, in short, coincided with the defeat of France, but with the triumph of the French Revolution; for the power entrenched at Vienna was the force unleashed at the Bastille—capital.

118.

> The nineteenth century produced a phenomenon unheard of in the annals of Western civilization, namely, a hundred year's peace—1815 to 1914. Apart from the Crimean War—a more or less colonial event—England, France, Prussia, Austria, Italy and Russia were engaged in war among each other for altogether only eighteen months. A computation of comparable figures for the two preceding centuries gives an average of sixty to seventy years of major wars in each.

K. POLANYI, *supra* note 117, at 5.

119. *See generally infra* text accompanying notes 125-34; G. BUTLER & S. MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 427-86 (1928).

120.

> Thus the Treaty of Paris, signed on 30 March 1856, was signed not only by the belligerents in the Crimean War but also by the other Great Powers, Austria and Prussia. To some extent territorial changes depended for their permanence and validity under the public law upon collective recognition. The appearance of Greece as an independent state was the outcome of collective intervention by the Major Powers and general recognition of the new situation. However, the Concert of Europe depended on the agreement of the Great Powers; European states with interests which conflicted with those of the Great Powers, and states outside the European Concert, were liable to various forms of forcible

European Concert, European diplomatic practice retained the transcendent legitimacy generated by the Congress of Vienna throughout the nineteenth century. Legitimacy and continuity gave the European Concert the character of a legal system—and these conditions required that no change be effected in matters regulated by treaty without the consent of all parties. The very character of the Concert of Europe as a legal system, in short, depended upon the rarity of treaty conflict.

What made such consensus possible was the influence of two factors: a balance of power among the major European states and a commonality of economic interest. A balance of power had been maintained in Europe since the Peace of Westphalia in 1648, but it had been maintained by means of war rather than diplomacy. The factor adduced by Karl Polanyi to explain the development of the diplomatic Congress as a means of maintaining the European balance of power was "the emergence . . . of peaceful business as a universal interest."[121] The industrial revolution made possible the widespread production of commodities for distant consumption. As a result, the economies of the great powers of Europe became increasingly intertwined, and the economy of each became increasingly dependent upon undisrupted trade. Since a major war on the European continent would certainly disrupt trade, every European power stood to lose by it. The only possible exception was Russia, which entered the industrial age late in the nineteenth century and which other European powers viewed with suspicion throughout much of this era.[122]

The antipathy of the European Concert towards war during this period resulted in a minimum of treaty conflict. However, it also prevented the development of any systematic response by the European Concert to treaty conflict. European powers were loathe to risk war to enforce a treaty, unless its breach threatened to upset the balance of power or disrupt commerce. In nineteenth century Europe, the rarity of treaty conflict was more the constitutive

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interference.

I. BROWNLIE, *supra* note 117, at 20 (citations ommitted). *See* J. BRIERLY, THE LAW OF NATIONS 332-33 (6th ed. 1963); G. BUTLER & S. MACCOBY, *supra* note 119, at 427-86; M. KAPLAN & N. KATZENBACH, *supra* note 117, at 116-18; H. TOBIN, THE TERMINATION OF MULTI-PARTITE TREATIES 206-49 (1933).

121. K. POLANYI, *supra* note 117, at 7.

122. E. CRANKSHAW, THE SHADOW OF THE WINTER PALACE 138-50 (1978).

condition than the consequence of a system of international law.

Most instances of treaty conflict that occasioned protest during this period did not implicate the balance of power. Some concerned essentially colonial situations peripheral to the European continent. In 1865 and 1912 England protested the preferential treatment of American vessels by small Caribbean states in apparent violation of English treaty rights. In each case a treaty conflict was involved, but in neither case was the conflict remedied.[123] In

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123. The Crimean War was concluded by the Congress of Paris in 1856. The resulting treaty contained a convention against privateering, subsequently acceded to by many nations, including Haiti. In 1869, however, Haiti signed a treaty with the United States providing that American privateers would be admitted to Haitian ports in time of war. Britain, a signatory to the Declaration of Paris, protested this treaty in 1865. A McNAIR, *supra* note 26, at 228-29. Within months, however, the American Civil War ended, and with it, the threat that the United States would commission privateers.

> Today, apart from the doubtful question of the position of successor States, it is believed that the only maritime State not a party to the Declaration of Paris is the United States, and they refrained from the use of privateers in the Civil War, in the war against Spain and in the two world wars.

Id. at 225-26. For discussion of the original American position on the Declaration of Paris, see G. BUTLER & S. MACCOBY, *supra* note 119, at 310-11.

In 1901 the United States and Great Britain concluded the Hay-Paunceforte Treaty regarding the construction and regulation of the Panama Canal. Article 3 of this treaty required that vessels of all nations using the canal be charged equal tolls. In 1903, however, the United States concluded the Hay-Varilla Treaty with Panama, Article 19 of which exempts all Panamanian vessels from tolls in using the canal. Quincy Wright commented in 1917:

> Section 5 of the Panama Canal Act of August 24, 1912, recognizes the exemption of Panama vessels. Great Britain protested against the exemption given to American vessels, also contained in this section, and in the same note made mention of the Panama exemption as being also contrary to the Hay-Paunceforte Treaty, but did not insist upon it. This treaty conflict does not seem to have come before the courts, and it is highly probable that, in view of the peculiar position of Panama in reference to the canal, the exemption of her vessels from tolls being one of the conditions upon which she permitted the canal to be constructed, this exemption will not be seriously questioned.

Wright, *Conflicts Between Internation Law and Treaties*, 11 AM. J. INT'L L. 577-78 (1917).

At least one instance of apparent treaty conflict occurred in our own history, prior to the Congress of Vienna:

> Such a conflict arose between Article 17 of the treaty of the United States with France of 1778 and Article 24 of the treaty with England of 1794. The former required the United States to admit French privateers and their prizes to American ports for purposes of repair and supplies, whereas the latter required her to forbid all belligerent privateers these privileges.

Id. at 566, 576-77. In Moodie v. The Amity, 17 F. Cas. 650 (D.S.C. 1796), the District Court for South Carolina recognized the validity of the earlier treaty, holding that it precluded admiralty jurisdiction over sale on land of prizes captured by lawfully commissioned French privateers. In so doing, however, the court seemingly ignoed plaintiff's argument

1894 France protested the Belgian king's lease, from England, of African territory he had earlier acknowledged as French. While France succeeded in inducing the Belgian king to abandon the lease, England simply occupied the disputed territory, eventually returning possession of a portion of it to the Belgian king.[124] Just as nuclear deterrence in no way inhibits superpower intervention in the Third World, the balance of power in Europe permitted military superiority in a colonial region to be exploited with impunity. Because of the balance there was little incentive for a European power bested in the colonies to retaliate at home. Nor was there any reason for the Concert of Europe to become involved in a colonial dispute. While the European powers traded with one another, colonies traded primarily with their rulers. Accordingly a colonial war would injure the economic welfare only of the loser, whereas a war on the European continent could injure all the Concert members. Colonial treaty conflict did not sufficiently threaten the Concert to warrant a negative response.

Occasionally, even continental disputes were resolved without the immediate supervision of the entire Concert. In 1846 Russia and Prussia agreed to Austria's annexation of Cracow. Britain protested that the Vienna Treaty of 1815 required those three powers to guarantee the independence and neutrality of Cracow. Yet the function of this provision was probably to prevent disputes among these three powers, and their agreement on Austrian annexation was probably more an index of peaceful cooperation among the three than of Austrian ascendancy. In any case, the matter died.[125]

A somewhat more alarming instance of treaty conflict was the Treaty of Villafranca which precipitated the unification of Italy. The Vienna Treaty accorded Austria sovereignty over Lombardy and Venetia. In 1859, after establishing an understanding with France, Sardinia began to provoke Austria. While conditions for a new congress to resolve the crisis were still under negotiation, war

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that jurisdiction attached because the case arose under the treaty with Britain.

124. AN ENCYCLOPEDIA OF WORLD HISTORY 879 (W. Langer 5th ed. 1972). *See* G. BUTLER & S. MACCOBY, *supra* note 119, at 472-73 for discussion of the Congo Conference of Berlin. *See also* 6 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 54, 529-31 (1973) (discussion of this case in connection with problem of treaty conflict and citation of bibliographical references to treaties discussed).

125. A. MCNAIR, *supra* note 26, at 228.

broke out between Austria and Sardinia, which was aided by France. What could have become a cataclysmic war ended quickly when France, having established Sardinian rule over Lombardy by signing the Treaty of Villafranca with Austria, withdrew. The Sardinian successes inspired a wave of nationalist insurrection throughout the Italian peninsula. The other great powers, wary of a resurgence of French expansionism, sought to convene a congress on the Italian situation. This effort failed when the belligerents refused to rubberstamp it. Yet events proved such a congress to be unnecessary. The unification of Italy under Sardinian rule strengthened the balance of power by providing a check against the territorial ambitions of both Austria and France.[126]

There was one context in which treaty conflict repeatedly elicited a more vigorous response from the Concert of Europe. This context was provided by the "Eastern Question": the threat to stability of the European political and economic system posed by the decline of Ottoman power. The only general European war of the nineteenth century, the Crimean War, resulted from British and French resistance to Russia's designs on the Ottoman Empire's Balkan provinces.[127] The war was concluded by the Treaty of Paris which guaranteed Ottoman independence and territorial integrity, and required that disputes between the Ottoman Empire and any other signatory be mediated by the remaining signatories.

By thus bringing the Ottoman Empire into the European Concert, the great powers appeared to further two common goals: first, they strengthened the balance of power by inhibiting any European power from unilaterally plundering Ottoman possessions; second, in their capacity as collective protectors of Ottoman sovereignty, the European powers could insure Ottoman solicitude for the Concert's objective of undisrupted trade. Yet the second goal was at odds with the first: because internal discord in a large empire might be as disruptive to trade as a war, every European power could claim an interest in the Ottoman Empire's internal affairs. This in turn encouraged the Sultan's disgruntled subjects—particularly in the Balkans—to seek support from European powers—particularly Russia.

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126. G. BUTLER & S. MACCOBY, *supra* note 119, at 451-53.
127. *See* E. CRANKSHAW, *supra* note 122.

When, in 1875, Christian revolts broke out in the Empire's Balkan territories, the European powers[128] forced Turkey to the conference table. At the Congress of Constantinople, held in 1876-77, the European powers proposed that they become involved in the administration of the Empire's Christian provinces. When the Turks refused this proposal, the conference disbanded and the European powers issued the London Protocol. This amounted to an ultimatum that the Sultan quickly improve the treatment of his European Christian population and negotiate a joint military demobilization with Russia, or suffer concerted European intervention in the Balkans. Turkey responded negatively to this ultimatum and Russia attacked with considerable success. Hostilities ended in 1878 with the Treaty of San Stefano in which the defeated Ottoman Empire conceded many rights guaranteed by the Treaty of Paris.

Great Britain, notwithstanding its acquiescence in the London Protocol, which effectively modified the Treaty of Paris without Turkey's consent, protested the Treaty of San Stefano on the ground that it modified the earlier treaty without the consent of all parties.[129] This protest is frequently cited in support of the illegality of treaty conflict, perhaps because it was one of the few such protests that was at all efficacious.[130] A proposal to convene a general European congress to resolve this problem at first foundered: Russia and England could not agree as to whether the conference would ratify the Treaty of San Stefano or renegotiate it. When, however, these two powers agreed on the terms of a modification of the treaty, a congress was convened in Berlin to ratify this compromise.[131]

Subsequent treaty conflicts engendered by the erosion of the Ottoman Empire were resolved similarly. In 1908, Austria annexed the Ottoman suzerainties of Bosnia and Herzegovina, while Bulgaria declared its independence of the Ottoman Empire. As England viewed these actions as violative of the Treaty of Berlin, she attempted to arrange a congress to consider them. Austria,

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128. Russia, England, France, Prussia, Austria, and Sardinia. G. BUTLER & S. MACCOBY, *supra* note 119, at 465.

129. G. BUTLER & S. MACCOBY, *supra* note 119, at 463-66; A. MCNAIR, *supra* note 26, at 230.

130. *E.g.*, A. MCNAIR, *supra* note 26, at 230.

131. G. BUTLER & S. MACCOBY, *supra* note 119, at 466-69.

with the support first of Germany, then of Russia, refused to cooperate without prior assurances that such a congress would simply ratify her annexations. After Turkey agreed to accept compensation from Austria, however, the great powers eventually recognized Austria's annexation and compelled a recalcitrant Serbia to accede as well.[132] In 1912, Bulgaria, Serbia and Greece, all former Ottoman possessions,[133] again became restive and made war on the Ottoman Empire, despite efforts on the part of the great powers to negotiate the dispute. Hostilities were suspended in 1913 by the Treaty of London in which Turkey ceded control of some disputed territory to the Balkan allies and consigned other territories to the great powers for disposition. Almost immediately, however, war broke out again among the victors and was settled by the Peace of Bucharest without the involvement or consent of the great powers, in apparent violation of the Treaties of Berlin and London. The great powers, by virtue of their military presence in Albania were nevertheless able to enforce some of the terms of the Treaty of London, notwithstanding Serbian resistance.[134]

In each of these three instances of treaty conflict, the European Concert was able to effect some modification in the terms of Turkey's capitulation. In no case, however, were they able to compel the belligerents to return to the status quo ante. The vigor of the Concert's response in these cases reflects not so much its effectiveness as a legal system, as its anxiety over the dissolution of the Ottoman Empire. The fact that treaty conflicts arose concerning matters of such vital importance to the Concert was one indication that the system was breaking down.

The foundation of international law in this period was collective consent manifested in adherence to multilateral treaties governing the distribution of power in Europe. Conflict among such treaties removed the constitutive condition for international law by circumventing collective consensus. Since treaties create obliga-

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132. *Id.* at 471-72.

133. The independent Kingdom of Greece was created by agreement between France, England, and Russia in 1827, joined by Turkey in 1829. The boundaries of Greece were fixed by succeeding protocols among these parties. G. BUTLER & S. MACCOBY, *supra* note 119, at 427-32. Serbia was recognized as an independent state at the Treaty of Berlin in 1878. *Id.* at 467. Bulgaria emerged as described above. *See supra* text accompanying notes 131-32.

134. G. BUTLER & S. MACCOBY, *supra* note 119, at 476-77.

tions in international law, the validity of treaties by definition depends upon the presence of an international legal system. If consensus was the foundation of international law in nineteenth century Europe, then treaty conflict undermined the validity of every treaty.

I am not merely offering a version of the familiar positivistic argument that the absence of a transcendent sovereign authority deprives international law of its legal character.[135] To the con-

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135. This position is most commonly associated with John Austin:

> Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities . . . . Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.
>
> And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.

1 J. AUSTIN, LECTURES ON JURISPRUDENCE Lec. 231 (1875). While other positivist philosophers have not taken such an extreme position, they have manifested great difficulty in assimilating international law to their conceptions of law. H.L.A. Hart, though a critic of Austin's definition of law as the command of a sovereign, is nevertheless skeptical of international law's legal status:

> The absence of [an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions] means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. It is indeed arguable . . . that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of its rules.

H. HART, THE CONCEPT OF LAW 209 (1961). Nevertheless, while international law lacks the paradigmatic characteristic of legal systems (a union of primary and secondary rules) Hart contends it is analogous to other legal systems in important respects, and could become similar in all respects by developing the requisite institutional framework. *Id.* at 226-31.

Hans Kelsen similarly postulates such institutions as all but essential to the existence of an international legal system. *See* H. KELSEN, PURE THEORY OF LAW 320-47 (1967). In the absence of such institutions, however, he sees international law as a "primitive legal order":

> This primitive law can be understood only if we distinguish—as does primitive man—between killing as a delict, and killing as a sanction. In order to understand international law, a differentiation must also be made between war as a delict and war as a sanction, despite the fact that the practical application of this distinction in a concrete case may be difficult . . . .
>
> Should we, however, contrary to the theory of "just war," refuse to regard war as in principle forbidden and permitted only as a reaction against a delict,

trary, I am assuming that international law can function as a legal system in the presence of conditions fulfilling criteria of legitimacy recognizable as such to the participants. I make no assumption as to what the criteria of legitimacy for international legal institutions must be; rather I assume that these criteria are internally developed and elaborated. In the international system of the nineteenth century, however, the legitimacy of international law was precariously balanced upon the unanimous consent of the great powers of Europe.

> we would no longer be in a position to conceive of general international law as an order turning the employment of force into a monopoly of the community. Under these circumstances, general international law could no longer be considered as a legal order.

H. KELSEN, GENERAL THEORY OF LAW AND STATE 339 (1961).

Critics of the positivist tradition suggest that it is not international law but international legal theory which is primitive.

> [T]he social environment within which international law is expected to function cannot be taken for granted to nearly the extent that it might be in investigating the borderlands of the known, knowable, and unknowable in a domestic legal context. For the theorist to assume the social and political environment of international law is to risk other perils, the most frequent of which is implicit reliance upon a model of law transplanted from domestic life. Since such a model does not fit the international setting, the effect is likely to be a theory of international law that is excessively formal (Kelsen) or simplistically cynical (Morgenthau).
>
> The first requisite of an adequate theory of international law is a concern with the distinctive attributes of law in an environment with the characteristics of the international system. Because Myres McDougal has made such a powerful demonstration of his awareness of this starting point for a theory of international law, I would identify him as our most important theorist. . . . Because of his insistence upon contextual analysis, McDougal makes the environment of world affairs relevant to any particular decision about the meaning of a legal rule. The necessity for this reference to context suggests that international legal theory is quite undeveloped, for, so long as it is necessary to take so much into account in making each legal appraisal, it is evident that there is no agreement about the role and character of law in the social order.

Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 233-34 (1964). *See generally* M. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER (1960); M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967). Cognizant of these criticisms, McDougal and others have attempted to develop a conception of law applicable to the international system, which they characterize as "horizontal" and "consensual" rather than "vertical" and "authoritative." *See* McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968). *See also* C. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979); G. Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (C. Black and R. Falk eds. 1972); Murphy, *Some Reflections upon Theories of International Law*, 70 COLUM. L. REV. 447 (1970).

B. *Treaty Conflict and International Tribunals*

The conceptual and practical possibility of an international legal response to treaty conflict depends upon the existence of international legal institutions which transcend the particular treaty arrangements which may come into question. The possibility of such an institution is itself in doubt since the only mechanism for bringing such an institution into existence is itself a treaty.[136] This means that any treaty made in violation of international law would itself raise the issue of treaty conflict. Some theorists have attempted to cope with this problem without addressing the problem of treaty conflict generally; they have argued that those treaties which are constitutive of international legal institutions have a special priority.[137] In any case, to the extent that such institutions claim a transcendent legitimacy, they may view themselves as being in a position to define the rights created by conflicting treaties and to create remedies for the infringement of those rights.

The twentieth century has seen the development of putatively transcendent international legal institutions. Nevertheless, such institutions have rarely been faced with the problem of treaty conflict and have been loath to confront it on those few occasions.

The first international tribunal, established in 1906 by the

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> A treaty has been described, with some degree of exaggeration, as "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions"; for instance . . . political agreements relating to peace, alliance, friendship, neutrality, guarantee, commercearies and law-making treaties, particularly of a multi-partite character; treaties akin to charters of incorporation because they create international unions or organizations; and so forth.

A. McNAIR, *supra* note 26, at 5 (quoting 11 BRIT. Y.B. INT'L L. 101 (1930)).

137. Kelsen is a leading exponent of this view. *See* Kelsen, *Conflicts Between Obligations Under the Charter of the United Nations and Obligations Under Other International Agreements*, 10 U. PITT. L. REV. 285 (1949). *See also* A. McNAIR, *supra* note 26, at 216-17. For a critique of this view, see G. HARASZTI, *supra* note 28, at 297-301. In any case, the United Nations Charter lays claim to priority over both prior and subsequent agreements: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U. N. CHARTER art. 103. Similar language may be found in Article 20 of the Covenant of the League of Nations: "The members of the League severally agree that this covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake they will not hereafter enter into any engagements inconsistent with the terms thereof." LEAGUE OF NATIONS COVENANT art. 20.

Treaty of Washington, was the Central American Court of Justice.[138] This court, established to resolve disputes between the signatories, considered one case involving treaty conflict in 1916.[139] This case is particularly significant for our purposes because it has been cited in support of the equal validity of two conflicting treaties.

By the Cañas-Jerez Treaty of 1858, Nicaragua agreed to consult the government of Costa Rica prior to permitting a foreign government to construct a transcontinental canal on Nicaraguan territory. In the event that Costa Rica's "natural" rights would be effected, Costa Rica's opinion would be dispositive; otherwise it would be merely advisory.[140] In 1888, in an arbitral award, President Cleveland reconfirmed Costa Rica's right to consultation and interpreted her natural rights as including territorial rights in the San Juan River and estuary, to which Costa Rica and Nicaragua were co-riparians.[141] In 1914, however, Nicaragua concluded the Bryan-Chamorro Treaty with the United States, granting the United States the exclusive right to build a canal in the San Juan River or elsewhere in Nicaragua.[142] Costa Rica, El Salvador and Honduras protested the treaty and the United States Senate ratified it "with the understanding . . . that nothing in said Convention is intended to affect any existing right of any of the said

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138. The Permanent Court of Arbitration, established in 1899 at the Hague was not a real court of justice as that term is ordinarily understood. For, in the first place, it was not itself a deciding tribunal, but only a list of names, out of which the parties in each case select, and thereby constitute, the court. Secondly, since in conflicts to be decided by arbitration the arbitrators are selected by the parties on each occasion, there are in most cases different individuals acting as arbitrators, with the result that there is no continuity in the administration of justice.

2 L. OPPENHEIM, *supra* note 26, § 25ab, at 43. "In . . . 1907, Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador established the 'Central American Court of Justice' at Cartago, consisting of five judges . . . . This Court was never of more than local importance, and it came to an end in 1918; but it is of interest as having been the first of its kind." *Id.* at 44 n.3. The Central American Court of Justice was a model for the Statute of the Permanent Court of International Justice. *Id.* at 36. *See* 2 AM. J. INT'L L. (Supp.) 231 (1908); Scott, Editorial Comment, *The Closing of the Central American Court of Justice*, 12 AM. J. INT'L L. 380 (1918); *See generally* Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759 (1932).

139. Costa Rica v. Nicaragua, Central American Court of Justice, September 30, 1916 (translated and reported in full in 11 AM. J. INT'L L. 181 (1917)).

140. *Id.* at 193.

141. *Id.* at 193-94.

142. *Id.* at 190-91.

named states."[143] This proviso was not entirely cynical—apparently the American government had no intention of building a canal in Nicaragua, but sought, by means of the Bryan-Chamorro Treaty, to prevent any other power from constucting a competitor to the Panama Canal.[144] Nevertheless, Costa Rica brought suit before the Central American Court of Justice, requesting that it declare the treaty void. The court found the Bryan-Chamorro Treaty to be a violation of Costa Rica's rights under the Cañas-Jerez Treaty, notwithstanding Nicaragua's argument that a conflict would not arise unless the United States and Nicaragua actually agreed to the construction of the contemplated canal.[145] Yet the court declined to declare the subsequent treaty void because the United States was not a signatory to the Treaty of Washington and a treaty between Nicaragua and the United States was beyond the jurisdiction of the court.[146] The court suggested, however, that with the aforementioned Senate proviso, the United States might have voluntarily assumed liability for the resulting violation of Costa Rica's rights.[147]

If the elaboration of a remedy for treaty conflict requires that an institution accord itself a transcendent legitimacy, the Central American court's response to the Bryan-Chamorro Treaty case betrays a lack of confidence on the part of the court in its own legitimacy. The court recognized the existence of treaty conflict in this case, but reached no decision as to the international legal consequences. It is possible that the court would have declared the treaty void if it had perceived itself as having the authority to do so, but jurisdictionally circumscribed by the Treaty of Washington, the court would not do so. Thus the case has no precedential implication for the validity of treaties concluded in violation of pre-existing treaty rights of third parties.[148]

The court's perceptions of its own illegitimacy were con-

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143. *Id.* at 192.

144. Finch, Editorial Comment, *The Treaty with Nicaragua Granting Canal and Other Rights to the United States*, 10 AM. J. INT'L L. 344, 346 (1916).

145. *Costa Rica*, 11 AM. J. INT'L L., at 217-26.

146. *Id.* at 227-29.

147. *Id.* at 226-27.

148. *Cf.* G. HARASZTI, *supra* note 28, at 305, citing Costa Rica v. Nicaragua for the following proposition: "[S]poradically developed international practice recognizes the validity of both treaties, although obviously [the signatory to both treaties] can perform only one of the treaties."

firmed by events: Nicaragua and the United States neither abandoned their treaty nor compensated Costa Rica, effectively ignoring the ruling of the court. The court, as a consequence, was discredited as ineffectual, and was dissolved in 1918.[149]

Shortly thereafter, an international court was established that lacked the jurisdictional deficiency of the Central American Court of Justice. The Permanent Court of International Justice (P.C.I.J.), established under the auspices of the League of Nations, was the first world court capable of elaborating legal norms for the entire international system.[150] Yet despite the new court's broad jurisdiction and association with an international institution which claimed transcendent legitimacy, the P.C.I.J. was reluctant to explore the legal ramifications of treaty conflict. Twice it faced instances of treaty conflict, and both times it blinked.

In the case of the Austro-German Customs regime, the court was asked to express an advisory opinion as to the compatibility of

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149. The Convention of 1907, establishing the Central American Court of Justice accompanied a General Treaty of Peace and Amity which provided for unilateral termination on the part of any party after ten years. In 1917, the government of Nicaragua, apparently incensed by the Central American court's interference with Nicaraguan sovereignty in the case of Costa Rica v. Nicaragua, indicated its intention to terminate the convention establishing the court (which it may not have had the power to do, as the termination power governed the accompanying treaty). This convention contained a mandate for a congress of the parties in the event that the court came to be suspended. The other four Central American nations attempted to hold such a congress and invited the attendance of the United States. The United States declined because it did not recognize the government of Costa Rica. The proposed congress was never held, and the court lapsed into nonexistence. *See generally* Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759, 781-82 (1932).

> Of the five so-called cases in which only states were parties, three were undertaken on the court's own initiative and were of no jurisprudential importance; two of these cases were very properly before the court and presented problems of a legal nature which might have given tests of its usefulness except for the fact that in both the ambitions of an overshadowing outside state deprived the action of the court of reality.

Id. at 785.

150. Article 14 of the Covenant of the League of Nations provided that: "The Council shall formulate and submit to the members of the League for adoption plans for the Establishment of a Permanent Court of International Justice." LEAGUE OF NATIONS COVENANT art. 14. Pursuant to this mandate, a statute establishing such a court was approved by the assembly and ratified by the member states in 1920. *See* 2 L. OPPENHEIM, *supra* note 26, at 45. The Permanent Court heard 61 cases from 1922 to 1939. A very concise procedural summary of the court's docket may be found in C. JENCKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 69-76 (1964). Useful summaries and comments upon the enormous volume of written opinions produced in these cases may be found in 1 J. VERZIJL, THE JURISPRUDENCE OF THE WORLD COURT (1965).

the Austro-German Customs Protocol signed in 1931 with two previous agreements between Austria and several other nations.[151] The court found the Austro-German treaty inconsistent with the Geneva Protocol of 1922.[152] Having identified an instance of treaty conflict, however, the court considered its task completed.[153]

More significant for our inquiry is the *Oscar Chinn Case,* which has been cited in support of the validity of subsequent conflicting treaties. This case, decided in 1934, concerned the compatibility of Belgian regulations concerning trade in the Congo basin and existing international conventions to which Belgium was signatory.[154] The Congo Act, signed by fifteen European nations at the Berlin Congress of 1885, mandated free trade in the Congo basin. A new convention regulating trade in this region, however, was signed by the belligerents of World War I at Saint-Germain in 1919. This convention covered trade involving the neutral signatories[155] only to the extent these nations voluntarily acceded to it (which none did).[156] It permitted somewhat greater restriction of trade in the Congo basin than had the Berlin Act.[157] In 1931, Belgium drastically reduced tariffs on trade carried by govern-

151. *See* 1 J. VERZIJL, *supra* note 150, at 257-70.

152. The result is anomalous in that fourteen of the fifteen judges viewed the relationship between the Austro-German Customs Protocol and the two previous treaties as identical; seven viewed the Austro-German treaty as consistent with both, and seven viewed the Austro-German treaty as inconsistent with both. Only the Cuban judge, De Bustamante, subscribed to the view which ultimately prevailed. *See id.*

153. A. McNAIR, *supra* note 26, at 223.

154. Oscar Chinn Case (U.K., Ir. v. Belg.), 1934 P.C.I.J., ser. A/B, No. 63, at 61 (Judgment of Dec. 12).

155. The neutral signatories were Denmark, The Netherlands, Spain, Sweden and Norway. Unlike these five, the Soviet Union was unable to join the convention of Saint-Germain until it became a member of the League of Nations in 1935—after this case was decided. 1 J. VERZIJL, *supra* note 150, at 397.

156. *Id.*

157. Article 1 of the General Act of Berlin of 1885 specifies that: "The trade of all nations shall enjoy complete freedom: 1) in all the regions forming the basin of the Congo and its outlets." *See* The Congo Act, Feb. 26, 1885, 10 Martens Nouveau Recueil (2d ser.) 414, 165 Parry's T.S. 485 (also known as the "General Act of Berlin"). Article 1 of the Convention of Saint-Germain, by contrast, calls for "commercial equality" among the "signatory powers," "within the area defined by Article 1 of the General Act of Berlin . . . ." *Id.* In addition "[t]he Convention of Saint-Germain, by Article 13 . . . has abolished the regime of freedom of trade so far as concerns the exemption from customs duties stipulated in Article 4 of the Berlin Act." *Id.* at 20. Nevertheless, the court implied that these slight departures from the broad mandate for free trade in the Congo basin of the Berlin Act made no difference in the case. *See generally id.* at 18-20.

ment-operated transport services in the Congo. Chinn, a British national, had operated his own transport business in the Congo since 1929. As the tariff reduction did not apply to this service, it forced Chinn out of business. The British challenged the validity of the allegedly discriminatory tariff reduction before the P.C.I.J.

The majority determined that the applicable law was provided by the Convention of Saint-Germain, as it had been accepted by both Britain and Belgium, and that the Belgian action was consistent with this treaty. Two of the fifteen justices, however, argued that the Belgian action was a violation of the Berlin Act and that the Convention of Saint-Germain, to the extent that it was inconsistent with the earlier treaty, was null and void ab initio.[158] Some scholars have argued that the majority's rejection

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> The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. . . . In 1919, some of the Powers parties to the General Act of Berlin, including the two States which have submitted the present case to the Court, acted in an entirely different manner. Without inviting the other contracting Parties to take part in the Conference which they held, they thought themselves entitled at that Conference to modify the General Act of Berlin *inter se*. It seems clear that in proceeding thus they acted contrary not only to an essential principle of international law, but also to Article 36 of the General Act of Berlin, which expressly provides that modifications may only be made in the General Act by agreement. This is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin. . . . It should be observed here that the validity of the Convention of Saint-Germain cannot, as the Court seems to hold, be dependent on the question whether or not any government has disputed its validity.

Id. at 72-74 (individual opinion of Van Eysinga).

> It is beyond doubt that the signatory States of the Congo Act desired to make it absolutely impossible, in the future, for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region. Accordingly, in my view, the nullity comtemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment, and the convention concluded in violation of the prohibition is automatically null and void. . . .
>
> I think that the case in which a convention has to be regarded as automatically null and void is not an entirely isolated case in international law. The Covenant of the League of Nations, as a whole, and more particularly its Article 20, in which the Members undertake not to enter into obligations or understandings *inter se* inconsistent with its provisions, would possess little value un-

of this position indicated a repudiation of the view that the latter of two conflicting treaties is void.[159] To the extent that the majority addressed the issue, however, they were noncommittal; thus, most scholars have considered the case inconclusive.[160]

> less treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void.

Id. at 88 (individual opinion of Schücking).

159. Herbert Waldock, Special Rapporteur to the International Law Commission on the Law of Treaties, enunciated this position in his second report, in which he wrote:

> Admittedly, the question of the legality of the Convention of St. Germain had not been raised by either party. But the question was dealt with at length by Judges Van Eysinga and Schücking in dissenting judgments and had, therefore, evidently been debated within the Court. Moreover, these Judges had expressly taken the position that the question of the validity or invalidity of the treaty was not one which could depend on whether any Government had challenged its legality, but was a question of public order which the Court was bound itself to examine *ex officio*. In these circumstances, it is difficult to interpret the Court's acceptance of the Convention of St. Germain as the treaty which it must apply, as anything other than a rejection of the doctrine of the absolute invalidity of a treaty which infringes the rights of Third States under a prior treaty.

Second Report on the Law of Treaties, [1963] 2 Y.B. INT'L L. COMM'N 56-57, U.N. Doc. A/CN. 4/SER. A/1963/ADD.1.

A similar conclusion is drawn by Schwarzenberger. 1 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 485 (3d ed. 1957). The idea here is that the position taken by Schücking and Van Eysinga involves seeing the formation of a conflicting treaty as the violation of a peremptory norm of international law, rather than a consensual norm. The interest protected by the sanction of invalidity is therefore a public interest, rather than the interests of the parties. Accordingly, reasons Waldock, the court may apply this sanction whether or not it is requested by any of the parties. Waldock assumes that because the court declined to do so, it recognized that it lacked the capacity to do so, and that its incapacity reflected the irrelevance of considerations of public order to the problem of treaty conflict, rather than the jurisdictional limitations of the court. His position was ultimately belied by the International Law Commission Convention on the Law of Treaties, which provides for International Court of Justice (I.C.J.) determination of the compatability of treaties with peremptory norms of international law only if (a) the invalidity of a treaty on grounds of violation of a peremptory norm is invoked as a ground for nonperformance, (b) other signatories to the treaty object, and (c) one of the parties to such a dispute requests I.C.J. adjudication. *See* S. ROSENNE, *supra* note 26, at 336. For a fuller discussion of the idea of peremptory norms of international law, *see infra* notes 258-88 and accompanying text.

160. The majority's treatment of this issue is colored by a particular conception of the Court's legitimate role. The Court's jurisdiction is limited to those disputes brought before it by consent of all parties. From this, the majority concluded that it lacked the capacity to consider the validity of the Convention of Saint-Germain unless one of the parties questioned it:

> No matter what interest may in other respects attach to these Acts—the Berlin Act and the Act and Declaration of Brussels—in the present case the Convention of St. Germain of 1919, which both Parties have relied on as the immediate source of their respective contractual rights and obligations, must be re-

Since World War II, the United Nations has replaced the League of Nations as the principal institutional framework for international law.[161] The International Court of Justice, functioning under United Nations auspices, has replaced the P.C.I.J.[162] No case involving treaty conflict has come before this tribunal.

C. *Extrajudicial Responses to Treaty Conflict in the Twentieth Century*

Few other instances of treaty conflict have engaged the attention of western commentators since the close of World War I.[163]

> garded by the Court as the Act which it is asked to apply; the validity of this Act has not so far, to the knowledge of the Court, been challenged by any government.

1934 P.C.I.J., ser. A/B, no. 63, at 19. In an opinion dissenting on other grounds, the British judge, for similar reasons, declined to opine whether the two treaties in fact conflicted, and, if they did, "whether a new treaty made in violation of [the Berlin Act] would be devoid of juridical effect, or whether it would merely be a wrongful act entitling a State which was not a party to the Convention of St.-Germain, but was a party to the Berlin Act, to demand reparation." *Id.* at 62 (dissenting opinion of Sir Cecil Hurst). Hersch Lauterpacht, a proponent of invalidating the latter of two conflicting treaties, was able to distinguish the *Oscar Chinn Case* as follows:

> The rigid application of [this] principle may lead to difficulties in cases in which the modification of a general convention by a new treaty is obstructed by a small number of the signatories of the former treaty. However, as every legal principle must be applied reasonably, it is submitted that the second treaty, although inconsistent with the first, would not be held by an international court to be invalid if it could be shown that the interests of the complaining State are not affected at all or that the degree to which they are affected is slight when related to the general advantage accruing from a new treaty.

1 L. OPPENHEIM, *supra* note 26, § 503, at 895. Lauterpacht limits application of the sanction of invalidity to those instances in which it will make a difference to somebody. Nevertheless, this qualification opened the way for Waldock's wholesale assault on Lauterpacht's position. For more on Lauterpacht's position, see *infra* notes 298-303 and accompanying text. For more on Waldock's attack on this position, see *infra* notes 317-48. For another instance of the World Court's restriction of its attention to instruments recognized by the parties before the Court, see Jurisdiction of the European Commission of the Danube between Galatz and Braila, 1927 P.C.I.J. ser. B, No. 14 at 23. For a typical treatment of the *Oscar Chinn Case* as inconclusive, see A. MCNAIR, *supra* note 26, at 223-24.

161. On the transition from the League to the United Nations, see LEAGUE OF NATIONS, THE LEAGUE HANDS OVER (1946); *see also*.Brierly, *The Covenant and the Charter*, 1946 BRIT. Y.B. INT'L L. 83; Myers, *Liquidation of League of Nation Functions*, 42 AM. J. INT'L L. 320 (1948); Wood, *Dissolution of the League of Nations*, 1946 BRIT. Y.B. INT'L L. 317.

162. The International Court of Justice came into existence in 1946; its statute is essentially similar to that of the P.C.I.J. For a useful introduction to the structure and functioning of the International Court of Justice, see INT'L COURT OF JUSTICE, THE INT'L COURT OF JUSTICE (1976).

163. Of necessity, such a claim can hardly be made with complete confidence. I note only that one controversial instance of apparent treaty conflict, the American recognition

Soviet commentators, by contrast, have expressed great concern about such incidents. The aftermath of World War I entailed the revision of many international conventions initially ratified by Czarist Russia. Excluded from the League of Nations and unrecognized by many Western powers, however, the Soviet Union was not consulted.[164] Vigorous protests were of no avail, as the West refused to recognize the new regime as a successor to Russian treaty rights. The Soviet Union's concern over treaty conflict continued even after its admission to the League of Nations in 1935. Soviet leaders have condemned multipartite defensive alliances as violative of nonaggression and friendship treaties that had been formed with the Soviet Union.[165] Most vigorously condemned

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of the People's Republic of China, posed no such problem in fact.

At the time of recognition, the United States maintained almost sixty treaties with Taiwan. V. Li, DERECOGNIZING TAIWAN 31, 32 (1978). It recognized the government of Taiwan as the sole legitimate government of China, while denying that Taiwan itself was Chinese territory. *See* Cohen, *Recognizing China*, 50 FOREIGN AFF. 30, 36 (1971). One treaty with Taiwan, known as the Mutual Defense Treaty, called for the United States to aid in Taiwan's defense against the People's Republic of China only at Taiwan's request. At least one scholar has argued that in recognizing the People's Republic as the sole legitimate representative of China, the United States recognized it as the successor state of the Republic of China, and as sovereign over Taiwan. *Id.* at 30-43. This would make such recognition inconsistent with the Mutual Defense Treaty, but it would also, Cohen argues, automatically invalidate this treaty. The United States could hardly defend Taiwan against its own government, at the request of that same government. Others have taken the view that the People's Republic and Taiwan are separate sovereign states with no legitimate claims to territory in common, so that no conflict was occasioned by American recognition of China. *See* Scheffer, *Law of Treaty Terminations Applied to the United States Derecognition of the Republic of China*, 19 HARV. INT'L L. J. 946 (1978). The United States adopted the latter posture. The Mutual Defense Treaty was the only treaty of which the People's Republic demanded revocation. This treaty had a termination clause permitting either party to end the agreement unilaterally with one year's notice. The United States did so, while agreeing to the continued validity of its other agreements with Taiwan. Christopher, *Relations with Taiwan*, 80 DEPT. STATE BULL. 10 (Jan. 1980).

164. The Soviet Union was recognized by Germany in 1922, Italy, France, and the United Kingdom in 1924, Japan in 1925, and the United States in 1933. 22 ENCYCLOPEDIA BRITANNICA 521 (1968). For a partial list of treaties protested by the Soviet Union during this period on grounds of conflict with prior obligations, see J. TRISKA & R. SLUSSER, THE THEORY, LAW AND POLICY OF SOVIET TREATIES 119-20 (1962).

165. *See* J. TRISKA & R. SLUSSER, *supra* note 164, at 120. "Iran's adherence to the Baghdad Pact, according to Preterskii, was a violation of its obligations under Article 3 of the Soviet-Persian Treaty of Nonaggression and Neutrality of October 1, 1927. Similarly Italy's action in joining NATO was, according to Preterskii, a 'crude violation' of the terms of its peace treaty." *Id.*

"Preterskii cited also the adherence of Italy on November 6, 1937 to the Anticomintern Pact concluded by Germany and Japan on November 25, 1936, as a violation of an existing treaty with the U.S.S.R., in this case the Soviet-Italian Treaty of Friendship,

were the Paris agreements of 1954, whereby the Western allies, without Soviet consent, provided for the rearmament of West Germany and her accession to the North Atlantic Treaty Organization (NATO).[166] Western commentators have dismissed such Soviet claims as reflecting expansive interpretations if not expansionist aims.[167]

While Western scholars have displayed little interest in concrete instances of treaty conflict, their interest in the abstract problem has grown in recent decades as a result of the United Nations codification of the law of treaties.[168] In the course of drafting the Vienna Convention on the Law of Treaties, Western commentators expressed vastly divergent views on the problem of treaty conflict, and were forced to confront Third World and Soviet views as well. This resulted in an ambiguous treatment of the problem in the final document.[169]

The traditional reticence of authoritative institutions of international law on the problem of treaty conflict is understandable. Prudential considerations dictate that institutions engaged in a struggle for legitimacy not render judgments that they cannot enforce. Academic equivocation on this issue is less easily explained: scholars of international law are not similarly constrained and this license has sometimes encouraged extravagant attributions of authority to a largely mythic world public order.[170] When the Amer-

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Nonaggression, and Neutrality of September 2, 1933." *Id.* (quoting Preterskii, *Znachenie mezhdunarodnogo dogovora dlia tret'ego (ne zakliuchivshego etot dogovor) gosudastva*, SOVETSKOE GOSUDARSTVO I PRAVO 71-80 (1957) no. 4).

166. The Soviets viewed various aspects of these agreements as violative of the Yalta and Potsdam agreements. *See* H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 56 (1972); J. TRISKA & R. SLUSSER, *supra* note 164, at 120.

167. "[A]ny international treaty concluded by the non-Soviet powers for the purpose of strengthening their defenses against Soviet imperialist expansion may be interpreted in the Soviet view as a violation of Soviet rights under existing treaties." J. TRISKA & R. SLUSSER, *supra* note 164, at 120-21.

168. In 1947, the United Nations established the International Law Commission and commissioned it to survey "the whole field of international law with a view to selecting topics for codification." Statute of the International Law Commission, art. 18, (1) U.N. Doc. A/CN. 4/4/Rev. 1. From 1950 to 1966, the Commission issued a series of 17 reports on the law of treaties under the successive leadership of Special Rapporteurs Brierly, Lauterpacht, Fitzmaurice and Waldock. The final codification was adopted in 1969. This convention, as well as the final draft produced by the Vienna Conference in 1966 is reprinted in S. ROSENNE, *supra* note 26, at 96-411. For a history of the process of codification, see *id.* at 29-91.

169. *See infra* notes 344-48 and accompanying text.

170. *See infra* notes 233-94 and accompanying text.

ican, Egyptian and Israeli negotiators turned to the academy for guidance on the problem of treaty conflict, however, they found themselves in a doctrinal morass; and now it is time for us, too, to don galoshes and mackintoshes and march off into the bog.

IV. The Paradox of Treaty Conflict

International legal institutions have been reluctant to confront the problem of treaty conflict, because it raises deep questions about their own legitimacy.[171] Academic theorists have only been slightly more forthcoming. Most have agreed that the formation of conflicting treaties violates international law; yet they have often been reluctant to explore its consequences. Concerning themselves largely with the line between the legal and the illegal, they have paid little attention to the range of remedies available to states injured by acts illegal under international law.

Some of this antipathy toward the specification of remedies may be ascribed to the relative weakness of international legal institutions of enforcement.[172] International law's apparent impotence has given it a peculiarly fictional sort of existence, and, consistent therewith, a rather literary tradition of scholarship.[173] Because international law has often existed more as a gleam in the eyes of visionary legal theorists than as an obligatory code for the behavior of nations, the question of remedies has seemed academic. Yet even as an academic exercise, attributions of legality can acquire meaning only with a definition of the rights thereby created; attributions of illegality can acquire meaning only with an elaboration of the sanctions they entail. In interrogating international legal authorities as to the legal status of conflicting treaties, we must be careful to elicit specific information on the rights of the injured parties. When we do so, we shall see that academic opinion resolves itself into two competing views of the treaty conflicts problem, resting on two different conceptions of the entitlements created by treaty. Some authors view the latter of two conflicting treaties as void because they view treaty expectations as property entitlements. Others view such treaties as valid because

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171. Indeed, these institutions have seemed reluctant to engage in any review of treaties. "So far, it is believed, no international tribunal has been directly compelled to pass upon the question of the effect of conflicts or incompatibility [with international law] upon the validity of a treaty." A. McNair, *supra* note 26, at 214.

172. *See generally* W. Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971).

173. "A literary approach to the presentation of international law persists. There have been marginal changes of tone and vocabulary, but there has been preserved an underlying structure of thought and argument which is more literary than scientific . . . [and characterized by] the tone of the inspired dilettante." Allot, *Language, Method and the Nature of International Law*, 1971 Brit. Y.B. Int'l L. 79. My Article is, of course, no exception.

they view treaty expectations as no more than liability entitlements.

A. *The Illegality of Treaty Conflict*

It follows from the definition of treaties offered above[174] that obligations undertaken in treaties may not be violated without violating international law. In determining the legal consequences of treaty conflict, however, we have to know something more about the scope of such obligations. Specifically, we have to know whether or not international law contains a doctrine of anticipatory breach.[175] In other words, we must know whether a state can violate a treaty simply by creating a conflicting obligation, or whether it must actually fail to perform. An answer to this question requires an explication of the concept of good faith in international law.

Most commentators identify the requirement that treaties be observed with a requirement that they be performed in good faith.[176] This dual obligation is embodied in the traditional principle of *pacta sunt servanda* as formulated by the United Nations International Law Commission: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[177] The American Law Institute Restatement of Foreign Relations Law also acknowledges a legal duty under international law to perform international treaty obligations in good faith.[178] Lord McNair, the leading British authority on treaty law, suggests

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174. *See supra* note 26 and accompanying text.

175. By anticipatory breach, I mean the doctrine that the formation of a contract obligating one to violate an earlier contract under some future circumstance is a wrong, mandating imposition of whatever sanctions ordinarily attend breach. For references and further discussion of this doctrine in American contract law, *see infra* note 196.

176. Lauterpacht is an exception. He does recognize a general "obligation of States to act in good faith." 1 L. OPPENHEIM, *supra* note 26, § 155a, at 346. However, he does not mention this obligation in his discussion of the obligation to observe treaties. *Id.* §§ 491-493, at 877-81. Moreover, he rejects the principle of *pacta sunt servanda* as the basis for that obligation, preferring instead to base it on "a customary rule of International Law that treaties are binding. The binding effect of that rule," he adds, "rests in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of International Law." *Id.* § 493, at 881. *See infra* notes 262-69 and accompanying text for a more detailed discussion of Lauterpacht's views on sources of international law.

177. Art. 26, Vienna Convention on the Law of Treaties, *reprinted in* S. ROSENNE, *supra* note 26, at 196.

178. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 138 comment a (1965).

that this requirement of good faith performance is analytically related to the concept of a treaty; the applicability of this concept is, in turn, one of his criteria for the existence of an international legal system.[179] Brierly actually roots the binding force of treaties in the obligation to act in good faith. "It is a truism," he writes, "that no international interest is more vital than the observance of good faith between states, and the 'sanctity' of treaties is a necessary corollary."[180]

For all of these commentators, the obligation to perform treaties is governed by the requirement of good faith. What is meant by this ubiquitous requirement? According to McNair, "[a] state may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of treaty; in such cases a tribunal demands good faith and seeks for the reality rather than the appearance."[181] Commenting on the *North Atlantic Fisheries Case*,[182] he concludes: "In short, the making of regulations by one party which in substance destroyed or frustrated the right of the other party would be a breach of good faith and of the treaty."[183] Thus, any act which destroys the value of a treaty right is a breach of the obligation to perform a treaty in good faith. This obviously applies to legislation which reduces the value of the promised performance, and especially to legislation which prohibits performance outright. The next question for us to consider is whether the acts giving rise to a breach of good faith in the performance of a treaty may include the formation of new treaties.

This question is more complicated than may at first appear, because of the dual nature of treaties as sources of both municipal and international law.

To the extent that treaties are binding under domestic law they are analogous to statutes. As noted in Chapter II, most na-

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179. A. McNair, *supra* note 26, at 465-66, 549-50.

180. *See* J. Brierly, *supra* note 120, at 331.

181. A. McNair, *supra* note 26, at 540. *See id.* at 465 for the role of the principle of good faith in treaty interpretation.

182. *See* J. Scott, The Hague Court Reports 141 (1916).

183. A. McNair, *supra* note 26, at 550. McNair also discusses a communication from the British government to the American government concerning the Hay-Pauncefote Treaty in which the British ambassador wrote: "International law does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right." *Id.* at 548.

tions view so-called self-executing treaties as binding law; other treaties may become binding through enabling legislation.[184] In this country, legally binding treaties are on par with acts of Congress. In the event of a conflict between an act of Congress and a self-executing treaty, the later document supersedes the earlier one.[185] This would suggest that the formation of a subsequent treaty inconsistent with performance of an earlier treaty would be as much a breach of good faith as the passage of a legislative act prohibiting performance of the earlier treaty.

Surprisingly though, McNair expresses reservations about the applicability of the doctrine of good faith to treaty conflict. If the first treaty is between *A* and *B* and the second is between *A* and *C*, McNair argues that "*A* does not *ipso facto* commit a wrongful act against *B* by making the second treaty, and does not do so unless and until *A* actually violates the treaty with *B*."[186] For this conclusion, McNair offers two principal arguments: First, *A* may decide to break the second treaty rather than the first; and second, performance of both treaties may become consistent before the need to choose arises.[187] Recall, however, that the standard for breach

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184. *See supra* note 29.

185. *Id.*

186. A. McNair, *supra* note 26, at 222.

187. *Id.* McNair in fact offers two additional arguments at this point which I will not treat in the text because they add little to our understanding of the problem.

The first such argument is the possibility that *A* will obtain *C*'s consent to the dissolution of the second treaty, or its offensive part. The rendering of this argument into a concrete context immediately displays its triviality: Israel will surely not consent to the dissolution of the peace treaty, nor will Egypt request it. If Egypt were prepared to dissolve the treaty it would never have incurred the diplomatic cost involved in making it in the first place—and this would be true of any state that would knowingly create a treaty conflict.

The second such argument is that *A* may not be capable of performing the offending treaty. Working out the implications of this argument requires that we distinguish different situations on the basis of which parties know that *A* cannot perform the second treaty. In the first place, we may exclude all situations in which one of the two parties to the second treaty knows that *A* cannot perform, but the other does not; if such is the case, the second treaty is void on grounds of fraud. *See* Vienna Convention on the Law of Treaties, art. 49, *reprinted in* S. Rosenne, *supra* note 26, at 278; 1 L. Oppenheim, *supra* note 26, § 500, at 892. If the second treaty is void, no treaty conflict is actually created, although international law is still violated. This leaves four cases to consider: (l) All three parties know that *A* cannot perform the second treaty. In this case there is no reason for *C* to form the treaty; (2) None of the parties know that *A* cannot perform. In this case, the possibility that *A* cannot perform has the same significance as the possibility that *A* will decide not to perform, which is analyzed in the text; (3) *A* and *C* know, but *B* does not. In this case, their only possible motive in making such a treaty is the desire to convince *B* that it cannot rely on its treaty with *A*. If this ambition succeeds, however, *B* has been dealt an injury which it

of good faith that McNair attributes to the International Court of Justice is the "destruction" or "frustration" of the victim's rights.[188] Let us consider each of his arguments from the standpoint of this criterion, by applying them in a concrete context.[189]

McNair's first argument is that *A may prefer to breach the offending treaty*. In the Egyptian-Israeli context, this might entail Egypt deciding to intervene in a war between Israel and Syria on the Syrian side. While such a result is conceivable, it is made considerably less likely by the peace treaty, for three reasons.

First, to the extent that Egypt's treaties are binding as municipal law, the peace treaty both eliminates a compelling reason for Egypt's leaders to intervene on Syria's behalf in such a situation, and creates a compelling reason for them not to. Prior to the peace treaty, failure to intervene might have violated Egyptian law; but after ratification of the treaty, intervention on Syria's behalf would violate Egyptian law.

Second, the peace treaty eliminates whatever security Egypt's Arab League partners might have derived from the assumption that Egypt would be reluctant to violate international law. Assuming the validity of both treaties, Egypt would have to violate one or the other in the event of a conflict. Whatever disincentives against breach the international legal system may provide, those disincentives no longer secure the Arab League treaties in particular. From the standpoint of those disincentives alone, Egypt will now be indifferent as between breaching the earlier treaties and the later treaties. This means (assuming, again, the validity of the second treaty) that from the standpoint of international law, Egypt's treaty partners are no better off than they would be if

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has no protection against unless the formation of such a conflicting treaty is viewed as a violation of good faith; and (4) *B* knows, but arguably *B* suffers no injury from *A*'s formation of a conflicting treaty because damage to *B*'s rights is bound to be exceedingly rare. Even in this situation, however, *B* may suffer injury to the security of its expectation of performance. Merely by making a conflicting treaty, *A* indicates its willingness to breach the earlier treaty. The mere fact that it may not be able to perform the second treaty doesn't insure that it *will* perform the first.

188. A. McNAIR, *supra* note 26, at 550; *see also supra* note 183 and accompanying text.

189. The context is the instances of treaty conflict with which we are most familiar—those created by the Egyptian-Israeli peace treaty. For purposes of this discussion, of course, we need only consider those aspects of the treaty which, at the time of the signing, could produce conflicts contingent upon future circumstances. This is not meant to suggest that there were no aspects of the treaty that in and of themselves violated Egypt's previous treaty obligations, regardless of future events.

they had never made a treaty at all. Even if their treaty rights have not yet been violated, the value of those rights has certainly been destroyed.

Third, the erosion of the Arab League's confidence in Egypt's future performance renders that performance even more unlikely. If, for example, Syria could not rely on the assistance of Egypt in the event of hostilities with Israel, it might take greater pains to avoid such hostilities. This might mean avoiding an attack that its government feels is justified under international law, or avoiding policies that might bring it into aggressive confrontation with Israel. In this way, the erosion of security in future performance may preclude the very conditions in which performance would become obligatory. The mere threat of non-performance, therefore, may burden a treaty partner even if actual breach never ensues.

McNair's second argument is that *the treaties could become consistent before performance was required.* In the context of the Middle East conflict, this could happen in two ways. First, it could happen de jure, that is, the Arab League could join in the Camp David peace process. Second, it could happen de facto, that is, circumstances calling for performance might never arise. The Arab League, for example, might never actually find itself in what it would view as a defensive war with Israel. In either case, however, the result would be the same: the Arab League would have failed to receive whatever security it had contracted for. I have already noted that the League's inability to rely on Egyptian performance might discourage them from provoking the conditions which would call for the performance of their treaty. This argument applies as well to the possibility that the League might join in the Camp David peace process. The departure of Egypt from the League's ranks considerably weakened the League's strategic position vis-a-vis Israel. This would surely have been a factor in any reevaluation of negotiation as a strategy.[190] It is virtually impossible to conclude, even after the fact, that an anticipatory breach was costless. To the extent that the cost involved is the sort that *B* may have sought to prevent by making a treaty with *A*, *B*'s treaty

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190. In fact, it was the hope of President Carter, and perhaps of President Sadat as well, that Egypt's unilateral decision would force the other Arab disputants to the conference table. *See* J. CARTER, KEEPING FAITH 349, 384 (1982).

rights may be said to have been destroyed or frustrated by *A*'s anticipatory breach.

Placing McNair's arguments in a concrete context thus reveals two deficiencies: they rely on dubious counterfactual hypotheses and they ignore an important function fulfilled by treaties.

McNair's strategy is to suggest that treaty conflict should not give rise to a remedy if it does not create any injury that would not have otherwise occurred. The difficulty with this approach is that it presumes that we can know what would have occurred had there been no anticipatory breach. Even if an anticipatory breach never results in nonperformance of a conditional obligation, it is impossible to know how many additional conditions mandating performance would have arisen but for the anticipatory breach.

But the more egregious presumption made by McNair is that only nonperformance can constitute the frustration of a treaty right. A number of circumstances may indeed result in *A* meeting its treaty commitment to *B*, notwithstanding a second treaty commitment to do otherwise. It is similarly possible, however, that *A* would have satisfied *B* in such a situation without ever having entered into a treaty. The reason why *B* has entered into a treaty with *A* is to increase its certainty that *A* will perform. In order to achieve that increased certainty, *B* was willing to make promises in return. As a result, it may have foregone some opportunities and made some enemies.[191] *B* was willing to accept these costs because it gained something in return that it would not otherwise have gotten—security. Uncertainty is a calculable cost[192] which treaties operate to decrease.[193] Controlling this cost is the economic rationale for contract.[194] In the realm of politics and war, uncertainty is more prevalent than in most other kinds of activity, and its costs may be higher. Nevertheless, treaties may operate like

191. As, for example, Egypt did when it signed its treaty of peace with Israel.

192. W. NICHOLSON, MICROECONOMIC THEORY 193-231 (1985). This has been noted in the context of contract law, *see* THE ECONOMICS OF CONTRACT LAW 4 (A. Kronman & R. Posner eds. 1979), and property law, Note, *Uncertainty Over Adverse Government Action and the Law of Just Compensation*, 90 YALE L. J. 1670 (1981), as well as in the sphere of international relations. *See* R. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 6-18 (1981).

193. R. BILDER, *supra* note 192, at 6-7.

194. THE ECONOMICS OF CONTRACT LAW, *supra* note 192, at 1-9; C. HARDY, RISK AND RISK-BEARING 1-5 (1923); R. POSNER, ECONOMIC ANALYSIS OF LAW 65-100 (1977).

other agreements to provide a measure of diplomatic and military security.[195] When this security no longer exists, however, it makes little sense to say that treaty rights still exist. For this reason, in the realm of contract, it is often considered unlawful to make a private contract that conflicts with a prior agreement with another party, and it may be considered a breach of contract.[196] The same rationale holds for extending the notion of anticipatory breach to treaty conflict; for if *B* does not know which of two competing obligations *A* will perform, *B* has gained no security by means of its treaty. It is as if *B* had made a unilateral promise. Under these circumstances, *B* has already lost whatever comparative advantage it gained by making the treaty.

In distinguishing treaty conflict from breach of good faith,

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195. M. McDougal, H. Lasswell & J. Miller, The Interpretation of Agreements and World Public Order 1 (1967). The close analogy between treaty and contract law is examined in detail in H. Lauterpacht, Private Law Sources and Analogies of International Law (1927). *See also* J. Brierly, *supra* note 120, at 317; A. McNair, *supra* note 26, at 6; C. Rozakis, *supra* note 85, at 1. *Cf.* Waldock, *General Course on Public International Law,* 2 Recueil des Cours 75-76 (1962) (the legal nature of treaties is analogous but not identical to contract). Of course, international agreements are not without their own risk. R. Bilder, *supra* note 192, at 14-15. However, they may be artfully constructed to minimize those risks. *Id.* at 23-194. In general, these risks will only preclude agreement if they outweigh the risks of proceeding without agreement, and thereby leave one of the parties worse off as a result of agreement. *Id.* at 12-13.

196. The *Restatement of Torts* argues that "intentionally and improperly interfer[ing] with another's prospective contractual relation . . . [by] inducing or otherwise causing a third person not to enter into or continue the prospective relation" is a tort against the promisee. Restatement (Second) of Torts § 766B (1977).

The *Restatement of Contracts* argues on this basis that a contract inducing nonperformance on another contract should be unenforceable on grounds of public policy. It cites Corbin and Williston for support. Restatement (Second) of Contracts § 365 (1979). However, the cited sections of Corbin's treatise concern bargains involving breach of fiduciary relationships and breach of relationships of agency, respectively. 6A A. Corbin, Corbin on Contracts §§ 1456-1457 (1962). Section 1470, however, is explicitly devoted to contractual conflicts and indicates that there are many circumstances under which conflicting contracts should in fact be considered valid. *Id.* at § 1470. In addition, Corbin points out that the illegality of a contract need not mean voidness. *Id.* at §§ 1373-74. Gilmore argues that Corbin's view is more true to the original spirit of contract because it involves offering the injured party only damages rather than specific performance. G. Gilmore, Death of Contract 14 (1974). The death of the special category of contract represents the decline of liability as the dominant interpretation of contract rights.

Regardless of the status of the later contract, however, Corbin clearly states that the making of a conflicting contract is a repudiation of the infringed-upon prior contract, and that such a repudiation constitutes anticipatory breach and should not be considered elective. 4 A. Corbin, *supra,* at §§ 959, 981; *see also* 11 S. Williston, §§ 1301, 1320 (3d ed. 1968). Williston recognizes that there are objections to the doctrine of anticipatory breach, but admits its authority. *Id.* § 1312.

McNair contradicts himself. The implication of his argument is that *A* must actually violate *B*'s treaty rights in order to commit a breach of good faith. While this view is not without precedent,[197] it contradicts McNair's own view that any act which frustrates or destroys a treaty right violates good faith.

The International Law Commission, however, has sided with the latter of these two contradicting views. Article 34 of the Vienna Convention provides that "[a] treaty does not create either obligations or rights for a third State without its consent."[198] In its commentaries on the draft articles, the commission said that in the event of treaty conflict, the rule now embodied in article 34 "precludes the parties to the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty without their consent."[199] It is not performance that is thus protected, but the right to expect it. Treaties are formed by the mutual expression of an intention to be bound by international law; the creation of treaty conflict repudiates that intention. They are generally formed for the purpose of securing performance; the creation of treaty conflict destroys that security. In so doing, it deprives the parties to the earlier treaty of their rights.

To summarize, then, the following five principles, taken together, imply that the making of conflicting treaties is itself a violation of international law: (l) Breach of treaty is a violation of international law; (2) Breach of good faith in implementing a treaty is equivalent to breach of treaty; (3) The creation of a domestic legal obligation to breach a treaty is a breach of good faith; (4) This applies as well to obligations to breach which are conditioned on future circumstances; and (5) The making of a second treaty is, in these respects, like the creation of any other domestic legal obligation.

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197. Roxburgh took the position that "whenever a state concludes a treaty which violates the existing rights of a third state, . . . the latter is entitled to intervene." R. ROXBURGH, *supra* note 33, at 33. Of course intervention is both a severe and an archaic remedy, although one which was sometimes employed in response to breach of treaty. Thus it is difficult to infer whether Roxburgh would now consider mere frustration (rather than violation) of the existing rights of a third state grounds for some lesser remedy.

198. S. ROSENNE, *supra* note 26, at 224.

199. *Draft Articles on the Law of Treaties*, 61 AM. J. INT'L L. 346 (1967) [hereinafter cited as *Draft Articles*] (commentary on Draft Article 26(4), which subsequently became Article 30(4)).

B. *The Ambiguity of Illegality*

That treaty conflict violates international law tells us little, however. Corbin points out that illegality may mean many things where a contract is concerned.[200] The same holds true for treaties. To say that the creation of a treaty conflict is a violation of international law is to say no more than that it is like any other breach. While the illegality of treaty conflict may provide grounds for invalidating the second treaty, it may simply justify awarding reparations to the injured party.[201]

Any further refinement of the claim that the making of a conflicting treaty is contrary to international law requires the confrontation of a jurisprudential paradox. This paradox stems from the fact that the making of a treaty is the creation of a legal obligation.[202] In order for there to be an act of treatymaking denominated illegal, there must be a treaty created; but such a treaty is a legal obligation. If the act is illegal, the treaty produced thereby must nevertheless have some legal force; if it creates no legal obligation, no act, illegal or otherwise, has taken place. This paradox, an illegal creation of a legal entity, renders discussion of treaty conflict exceedingly difficult. The categorical scheme employed by most international law scholars simply does not admit of the possibility that international law may speak with two voices.

Fitzmaurice, for example, complacently observes that:

> The supremacy of international law in the international field simply means that if nothing can be or is done, the State will, on the international plane, have committed a breach of its international law obligations, for which it will be internationally responsible, and in respect of which it cannot plead the condition of its domestic law by way of absolution. International law does not therefore in any way purport to govern the content of national law in the national field—nor does it need to. It simply says—and this is all it needs to say—that certain things are not valid according to international law, and that if a State, in the application of its domestic law acts contrary to international law in these respects, it will commit a breach of its international obligations.[203]

This passage is more consistent than it is informative. Domes-

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200. 6 A. CORBIN, *supra* note 196, §§ 1373-74.

201. *See* A. MCNAIR, *supra* note 26, at 553-86 for a review of remedies for breach.

202. *See supra* note 26 and accompanying text.

203. Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 80 (1957).

tic legislative acts which require the violation of international law, we are told, are invalid as international law. Implementation of such acts violates international law. But why are such acts invalid as international law? Is it because they conflict with international law, or because they are not sources of international obligation in the first place? If the act consists of the ratification of a treaty, is it still invalid? If the legislation is invalid, presumably its mere passage would not constitute a violation of international law, since from the standpoint of international law, nothing would yet have happened; only implementation of the legislation would violate international law. But what if the legislation is a valid source of international obligation—is its mere ratification sufficient to constitute breach of an international obligation, or must it be implemented? In describing all acts violating international law as invalid from the standpoint of international law, Fitzmaurice conjures up a world without treaty conflict. The question raised by treaty conflict is whether an act can simultaneously violate and create international law. Fitzmaurice begs the question by assuming that acts violating international law may create only domestic law; nor is such myopia uncommon.[204]

This stress on the rigid separation of the spheres of international and domestic law obscures the fact that international legal obligations are created by operation of domestic law. Hence, conflict between international and domestic legal obligations may also be a conflict between two international legal obligations. If such a conflict cannot be satisfactorily explained in terms of a clash between international law and domestic law, it may result from a conflict between two different types of international law.

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204. Hackworth comments that

> [w]here a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail. While this is necessarily true as a matter of municipal law, it does not follow, as has sometimes been said, that a treaty is repealed or abrogated by a later inconsistent statute. The treaty still subsists as an international obligation although it may not be enforceable by the courts or administrative authorities.

5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 85 (1943).

The *Restatement of Foreign Relations Law* is similarly noncommittal: "The duty of a state to give effect to the terms of an international agreement to which it is party . . . is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the term of the agreement." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 140 (1965).

An examination of the International Law Commission's Vienna Convention on the Law of Treaties confirms this suspicion. This convention treats the problem of treaty conflict as a conflict within international law; yet its language seems as equivocal as that of the passage by Fitzmaurice discussed above. Draft Article 26(4) says of conflicting treaties:

> When the parties to the later treaty do not include all the parties to the earlier one: . . . as between a State party to the earlier one, and the State party to both, the earlier treaty governs their mutual rights and obligations; (b) as between a State party to both treaties and a State party to only the later treaty, the later treaty governs their mutual rights and obligations.[205]

Lest we leap too quickly to the conclusion that this text establishes the validity of the conflicting, or subsequent, treaty, we are warned by the official commentaries to the draft articles, that the rules in paragraph 4 of Section 26 should not be "interpreted as sanctioning the conclusion of a treaty incompatible with its obligations towards another state under another treaty."[206] It seems as though the second treaty is at once legal and illegal: valid as between the parties, even though its formation violates international law.

The implication is that there are two types of legal norms coexisting within the same system: relational norms creating obligations toward specific participants in the system, and general norms creating obligations toward the system as a whole. The question posed by treaty conflict is what happens when these two types of norms come into conflict. Fitzmaurice suggests that a relational norm violating a systemic norm might be invalid. The Vienna Convention implies the reverse. The simple assertion that treaty conflict is illegal does not serve as a basis for choosing between these two views. Indeed, as many theorists have noted, legal norms are meaningless without the specification of sanctions for

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205. *Draft Articles, supra* note 199, at 341.

206. *Id.* at 347. Paragraph 5 of Article 30 provides that:

> Paragraph 4 is without prejudice to . . . any question of the termination or suspension of the operation of a treaty under Article 60 [i.e., for breach] or to any question of responsibility which may arise for a state from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another state under another treaty.

Vienna Convention on the Law of Treaties, May 23, 1969, 63 AM. J. INT'L L. 875, 885 (1969).

their breach.[207] Thus a meaningful account of the illegality of treaty conflict will elude us until we can say something about the sanctions it entails. Determining these sanctions will in turn require a clarification of the conflict between systemic and relational norms in international law. These tasks may be facilitated by the elaboration of two related frameworks: one concerned with the nature of the legal norm violated, the other concerned with the sanction for violation.

C. *Objective Right and Subjective Rights*

The first framework involves a distinction between acts violating the "objective right" and acts violating "subjective rights." This distinction, though mystifying to English-speaking lawyers, is

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207. Kelsen argues that unless a sanction and a means of redress are specified, no legal right follows from another party's duty. H. KELSEN, GENERAL THEORY OF LAW AND THE STATE 81-83 (1961). When sanctions are specified, however, he argues that the notion of an "illegal" act becomes meaningless. Thus he writes:

> The delict, i.e., the fact that one party has not fulfilled the contract, is not sufficiently characterized by saying that it is "a condition of the sanction." The making of the contract and the suit of the other party are also such conditions. What then is the distinctive characteristic of that condition which is called the "delict"? Could no other criterion be found than the supposed fact that the legislator desires conduct contrary to that which is characterized as "delict," then the concept of delict would be incapable of a juristic definition. The concept of delict defined simply as socially undesired behavior is a moral or a political, in short, not juristic but a metajuristic, concept. Definitions characterizing the delict as a "violation of law," as an act which is contrary to law, "illegal" or "unlawful," as a "negation of law"—in German, "un-law" (Unrecht)—all are of this kind. All such explanations only amount to saying that the delict is against the purpose of law. But that is irrelevant to the legal concept of delict. From a merely juristic point of view, the delict is no "violation of law"—the specific mode of existence of the legal norm, its validity, is in no way endangered by the delict. Nor is the delict, from a juristic point of view, "contrary to law" or a "negation" of law; for the jurist, the delict is a condition determined by law as much as, in our example above, are the making of the contract and the action.

Id. at 53. H.L.A. Hart argues a similar point. H. HART, PUNISHMENT AND RESPONSIBILITY 6-7 (1968). A further requirement of specificity is stressed in A. ROSS, A TEXTBOOK OF INTERNATIONAL LAW 24 (1947): "A legal rule which implied certain duties but did not state on when those duties bear would only be a meaningless fragment." In the absence of specific plans for enforcing a norm, its role becomes merely mythic. Such myths legitimate a legal order that permits their violation. *See* T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937); M. EDELMAN, THE SYMBOLIC USES OF POLITICS 22-43 (1977); W. REISMAN, FOLDED LIES 15-36 (1979). "My colleagues and I have urged scholars to reserve the term *law* for those processes of decision which are both authoritative and controlling." W. REISMAN, *supra*, at 17.

basic to civil law jurisprudence.[208] As a consequence, it has had a major structuring influence in international legal theory.[209]

In civil law systems, the "objective right" consists of those conditions required by law. Objective right may be a source of "subjective rights" which are private claims against particular persons. Private entitlements are always subjective; such subjective claims will be enforced, however, only if they are consistent with objective right.[210] Only the implementation of objective right jus-

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208. Gutteridge characterized this distinction as "difficult to explain to the English lawyer." Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 24 (1935). Pound noted that "[c]riticism of the term 'subjective right' becomes common in the present century. The terms [of civil law] are awkward and happily are not needed in English, since we have distinct words for right (what is just), *a* right, and law." 4 R. POUND, JURISPRUDENCE 65 (1959). The easy distinguishability of these terms in English is viewed by Fletcher as a buttress to a regrettable positivism less prevalent on the continent. Fletcher, *supra* note 23, at 970, 980-87.

209. The jurisprudence of international law has been dominated by the civil law tradition since its inception.

> It was only natural to carry over Roman pronouncements on municipal law to international law, *viz.*, on ownership to territorial sovereignty; on contracts to treaties; on agency (mandatum) to diplomatic missions, etc. Not only did the Corpus Juris enjoy the highest authority in the atmosphere of humanism as *ratio scripta*, it was the law of the land within the Holy Roman Empire and an important influence in other European territories. Moreover, it was at the bottom of powerful canon law.

Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 681-82 (1952). Nussbaum goes on to point out that England, far from resisting this development in favor of its own common law, facilitated it enormously. *Id.* at 683-85. He also suggests that the influence of Roman law was ultimately replaced by that of first, natural law, and then the civil codifications of the nineteenth century. *Id.* at 685-86.

Rozakis has suggested that the idea of objective right (and objective wrong) in international law is increasingly being realized through the development of international legal institutions. C. ROZAKIS, *supra* note 85, at 24-30. Duguit suggested the applicability of such a notion to international law:

> The international norm, being thus understood as founded on the conditions of international solidarity and on the sentiment, of justice, and as applying, not to imaginary entities which would be nations and States, but to individuals, governors and governed, who compose them, avoids the objection which, under different forms, has always been made to international law and which can be formulated thus: there can be no international law because there is no commanding power imposing an international norm upon the different states.

Duguit, *Objective Law IV*, 21 COLUM. L. REV. 242, 253 (1921). In taking this position, Duguit anticipates the views of the influential legal realist scholars of international law, Harold Lasswell and Myres McDougal. For elaboration of their views and his, see *infra* text accompanying notes 281-94.

210. According to Pound, private rights were first distinguished from "what is right backed by the state" by Donellus in 1 DE IURE CIUILI 2-4 (1589):

> Donellus had distinguished *ius* as law from *ius* as a right. But the word we trans-

tifies the coercive force of the state. Objective right represents a

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> late as "law" meant what is right backed by the state. Thus an ethical idea was made to stand out both in *ius*, law, and in *ius*, a right [in the nineteenth century]. The latter was taken to be the former put subjectively. *Ius* as "law" was objective right *(droit objectif, objektives Recht)*.

4 R. POUND, *supra* note 208, at 61. Fichte saw legal rights (as guaranteed by the legal order) as the embodiment of reason, which in turn was the source of freedom exercised through the use of legal rights. Chroust, *Some German Definitions of Law and Legal Philosophy from Kant to Kelsen*, 22 NOTRE DAME LAW. 365, 368 (1947). Hegel developed this idea with specific reference to his dialectic of subjectivity and objectivity. Thus he defined right as follows: "An existent of any sort embodying the free will, this is what right is. Right therefore is by definition freedom as Idea." G. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 33 (T. Knox trans. 1952). Taken out of context, this definition might be understood to justify unrestricted license. By the "embodiment of the free will," however, Hegel refers exclusively to the product of the will acting rationally, which means in such a way as to maximize its own freedom. For the will to maximize its own freedom, however, requires that it act in such a way as to maximize the freedom of all, by conforming to just laws. This conclusion follows from a claim about the nature of the will: "The will's activity consists in annulling the contradiction between subjectivity and objectivity and giving its aims an objective instead of a subjective character . . . ." *Id.* at 32. The will seeks to objectify itself, that is, have a real effect on the world. Yet packed into Hegel's concept of objectivity is a second connotation beyond that of reality. Objectivity also connotes universality. Thus, "[t]he absolute goal, or, if you like, the absolute impulse, of free mind is to make its freedom its object, i.e., to make freedom objective as much in the sense that freedom shall be the rational system of mind, as in the sense that this system shall be the world of immediate actuality." *Id.* at 32. For Hegel it is the natural function of the will to realize the ambitions of mind or spirit; and it is the natural ambition of mind to become objective, that is to perceive and reason from a universal rather than merely individual perspective. Thus the genuinely free will of any individual will seek to maximize freedom of mind generally, rather than freedom for the individual. Objective right would therefore consist of those actual conditions which maximized freedom for all; subjective rights would consist of those acts or expectations which conform to objective right.

This formulation had a structuring influence on the scholarship of the Pandectists, which ultimately shaped the German Civil Code. *See, e.g.*, 1 B. WINDSCHIED, LEHRBUCH DES PANDEKTENRECHTS § 37 (5th ed. 1882). "Right (right in the subjective sense, subjective right) is the concrete content of a power or authority of the will granted by the legal order (right in the objective sense, objective right.)" For translation of the rest of this paragraph, from a later edition, see R. POUND, *supra* note 208, at 65 n.43. The distinction between objective right and subjective rights is also crucial for understanding the jurisprudence of the West German Constitution or Basic Law. This point is helpfully, although somewhat confusingly, developed in Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980):

> To understand the value orientation of the West German legal system, it is helpful to realize that German constitutional jurisprudence distinguishes between basic rights as *subjective* rights and basic rights as *objective* value decisions of the constitutional order . . . . Subjective rights, often termed "defense" or "negative" rights, are claims that the individual has against the state. . . . Basic rights as objective value decisions are viewed as charging the state, in the words of the President of the Federal Constitutional Court, "with an *affirmative duty* to implement programs to secure and protect these values." They seem to oblige

public interest, to which individual interests may legitimately be subordinated.[211] Acts contrary to objective right, sometimes referred to in European legal systems as acts contrary to good morals, therefore, can not give rise to subjective rights, and may be criminally punished.[212] This entails, of course, that the vindica-

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> the state actively to create and safeguard a sociopolitical context that will be conducive to the vigorous exercise of subjective rights. The exercise of these subjective rights is in turn the principal means for realizing the values of the political system.

Id. at 675-76.

The distinction between subjective and objective rights has also been influential in French jurisprudence. *See generally* Duguit, *Objective Law*, 20 COLUM. L. REV. 817 (1920); Duguit, *supra* note 209. Duguit views subjective rights as entirely derivative from and subordinate to objective right; what is noteworthy, however, is his sense of the universality of the distinction:

> In asking whether law exists and what it is, we may have two questions in mind:
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> The first is to know whether a man living in a given society is by that very fact subject to a rule of conduct whose violation involves a social reaction which can be organized. The rule of conduct so defined . . . is . . . objective law. . . .
>
> [W]ithout indeed dismissing the problem of objective law, man has for centuries made it of secondary importance and wished to solve first the whole insoluble problem of subjective law. . . . [A]re there certain wills which have, permanently or temporarily, a quality of their own which gives them the power to impose themselves as such upon other wills? If this power exists, there is a subjective law . . . .

Duguit, *supra*, at 818-19. *See also* Gutteridge, *supra* note 208, at 24, 27-28, for a discussion of the similar views of Josserand.

211. Gutteridge writes of Josserand, Duguit, and Gény, three proponents of "objective right":

> [Josserand] advances the view that the exercise of a right must be governed by its conformity to the social purpose of the rule of law which creates the right. Law is brought into being for the benefit of the community and not for the advantage of the individual. M. Josserand cites with approval the statement of Duguit that man, as an isolated being, cannot have any rights so that it is only as a member of an organized community that it is possible for him to acquire a legal personality. The extent of the exercise of a right must, therefore, be fixed, not by reference to the benefit which is conferred on the individual, but in its relation to the social complex as a whole. Gény expresses very much the same idea when he says that it is necessary to weigh individual interests in the scales of justice, and to secure the preponderance of those which are the most important when judged by the criterion of the interests of society.

Gutteridge, *supra* note 208, at 27-28. Kommers writes of the German basic law: "While the state must provide a system in which subjective rights can be exercised, those rights must be exercised in conformity with certain principles of political obligation and ethical norms." Kommers, *supra* note 210, at 657.

212. These two claims are related: because an act contrary to good morals has no legal force, it cannot be justified even if it is performed under color of law. The West German Civil Code decrees that "a juridical act *contra bonos mores* is void." BÜRGERLICHES GESETZBUCH [BGB] art. 138 (W. Ger.). Another article creates civil liability for intentional

tion of objective right justifies burdening an offender more than necessary to compensate a victim; it may even justify sanctions which further burden the victim[213] or innocent third parties.[214]

Subjective rights always derive from juridical acts, that is, acts consistent with objective right—but objective right will not always enforce subjective rights thus created. This is because subjective rights are relational.[215] If, for example, *A* is obligated to *B*, *B* then has a subjective right against *A*. Such relationships are governed by a requirement of good faith.[216] Indeed, the violation of good faith may itself be conceived as the violation of a subjective right. Since the right violated is relational, the appropriate response is to compensate the victim in order to bring the relationship back into equilibrium. If the enforcement of a subjective right would involve a breach of the good faith requirement governing the relations between the parties, the subjective right will not be enforced. The right has been "abused" and is therefore forfeit, although it was validly created. What counts as such an "abuse of right" is generally an effort to enforce a right when the cost to the obligor would be disproportionate to the obligee's benefit. Such disproportionality undermines the enforceability of the right because no party other than the obligor and the obligee has an "interest" in the vindication of a subjective right as such.[217] Once

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injury *contra bonos mores. Id.* art. 826. Pursuant to this section, West German courts have awarded civil damages for the consequences of turning people in to the Gestapo during the Nazi regime. 2 *Monatsschrift für Deutsches Recht* 174, 174-76 (1948). More significantly, in a controversial series of cases, they have prosecuted such acts of grudge informing as "unlawful imprisonment" under the German Criminal Code of 1871. STRAFGESETZBUCH [STGB] § 239. That the act is *contra bonos mores* strips it of lawfulness. *See* Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 618 (1958).

213. Some German criminal theorists recognize no right of self defense against the blackmail of criminals, on the ground that the legal interest threatened by such conduct is the state's interest in the enforcement of the criminal law, rather than the property of the victim. *See* Arzt, *Notwehr gegen Erpressung,* 19 MONATSCHRIFT FÜR DEUTSCHES RECHT 344 (1965); *cf.* Haug, *Notwehr gegen Erpressung,* 18 MONATSSCHRIFT FÜR DEUTSCHES RECHT 548 (1964).

214. The sanction of imprisonment, for example, burdens a defendant's dependents.

215. This view is particularly associated with Savigny and the historical school in German jurisprudence. *See* 4 R. POUND, *supra* note 208, at 65-66.

216. *See* Matter of Rogenmoser v. Tiefengrund A.G., 59 BG II 372 (1933), *reprinted in* R. SCHLESINGER, COMPARATIVE LAW 505 (1970); German cases on contractual impossibility are collected in A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 1073-99 (2d ed. 1977); Powell, *Good Faith in Contracts,* 9 CURRENT LEGAL PROB. 16 (1956).

217. Because the doctrine of abuse of right is predominantly concerned with the exercise of "subjective rights," many English speaking commentators assume that it must be

a court dictates a remedy for the violation of such a right, however, it invests the right with a public interest. The *enforcement* of the remedy is now the vindication of objective right, and this is what justifies the state in employing coercive sanctions toward that end.

D. *Property Entitlements and Liability Entitlements*

The distinction between objective right and subjective rights interacts in important ways with a taxonomy of entitlements developed by Guido Calabresi and Douglas Melamed.[218] Calabresi and Melamed distinguish three types of entitlements in terms of the conditions under which they may be legally infringed: property entitlements, liability entitlements, and inalienable entitlements. A property entitlement is one that cannot be infringed

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governed by a subjective standard. Thus they distinguish between exercising a right in situations in which it is inapplicable and exercising a right with an evil motive, holding that only the latter should genuinely be considered abuse of right. *See* Crabb, *The French Concept of Abuse of Right*, 6 INTER-AM. L. REV. 1, 12-15 (1964); Devine, *Some Comparative Aspects of the Doctrine of Abuse of Rights*, 1964 ACTA JURIDICA 148, 149, 154-55; Johnson, *Abuse of Right in Soviet Civil Law*, 1 SOLIC. Q. 320 (1962) (arguing that the Soviet doctrine of abuse of right does not really qualify as such, because it employs objective criteria). Each of these authors seems to be straining against the very doctrine they are attempting to explain, however. They are constrained to admit that French and Soviet courts in fact employ objective criteria for the identification of an abuse of right. In French law, the creation of a nuisance is held to be an abuse of property rights. *See* Devine, *supra*, at 154. In Soviet law, the maintenance of rental property has been viewed as an abuse of the right to possess property. *See* Johnson, *supra*, at 324-34. In Germany, the concept of abuse of right has been invoked to deny a claim of self defense where the interest defended (the right to a parking space) was outweighed by the interest attacked (life). 16 Neue Juristische Wochenschrift [NJW] 824, 825 (Bayerischen Obersten Landesgerichts [Bay ObLG], München 1963); *see also* G. FLETCHER, RETHINKING CRIMINAL LAW 873 (1978). The Swiss Civil Code explicitly links the doctrine of abuse of right to the obligation to deal in good faith (Section 2). This provision may be used by Swiss courts to strike down or modify contracts on grounds of equity alone. Gutteridge, *supra* note 208, at 39, 40. The reason for the widespread use of what a common lawyer would consider an "objective" criterion for the review of what a civil lawyer would consider a "subjective right" is easily explained: the judgment that a right has been abused entails a moral judgment which must be referenced to some moral criterion—good faith in Germany, or the absence of antisocial motives in Russia. Each of these standards implies judgments of substantive fairness or exploitation in relations between people. Making these judgments, in turn, requires objective criteria of fairness. In general, one cannot condemn behavior as exploitative without maintaining substantive expectations about people's obligations to one another. *Id.* at 26-29.

For a useful discussion of the doctrine of abuse of right in international law, see H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286-307 (1933).

218. Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

upon without the holder's consent; a liability entitlement is one that cannot be infringed upon without compensation to the holder; and an inalienable entitlement is one that cannot be infringed upon under any circumstances.[219]

Just as the distinction between violations of objective right and the violation of subjective rights has remedial implications, so does the distinction among property, liability, and inalienable entitlements. Consider expectations created by an agreement. In the first place, such expectations are not generally regarded as inalienable entitlements, for otherwise they would have pre-existed the agreement.[220] Agreements may, however, be viewed as sources of either property or liability entitlements.

If agreements are viewed as sources of property entitlements,

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219. *Id.* at 1092-93.

220. If we say that someone acquires an entitlement by means of a contractual agreement, we suggest that the entitlement can be held by others and disposed of (i.e., alienated) by them. Of course, it need not follow that, once acquired by contract, a right may be disposed of by contract. Consider entitlements to liberty and life, which are often considered inalienable. One could imagine a society in which a slave could purchase his freedom from a master but not sell it. Similarly, one could imagine a society in which one could purchase one's life, for example, by selling oneself into slavery, but that having done so, one could not dispose of one's life. Rousseau argues, however, that in selling oneself into slavery, one alienates all of one's rights. J. ROUSSEAU, THE SOCIAL CONTRACT 53-58 (M. Cranston trans. 1968) (1st ed. Amsterdam 1762). If a slave cannot dispose of her own life, in other words, it is because of her master's property right, rather than her own inalienable right. Hobbes would permit both the purchase and sale of life by contract. The right to resist death, however, is inalienable and may be neither purchased nor sold. T. HOBBES, DE CIVE 39 (S. Lamprecht ed. 1949) (1st ed. London 1651). Locke apparently views the right to life as natural and inalienable, but forfeited "by some act that deserves death." One whose life is forfeit may be held in slavery, but not by contract. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, §§ 22, 23 (J. Gough ed. 1948) (1st ed. London 1690). Sovereignty, often viewed as an inalienable entitlement, has sometimes been treated as the product of a contract. Hobbes, for example, advocated that authority be inalienably vested in a sovereign by the agreement of its subjects. Yet the sovereign who receives the inalienable entitlement is not a party to this agreement. In Hobbes' view, to be bound by such an agreement would be inconsistent with sovereignty. *See infra* text accompanying notes 434-40. Rousseau also characterized sovereignty as inalienable and described the creation of the sovereign as a social contract. Unlike Hobbes, he advocated that sovereignty be retained by the parties to the social contract; but he conceived of the social contract as an enduring community rather than an agreement. *See infra* text accompanying notes 396-407. An agreement between sovereign and subject that conferred a right to perpetual obedience on the sovereign, and that conferred on the subjects an expectation that the sovereign's right would never be assigned or dissolved, would be a counter example to the proposition in the text—provided that both parties also alienated the right to renegotiate their agreement. This last condition could only be met if there were some power capable of enforcing the sovereign's obligation not to negotiate. The existence of such a superior authority, however, is commonly thought to preclude sovereignty.

the appropriate remedy for breach is specific performance, since only actual performance of the agreement would insure that the promisee's expectations would not be violated without his or her consent.[221] Such a remedy would prevent the promisor from conveying the interest promised to a third party. This means that an agreement conflicting with an earlier agreement would not be specifically enforceable. A further implication of this remedy is that the second conflicting agreement cannot function as a source of property entitlements. If entitlements created by agreements are viewed as property, the second of two conflicting agreements cannot be valid.

If agreements are viewed as a source of liability entitlements, on the other hand, the appropriate remedy for breach is obviously damages. The treatment of expectations grounded in agreements as mere liability entitlements reserves to the promisor a right to pay damages rather than perform. Implicit in this right is a right to convey the interests promised to a different promisee, provided the promisor pays the first promisee reparations. This does not deny the fact that the promisee has a right as well—a right to receive either performance or damages. The second promisee, however, is equipped with the same rights as the first. If agreements are viewed as sources of liability entitlements, in other words, conflicting obligations are both equally valid.

The remedial consequences of infringing a property entitlement include compulsory performance and the invalidation of conflicting agreements, both remedies associated with the violation of objective right. By contrast, the remedial consequence of infringing a liability entitlement is compensation, a remedy associated with the violation of subjective rights. There is a reason for this convergence; our taxonomies of illegality are analytically linked.

E. *The Relationship Between the Two Distinctions*

One may distinguish the three types of entitlements described by Calabresi and Melamed in terms of the relationship between

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221. *See generally* Kronman, *Specific Performance*, in THE ECONOMICS OF CONTRACT LAW 181-94 (A. Kronman & R. Posner eds. 1979) (arguing that contractual expectations should be specifically enforced, because they share characteristics with property entitlements identified by Calabresi and Melamed).

two factors: the consent of the holder of the entitlement and the consent of the state to the infringement of the entitlement. In the instance of liability entitlements, the state consents to infringement, whether or not the individual entitlement holder consents. Of course, if a liability entitlement is infringed, the state will require that the holder be compensated. The state's consent to infringement is conditional, but it is not conditioned upon the consent of the entitlement holder. In the case of property entitlements, by contrast, the state consents to infringement if and only if the individual does.[222] In the case of inalienable entitlements, of course, the state never consents to infringement, regardless of the will of the entitlement holder.

In all of these contexts, violation of the will of the state violates objective right and justifies the use of coercive or punitive sanctions. Inalienable entitlements such as life may be protected by means of coercive force, even against the holder of the entitlement. Thus euthanasia is generally criminally punishable and the prevention of suicide may justify the use of force.[223] Where personal liberty has been viewed as an inalienable entitlement, coercive contracts have not only been viewed as void ab initio,[224] but sometimes as cause for criminal liability as well.[225] This has meant that most Western legal systems have been unwilling to specifically enforce contracts for personal service.[226] Doing so would identify

222. The obvious exception is the power of eminent domain. For Hobbes, this power was implicit in the social nature of property. "Seeing therefore the introduction of *propriety* is an effect of the commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign; . . . [f]rom whence we may collect, that the propriety which a subject hath in his lands, consisteth in a right to exclude all other subjects from the use of them; and not to exclude their sovereign. . . ." T. HOBBES, LEVIATHAN 161, 163 (M. Oakeshott ed. 1960) (1st ed. London 1651). C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 96 (1961). For Locke, however, who derives the legitimacy of government from a desire to protect property rights, the power of eminent domain (as distinguished from the power of taxation) would annihilate the right of property. J. LOCKE, *supra* note 220, at §§ 123, 124, 138-39. For Blackstone, who attempts to reconcile the postures of Hobbes and Locke with respect to property, the doctrine of eminent domain is a pragmatic (if problematic) compromise. *See* Kennedy, *supra* note 23, at 261-64. 1 W. BLACKSTONE, COMMENTARIES *135.

223. *See, e.g.*, N.Y. PENAL LAW, §§ 125.15(3), 35.10(4) (McKinney 1975).

224. *See* Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 ("shackling" contracts void under BGB § 138(1) for offense to good morals).

225. *See, e.g.*, Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

226. *See* The Case of Mary Clark, a Woman of Color, 1 Blackf. 122 (Ind. 1821) (specific enforcement of 20 year indentured servitude analogous to slavery); Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959) (hostility toward specific

objective right with the subjective right to personal service, thereby creating a property right in another's labor. Enforcing the right in this way would permit an abuse, i.e., the infringement of an inalienable entitlement.

As a result, European legal systems tend to recognize only a liability right to promised service. These legal systems have been willing, however, to specifically enforce other kinds of contract obligations, thereby recognizing them as property entitlements. France enforces such obligations by means of punitive fines, whereas Germany enforces them by means of imprisonment.[227] Even common law jurisdictions which generally recognize contracts as creating only liability rights, are willing to employ coercive sanctions to *enforce* those liability rights.[228] Each of the three types of entitlement involves a different relationship between the will of the holder and the will of the state; but for each type of entitlement, it is the frustration of the will of the state that violates objective right and inspires a coercive response.

The infringement of an entitlement without the consent of the owner, however, is the violation of a subjective right. By this, I do not mean that the frustration of any person's will is the violation of a subjective right. If one has no entitlement protected by objective right, one has no subjective right. If, however, the legal system provides any protection for an interest that can be identified as being held by a particular person, against infringement by others, that person has a subjective right against those others. The subjective right remains valid even on those occasions where it is not enforced—but it must be enforceable under some conditions, else it is merely an interest or desire, not a right. Subjective rights are dependent on objective right even when they are not coextensive with its prescriptions. Only in the instance of property entitlements are objective right and subjective rights coextensive. The treatment of an entitlement as a property entitlement therefore necessarily identifies it with the interests of the state and invests it with the state's authority. Indeed, the protection of property has long been identified with the vindication of state power. Hobbes argued that neither crime nor property would be possible

enforcement of contracts for personal service traced back to Roman Law).

227. *See generally* Dawson, *supra* note 224.

228. *See generally* M. COHEN, LAW AND THE SOCIAL ORDER 69-112 (1982).

without sovereignty; Locke, by contrast, derived the sovereignty of government from its function of protecting property.[229] Douglas Hay has suggested that the legitimation of the authority of property holders was the chief function of the criminal law in Locke's England.[230] In other contexts, property seems to have functioned as an important symbol of sovereignty, so that attacks on property were construed as a kind of violent insurrection.[231]

F. *Two Types of Illegality*

We have now explicated two frameworks for analyzing the illegality of treaty conflict and explored the relationship between them. By combining these two analytic schemes we can sketch the jurisprudential implications of two different approaches to the problem of treaty conflict. Treaty conflict may be viewed as a violation of one of two types of standards: good faith or good morals.[232] Good faith standards govern subjective rights; a violation of good faith is the violation of a subjective right. If treaty conflict is viewed as a violation only of good faith, treaties are liability entitlements, in which case the appropriate remedy for breach is damages. The implication of this view is that both conflicting treaties are valid. If, however, treaty conflict is viewed as a violation of good morals, it violates objective right as well as the subjective rights of the promisees. In this case, treaties must be viewed as sources of property rights, and the appropriate remedy for breach should be specific performance. The implication of this view is that the second of two conflicting treaties is void.

We have already noted that most commentators view treaty conflict as a violation of at least good faith. This would imply that the appropriate response of the international legal order to treaty conflict would be to recognize both treaties and require that the first promisee be compensated. Yet, as we shall see, many commentators view the second of two conflicting treaties as void ab initio. The above analysis would suggest that the voiding of the later treaty reflects a view of treating entitlements as property, and a view of treaty enforcement as the vindication of "objective

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229. *See supra* note 222.

230. Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17-63 (1975).

231. *See infra* note 246.

232. *See supra* text accompanying notes 211-16.

right." In the next Chapter, we shall analyze the arguments offered by several supporters of voiding the second treaty, in light of this hypothesis.

V. Treaties as Property Entitlements

This Chapter shall trace the development of the view that the second of two conflicting treaties is void ab initio. This view appears to have originated with the natural law theorists of the seventeenth and eighteenth centuries. The arguments offered for this position by the natural law theorists turned on an explicit identification of treaty rights as property. With the rise of legal positivism[233] in the nineteenth century, however, these arguments were transposed into new rhetorical settings. The idiom of property rights gave way to such new formulations as "the public order" and the "interests of the international community." While the terminology shifted over time, the basic structure of argument has remained the same: whether couched in the terminology of enlightenment rationalism or modern instrumentalism, arguments for voiding conflicting treaties identify treaty entitlements with some notion of "objective right." If this claim is roughly accurate, it follows that a preference for voiding conflicting treaties implies a commitment to the supremacy of the international legal order over national sovereignty.

Recall that a treaty is an agreement between two nations creating obligations in international law.[234] The more binding treaties are understood to be, the more authority is accorded international law. As a practical matter, nations have rarely accorded much authority to international law. Prior to the establishment of international tribunals in this century, the principle remedy available to victims of treaty breach was unilateral termination of the treaty.[235] While more vigorous responses were not scorned, they were recognized as infringements—however justified—upon the sovereignty of the promisor.[236] International law might justify the

233. *See supra* note 135 for a discussion of positivist accounts of international law.

234. *See supra* note 26 and accompanying text.

235. Indeed, it remains the principle remedy for breach. A great number of notable instances of unilateral renunciation in response to breach are collected in B. Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party 104-93 (1966).

236. The strategy referred to is intervention, which was considered a permissible remedy for breach of treaty prior to the formation of the League of Nations. *See* H. Hodges, The Doctrine of Intervention 36-37 (1915); R. Roxburgh, *supra* note 33, at 20. Hodges defines intervention as "*an interference by a state or states in the external affairs of another states* [sic] *without its consent, or in its internal affairs with or without its consent.*" H. Hodges, *supra,* at 1 (emphasis original). "Intervention is in the first instance a hostile act, because it consti-

use of force, but could not obviate it.

A property right is one that cannot be infringed without the consent of the holder.[237] If treaties are understood to establish property rights, they are very binding indeed. Specific enforcement of such rights would require extensive intrusion upon national sovereignty. Thus the transformation of international promises into property presupposes an especially potent international legal order.

A. *Natural Law Arguments*

Arguments that the latter of two conflicting treaties is void ab initio rely upon the claim that treaty rights are property. Not surprisingly, they invoke the image of a transcendent legal order to explain the limitation on national sovereignty that this claim implies. Prior to the development of recognized international legal institutions, natural law was invoked as a transcendent legal order; subsequently, natural law principles were presented as implicit in the positive legal institutions of the emerging international order.

Natural law scholarship of international relations was a form of advocacy. It envisioned a nonexistent legal order and attempted to establish its authority by argument. The less natural law theorists could rely on the actual practice of states for authority, the more compelling their normative arguments had to be. On the other hand, the less they conformed their doctrines to state practice, the less compromised their conclusions had to be. Largely unrecognized and unenforceable, natural law entitlements tended to be absolute and unqualified. Grotius argued that a promise accompanied by

> an intention to convey a special right to another. . . . is a perfect promise, and has an effect similar to an alienation of ownership. It is a first step to the alienation of an object or of some portion of our liberty. . . . God himself, who can be limited by no established law, would act contrary to his own nature if he did not fulfill his promises. . . . Whence it follows that the obligation to keep a promise springs from the nature of that unchangeable justice which is, in its own way, an attribute common to God and to all who

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tutes an attack upon the independence of the state subjected to it . . . .[I]t is regarded by the state intruded upon, if not previously agreed to, as an act of war in that its sovereignty is impaired." *Id.* at 5.

237. Calabresi & Melamed, *supra* note 218, at 1106.

have reason.[238]

Though in itself unenforceable, natural law justified the authority of positive law to interfere with "natural" liberty. "Obligation," argued Pufendorf, "places, as it were, a kind of bridle upon our liberty of action, so that we are unable rightly to turn in a direction different from that to which obligation leads."[239] Mere acceptance of a promise created a "perfect obligation" and a correlative "perfect right."[240] For Pufendorf, as for Grotius, a perfect right was an absolute right to the thing promised:

> [If] . . . the will to accept on the part of the second party . . . has concurred with the will of the one who makes the promise, . . . then it is understood that at this same moment the right to the thing promised has passed from the latter to the former, and therefore the promisor has no longer the right not to fulfill his promise to the promisee against the will of the latter.[241]

Such perfect rights, argued Wolff, arise from treaties,

> [for] treaties . . . contain promises made by one party, accepted by the other. Therefore, since a promisor binds himself absolutely to the promisee, and a perfect right belongs to the promisee to that which has been promised; from treaties a perfect obligation arises and a perfect right is acquired.[242]

"[A] perfect right," Wolff continued, "involves the right to compel one to perform . . . what has been agreed upon."[243] Vattel also concluded that "the engagements of a treaty . . . produce . . . a perfect right."[244] He reasoned:

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238. H. GROTIUS, THE LAW OF WAR AND PEACE 137 (L. Loomis trans. 1949) (1st ed. Paris 1625).

239. 2 S. PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 72 (W. Oldfather trans. 1964) (1st ed. Hagae-Comitis 1660).

240. *Id.* at 81; *see also* H. GROTIUS, *supra* note 238, at 142.

241. S. PUFENDORF, *supra* note 239, at 81. Hobbes takes a similar view of the effect of an agreement on the state of nature:

> Whosoever shall contract with one to do or omit somewhat, and shall after covenant the contrary with another, he maketh not the former, but the latter contract unlawful. For he hath no larger right to do, or to omit aught, who by former contracts hath conveyed it to another. Wherefore he can convey no right by latter contracts, and what is promised, is promised without right. He is therefore tied only to his first contract, to break which is unlawful.

T. HOBBES, *supra* note 220, at 39.

242. 2 C. WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM § 377 (J. Drake trans. 1934) (1st ed. Halle im Magdeburgischen 1749).

243. *Id.* § 390; *see also* H. GROTIUS, *supra* note 238, at 175.

244. E. DE VATTEL, THE LAW OF NATIONS 196 (J. Chitty trans. 1852) (1st ed. Londres 1758).

It is a settled point in natural law, that he who has made a promise to any one has conferred upon him a real right to require the thing promised,—and consequently, that the breach of a perfect promise is a violation of another person's right, and as evidently an act of injustice as it would be to rob a man of his property.[245]

For these natural law theorists, the power to void a broken treaty was an inadequate remedy for breach. As a practical matter, it offered no solace to the recipient of a unilateral promise; conceptually, it was inadequate because it took into account only the interests of the parties involved. Treaty rights were analogized to property precisely because they implicated interests beyond those of their holders. Breach of treaty threatened the natural order in the same way that burglary threatened the integrity of the community and violated the sovereignty of the king.[246] Thus Vattel continued:

The tranquillity, the happiness, the security of the human race, wholly depend on justice. . . . [The] obligation [to perform promises] is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature and acknowledge no superior upon earth, to maintain order and peace in their society.[247]

For the natural law theorists it was crucial that treaty rights be treated as property, so that international law could substitute for sovereignty. Wolff accordingly argued that:

All nations are understood to have come together into a state, whose separate members are separate nations, or individual states. For nature herself has established society among all nations and compels them to preserve it . . . . In the supreme state the nations as a whole have a right to coerce the individual nations, if they should be unwilling to perform their obligation.[248]

This right derives not from the rights of the individual nations, but from the prerogatives of sovereignty:

The law of nations as a whole with reference to individual nations in the supreme state must be measured by the purpose of the supreme state. . . . Some sovereignty over individual nations belongs to nations as a whole. For

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245. *Id.* at 195.

246. For the proposition that crime in the eighteenth century was perceived as a violation of royal sovereignty, see Hay, *supra* note 230, at 17. For its significance as the violation of community boundaries, see D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 3-30 (1972); Fletcher, *The Metamorphosis of Larceny,* 89 HARV. L. REV. 469 (1976).

247. E. DE VATTEL, *supra* note 244, at 195.

248. C. WOLFF, *supra* note 242, at §§ 9, 13.

a certain sovereignty over individuals belongs to the whole in a state.[249]

The rights of nations, in other words, were dependent upon the authority of natural law and not the other way around.

While natural law could transform promises into property, therefore, it could also invalidate them entirely. "The clearest evidence of incompatibility of a promise with the intention of the promiser," argued Grotius, "is when a literal following of his words would involve something unlawful, that is, something contrary to natural or divine law. For such promises are incapable of creating an obligation."[250] "We are unable," agreed Pufendorf, "to contract an obligation about those things, over the disposal of which we have lost the moral faculty or authority. Of this sort are matters forbidden by the laws."[251] Vattel, too, concluded that "for . . . want of sufficient powers . . . a treaty concluded for an un-

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249. *Id.* at §§ 14, 15. Note that Vattel explicitly rejected Wolff's notion of a supreme state:

> I differ entirely from Monsieur Wolff in the manner of establishing the foundations of that species of the law of nations which we call *voluntary*. Monsieur Wolff deduces it from the idea of a great republic (civitatis maximae) instituted by nature herself, and of which all the nations of the world are members. . . . I acknowledge no other natural society between nations other than that which nature has established between mankind in general.

E. DE VATTEL, *supra* note 244, at xiii. While Vattel substitutes nature for a civil society of nations as the ultimate source of authority for international law, he purports to reach substantially the same conclusions as Wolff by similar reasoning. *Id.* at xiv-xv. Yet his arguments against such a world-state turn on the claim that it is unnecessary in explaining the "*voluntary*" law of nations, as opposed to the "*necessary*" law of nations. In other words, he argues that one need invoke no higher authority to explain the validity of mutual promises between states ("voluntary" law); yet he admits the need to invoke a higher authority in order to explain the invalidity of "unjust" treaties ("necessary" law). *Id.* at 194-95. If, however, treaties contrary to the law of nature are beyond the power of sovereign nations, then national sovereignty is ultimately dependent on a higher authority. Thus, Vattel is simply inconsistent when, in his preface, he writes:

> It is essential to every civil society (*civitati*) that each member have resigned a part of his right to the body of the society. . . . Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses an absolute independence on all the others.

Id. at xiii. Like the later proponents of the jus cogens doctrine, who purported to give up the natural law perspective altogether, Vattel was simply kidding himself.

250. H. GROTIUS, *supra* note 238, at 184.

> To render a promise valid, it must be one that is or can be in the power of the promiser to perform. Hence, in the first place, no promises to perform an act in itself illegal are valid, because no one has, or can have, a right to do such a thing.

Id. at 140.

251. S. PUFENDORF, *supra* note 239, at 114.

just or dishonest purpose is absolutely null and void,—nobody having a right to engage to do things contrary to the law of nature."[252] Treaty obligations were binding at the pleasure of "the Supreme State;" they were creatures of international rather than national sovereignty.

The violation of a treaty obligation was a violation of international sovereignty; thus, treaties requiring the violation of prior treaties were void by operation of natural law. "[W]hen several states are at war with each other," Grotius asked himself, "to which side ought one to give assistance if allied with both? . . . [I]f personal assistance, which cannot be divided, is required of us who promised it," he answered, "reason requires that we give preference to one with whom we have been longer allied."[253] Pufendorf gave a similar answer: "[T]he earlier alliance takes precedence, because in the later it is understood that only those actions which were free of the former obligation have been obligated."[254] "[T]he more ancient ally," Vattel agreed, "is entitled to a preference; for the engagement was pure and absolute with respect to him; whereas we could not contract with the more recent ally, without a reservation of the rights of the former."[255] Phillimore, a nineteenth century natural law theorist, concurred with tradition: "[T]he more ancient one must be executed, because it was not within the competence of the party promising, to act in derogation of his antecedent engagements to another."[256] Wolff summarized the rationale for this result:

> Later treaties contrary to earlier ones are illegal, and they are invalid by the law of nature. For a perfect right is acquired from treaties. . . . And if later treaties shall have been contrary to earlier ones, in them things are promised which cannot be promised without impairing the earlier treaties,

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252. E. DE VATTEL, *supra* note 244, at 194-95.

253. H. GROTIUS, *supra* note 238, at 173.

254. S. PUFENDORF, *supra* note 239, at 118.

> I cannot . . . make a valid pact with a third person about my own things or actions over which a second person has already acquired a right. . . . The latter pact is rendered invalid by the earlier, or rather, the earlier shows that a later cannot exist. And in this sense is to be accepted the trite dictum, "the prior in time is superior in right," namely, not that time in itself confers any right, but because the prior in time has already acquired some right which prevents the later in time from being able to acquire a right to the same thing.

Id. at 117.

255. E. DE VATTEL, *supra* note 244, at 197.

256. 2 R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 91 (1854).

> consequently this would be just as if he who enters into the later treaty should promise a thing which he no longer has. Therefore, since a promise would be invalid, if anyone promises a thing which he knows he no longer has, later treaties which are contrary to earlier ones are invalid by the law of nature.[257]

The natural law theorists gave pride of place to the prior treaty because they viewed it as property, invested with the superior sovereignty of the natural order, specifically performable in principle, if not in practice.

B. *Modern Arguments from Customary Law*

As an actual international legal order developed, the methods and aims of international law scholarship began to change. Natural law scholarship had been visionary, deriving legal principles from a natural order, purportedly by means of mathematical logic.[258] As the envisioned international legal system became increasingly actual, however, it also became increasingly mundane. Its sources were civil rather than natural or divine; its content was contingent upon the customs and compromises of actual nations. These developments occasioned a transformation of the role of international law scholars; where formerly they had prescribed norms for the behavior of sovereign states, now they merely described their actual practices.[259] The doctrines they proposed

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257. C. WOLFF, *supra* note 242, at § 383.

258. Pufendorf's *Elementorim* is structured as a series of deductions from definitions and axioms. *See generally* S. PUFENDORF, *supra* note 239. Wolff, too, presented his *Jus Gentium* as a deductive system. *See generally* C. WOLFF, *supra* note 242. Mathematics was chosen as a metaphor within the rhetoric of natural law, argued Ernst Cassirer, because law was an ideal rather than an empirical order:

> Montesquieu declares: "Laws in their broadest sense are the necessary relations which are derived from the nature of things." Such a "nature of things" exists in the realm of the possible as well as that of the real, in the realm of the purely conceptual as well as in that of the factually existent, in the physical as well as in the moral world.

E. CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 243 (F. Koelln & J. Pettegrove trans. 1951) (1st ed. 1932). The study of human nature itself was described as a kind of deductive logic: "[s]ome called this a political mathematics (Condillac) or geometry (Beccaria) or calculus (Condorcet) or algebra (Hutcheson)." G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 95 (1978).

259.

> The science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor was the endeavour, on the whole sincere, of the Powers after the Congress of Vienna to submit to the rules of the Law of Nations. The

were to be judged in terms of those practices, rather than vice versa. In shifting their fealty from heaven to earth, the natural lawyers established their claims on the firmer ground of customary law, but they gave up the Archimedean point from which custom had previously been criticized.

The collapse of natural law doctrine into customary law occasioned a crisis for the property view of treaty entitlements. Recall that this view invested treaty rights with the sovereignty of a natural order that transcended and preexisted the sovereignty of states. If the sanctity of treaties were not guaranteed by some higher authority, then states could simply violate treaties by the same power which they could use to form treaties in the first place. Accordingly, a treaty entailing violation of a previous treaty would be no less valid than that earlier treaty. With the decline of natural law as a source of international law, therefore, the sanctity of treaties could no longer claim priority over the validity of any particular treaty. The only possible source for a norm forbidding breach was custom, and customary law ultimately rested on the same authority as conventional law—consent.[260] If customary law rested on no higher authority than consent, there appeared to be no reason why particular nations could not simply contract out of any of their obligations under customary law, including their obligation not to form agreements in violation of obligations previously undertaken by convention. Only if there were some norms of customary law that could not be contracted out of, usually referred to as jus cogens,[261] could customary law impose limitations on the power of states to make conflicting agreements. The view of treaty entitlements as property paradoxically required the subordination of conventional law to customary law.

Modern scholars of international law have employed four dif-

> second factor was the many law-making treaties which arose during this century. And the last, but not indeed the least factor, was the rising predominance of positivism over the theory of the Law of Nature. . . . [O]n the whole, positivism was victorious at the end of the nineteenth century and the beginning of the twentieth. In denying the validity of sources of International Law other than the will of States it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and of politics.

1 L. OPPENHEIM, *supra* note 26, § 59.

260. *Id.* § 16.

261. *See supra* notes 89-90 and accompanying text.

ferent arguments to justify the subordination of conventional law to customary law. Each of these arguments proceed from different premises, though in practice they intertwine.

One argument, espoused by Sir Hersch Lauterpacht, is conceptual. Treaties, he admits, are sources of law;[262] but they are not wholly independent sources of law. By definition, they are agreements to create obligations binding in international law. This implies that conceptually, treaties are dependent for their validity on some other source of law. "Law," claims Lauterpacht, "is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power."[263] The common consent of a community, in other words, is what makes international law binding. Historically, Lauterpacht asserts, custom preceded explicit convention as a means of expressing that consent.[264] Yet he feels that the priority of custom over convention is ultimately logical rather than chronological; the very existence of a community is dependent upon the presence of ongoing patterns of intercourse,[265] structured by rules commanding common consent.[266] Common consent cannot mean the explicit consent of each member of the community, since the membership of the community is determined simply by participation in patterned intercourse. "The question whether there be such a common consent . . . is a matter of observation and appreciation, and not of logical and mathematical decision. . . . It is for that reason that custom is at the background of all law, whether written or unwritten."[267] Having thus established the authority of tradition, Lauterpacht may reroot natural law doctrines in the new

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262. 1 L. OPPENHEIM, *supra* note 26, §§ 16, 18.

263. *Id.* § 5.

264. *Id.* § 12.

265. "A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals." *Id.* § 7.

266.

> A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power. Without some kind both of morality and of law no community has ever existed, or could possibly exist.

Id. § 4. Thus the existence of a community and the existence of rules of law and morality are, by definition, mutually dependent.

267. *Id.* § 11.

soil of customary law: "It is a recognized customary rule of International Law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty."[268] These doctrines include the conception of treaty entitlements as property, invested with the transcendent authority of the international legal order. "Treaties . . . are part of International Law. . . . This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker."[269] Lauterpacht views states as incapable of making conflicting treaties because treatymaking is dependent on the existence of a supplementary body of law; that body of law is custom, and customary law forbids treaty conflict.

A second argument bases the authority of customary law on conventional law itself. It begins with the same conceptual premise: that treaties are valid only with the support of a supplementary body of law. That supplementary body of law is supplied, however, by conventional law rather than customary law. Some scholars argue that, as an empirical matter, existing international legal institutions are the product of convention. Such treaties—the U.N. Charter, the Statute of the International Court of Justice, the International Labor Conventions, for example—create law.[270] Because these treaties establish the international legal order that makes treaties possible, they take precedence over all other treaties.[271] These treaties make customary

268. *Id.* § 506.

269. *Id.* § 503.

270. *Id.* § 492 for a discussion of law making treaties generally.

271. *See supra* note 137. *See generally* C. ROZAKIS, *supra* note 85, at 1-23. Rozakis disputes the claim that customary law precedes conventional law historically or logically, *id.* at 21; in addition, he explicitly rejects Lauterpacht's assumption that international law can take root in an international community of interest: "The world is no longer constituted of a numerous clausus of national entities with the same or similar cultural, ethical and political background where a kinship of interests determined the development of their relations." *Id.* at 15. As a consequence, he argues, state autonomy must be restrained by imperative law. *Id.* The capacity of international law to enforce its norms is brought into question, he feels, by its traditional reliance on the autonomous consent of states for validity. *Id.* at 1, 6-7 & 20. Nevertheless, the increasing development of recognized institutions of international law gives it increasing validity. *Id.* at 1, 16. Because these institutions are consensual in origin, their authority is valid. *Id.* at 23.

law binding.[272] Customary law, in turn, holds as void treaties which conflict with peremptory norms of international law. Indeed, the recent United Nations Convention on the Law of Treaties may be viewed as a lawmaking treaty; it explicitly recognizes the doctrine of jus cogens.[273] It may be argued that the prohibition on making conflicting treaties is such a jus cogens, or peremptory norm of customary law.[274] By thus employing the distinction between lawmaking treaties and other treaties, one may hold conflicting treaties void on the basis of conventional law alone.

A third argument for the doctrine of jus cogens, advanced by Alfred Verdross, is based on instrumental considerations.[275] It begins with the premise that the function of law is to effectuate the interests of a community. Treaties, therefore, are valid law because they advance the mutual interests of the parties. A second premise is that the nations of the world constitute a community with its own set of interests.[276] Ordinarily, Verdross argues, treaties implicate only the interests of the parties involved; however, where they run afoul of the interests of the larger international community, they must yield.[277] The implicit premise is that the

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272. Article 38 of the Statute of the International Court of Justice recognizes customary law as a valid source of international law. STAT. I.C.J. art. 38 § 1(b).

273.

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character.

Id. art. 53.

274. Professor Tunkin of the Soviet Union took that position during the drafting of the I.L.C. convention on the law of treaties. *See* C. ROZAKIS, *supra* note 85, at 47 n.3.

275. *See* Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937); Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966), [hereinafter cited as Verdross II].

276.

> [I]n the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se*.

Verdross II, *supra* note 275, at 55, 58.

277. *Id.* at 55, 58.

interests of the community are not easily defined. It is generally agreed that they include prohibitions on war, piracy, slavery, and perhaps other human rights violations.[278] Whether the international community has a sufficiently independent interest in the sanctity of treaties to warrant application of the jus cogens doctrine to treaty conflict, however, is unclear. The argument that the interests of an international community mandate the doctrine of jus cogens was influential during the drafting of Article 53 of the Vienna Convention;[279] yet few Commission members assumed that the doctrine would apply to treaty conflict.[280]

A fourth approach to the problem of jus cogens, developed by the neo-realists Harold Lasswell and Myres McDougal,[281] interweaves elements of the other three. Like Lauterpacht and Verdross, Lasswell and McDougal see a relationship between the validity of a legal system and the existence of a community. But they see this relationship as symbiotic: while the existence of such a community can lend validity to legal institutions, effective legal institutions can foster the development of such a community.[282]

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278. *Id.* at 58-59.

279. *Id.* at 57-58.

280. *See infra* notes 295-351 and accompanying text. Verdross's view is ambiguous: "At first glance all treaties encroaching upon the rights of third states seem to be contrary to *jus cogens*. In fact such treaties are illegal if the third states do not give their consent, but not all of them are prohibited by a rule of *jus cogens*." Verdross II, *supra* note 275, at 58-59.

281. Schlegel characterizes Lasswell and McDougal as refugees from legal realism:

> Deprivation of the certainty of doctrine by the destruction of the formalist universe and of the certainty of fact by the failure of empirical social science provided the justification for seeking legitimacy in orderly process; for the lasdougalians the same two deprivations provided the justification for seeking legitimacy in a policy analysis based on assertedly democratic values and the soft facts of experts' opinions.

Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195, 197-98 (1980).

282. Miller, Lasswell, and McDougal refer to this symbiotic relationship as a world "constitutive process."

> It is by agreement most broadly conceived . . . that the effective participants in earth-space power processes establish an overall "constitutive process"—identifying authoritative decision-makers, projecting fundamental community objectives, affording structures of authority, providing bases of power in authority and other values, legitimizing or condemning different strategies in persuasion and coercion, and allocating competence among effective participants over different authority functions and value interactions—for the maintenance of a modest minimum order.

M. MCDOUGAL, H. LASSWELL & J. MILLER, INTERPRETATION OF AGREEMENTS AND WORLD PUB-

Like Verdross, Lasswell and McDougal perceive a relationship between the existence of an international community and the international protection of humanitarian concerns. Where Verdross justifies the protection of humanitarian concerns in terms of the interests of such a community, however, Lasswell and McDougal urge the development of such a community in order to insure the protection of these concerns.[283] While such a community is not yet fully realized, they argue, its development can be encouraged by strengthening existing international legal institutions. Like proponents of the second argument, in other words, Lasswell and McDougal would accord priority to formal legal institutions. They believe that in interpreting and enforcing international agreements, these institutions should seek to strengthen themselves wherever possible.[284] This entails treating agreements as void

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LIC ORDER 4 (1967) (citation omitted).

> [D]ecision-makers often enjoy [opportunities] to give effect to the goals of a public order of human dignity. At the level of verbal commitment many authoritative decision-makers of the contemporary world community have associated themselves with the overriding objectives of such a public order system. In concrete controversies such decision-makers may find themselves able to bring the facts of life more into accord with their proclaimed purposes.

Id. at 40.

283. Miller, Lasswell, and McDougal refer to these concerns as "human dignity." Human dignity is never defined in their work on treaty interpretation, but it seems to encompass both deference to national sovereignty, *id.* at 6, and the protection of human rights in violation of national sovereignty, *id.* at 108. The closest thing to a definition of human dignity is offered as "[t]he goal which envisions world social processes ordered more by persuasion than coercion." *Id.* at 6. This definition, of course, might be seen to encompass both national rights and individual rights of self determination; it obscures the possibility that these rights might be incompatible, however. Lasswell and McDougal elsewhere define human dignity as the sharing of power, respect and knowledge. Shared power seems to require broad political participation and extensive public regulation of economic life. Shared respect seems to involve the protection of zones of privacy. *See* Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. REV. 203, 217-26 (1943). It does not take much imagination to see how these prescriptions might also conflict. In any case, deference to human dignity is the governing principle of interpretation for Lasswell, McDougal, and Miller:

> It is necessary . . . to appraise the compatibility of the different objectives of the parties with the constitutive policies of the general community and the goal values of a public order of human dignity. Asserted objectives contrary to constitutive policies should of course be rejected. In cases of conflict between asserted objectives, or doubt about objectives, presume in favor of objectives most in accord with human dignity goals.

M. MCDOUGAL, H. LASSWELL & J. MILLER, *supra* note 282, at 52.

284. McDougal, Lasswell, and Miller identify as a controlling purpose of "authoritative decision-maker[s],"

when they violate "the goals of public order."[285] Among the "overriding community policies" to be given effect in this way is the principle of *pacta sunt servanda,* with the consequence that subsequent conflicting treaties be held void.[286]

With this last approach, modern scholars of international law have come full circle. Like the natural law theorists, McDougal and Lasswell are ambitious partisans of international order. Their position on treaty conflict, like that of the natural law theorists, plays a rhetorical and strategic role in this larger project. Their purpose in invalidating conflicting treaties is to dramatize the claims of the international order to authority. Like the natural law theorists, McDougal and Lasswell place the authority of this order above that of discrete nations. Where, however, the natural law theorists understood the international order's authority as a limitation on the sovereignty of nations, Lasswell and McDougal dispense with the language of sovereignty altogether. For them, international law is a world "constitutive process," populated by a variety of "participants," rather than states,[287] functioning to im-

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> the aspiration to defend and expand a social system compatible with the overriding objectives of human dignity. . . . [A]n authoritative decisionmaker who lives up to his full obligation must examine the significance of every specific controversy for the entire range of policy purposes sought by the total system to which he is responsible.

Id. at 41.

285. *Id.* at 44.

286.

> The former rule, as Professor Garner's Harvard Research Draft observes, is simply one application of the principle of *pacta sunt servanda*: "It affirms in effect the principle that when a State has bound itself by a treaty with another State," it cannot thereafter relieve itself of the obligations it has thereby assumed by concluding a later treaty with another State under which it assumes obligations the performance of which would involve an impairment or repudiation of the obligations which it has already assumed *vis-à-vis* the State with which it concluded the earlier treaty. The clearest formulation of the latter rule has been given by McNair: "A treaty between two states the execution of which contemplates the infliction upon a third State of what customary international law regards as a wrong is illegal and invalid *ab initio.*" Thus, although two states may legally contract to change the width of their territorial waters, or to eliminate existing diplomatic immunities, or to change the present rights of their respective nationals concerning military service, confiscation of property, and so they are at the same time not free to apply these agreements in ways to injure non-consenting third parties.

Id. at 109.

287. *Id.* at 14-15.

plement "the goals of a public order of human dignity."[288] Lasswell and McDougal make their vision of an international community plausible by deliberately keeping the idea of sovereignty in soft focus.

C. *The Subordination of Sovereignty*

The subordination of national sovereignty to international legal institutions is implicit in the very idea of a doctrine of jus cogens. This is true, for one, because it presumes the legitimacy of international legal institutions as a source of objective right. As Rozakis points out, "a significant change brought about by the acceptance of the specific function of jus cogens by the international legal community is the introduction of the notion of objective illegality in the domain of international law."[289] "This concept," he adds, "will successfully contribute to the protection of those rules of law which are considered indispensable for the smooth function of the international legal system and for the well-being of the international society."[290] The well-being of that society, he argues, calls for "a growing institutionalization of the world community."[291] "The introduction of the jus cogens concept," he concludes, "constitutes . . . a manifestation of that institutionalization of the international community. It undoubtedly represents . . . a step forward toward a more centralized world order in which the predominant interests will no longer be the individual, egocentric aspirations of particular states."[292] The doctrine of jus cogens, it seems, strengthens the international legal order by presuming its strength. Such institutions cannot be imagined, let alone built, in a political vacuum, however. The strengthening of international institutions entails a correlative weakening of national ones:

> [T]he introduction of the jus cogens concept in the realm of international relations entails a significant interference of law with a field that was previously dominated by the absolute will of states, namely the field of international agreements. The jus cogens concept considerably limits the notion of

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288. *Id.* at 40.
289. C. ROZAKIS, *supra* note 85, at 19, 24, 27.
290. *Id.* at 27.
291. *Id.* at 29.
292. *Id.* at 29-30.

state sovereignty.[293]

Indeed, Duguit argued, on the eve of the formation of the League of Nations, that the identification of international law with the objective notion of right would obviate national sovereignty entirely:

> There is an objective law which imposes itself upon individuals and only upon them in their social relations and in their international relations. There is no legal right of individuals, a power belonging to their will. A fortiori, there is no legal right of social groups . . . . This belief in the rights of nations . . . is a fact which the observer cannot neglect, any more than the belief in national sovereignty. But neither the one nor the other corresponds to anything real; scientifically, the legal rights of peoples cannot be spoken of, because neither their personality nor the existence of legal right can be demonstrated.[294]

With the decline of natural law jurisprudence, the property conception of treaty entitlements has taken refuge in the controversial doctrine of jus cogens. That doctrine may be defended through a variety of strategies—yet each of these strategies ultimately rests on the same premise. Lauterpacht argues that customary international law may constrain national sovereignty because it is conceptually prior to national sovereignty. Rozakis argues that customary international law may constrain sovereignty because sovereignty has consented that it do so. Verdross argues that customary law may constrain sovereignty because this is in the interest of an international community which transcends sovereign nations. McDougal and Lasswell argue that customary law may constrain sovereignty because that would advance the interests of international legal institutions. Whether national sovereignty is viewed as subordinate to international custom as a source of law, or as a means to the erection of an international order, the meaning is the same. In either case, the international legal order is the source of legitimacy. The sovereignty of nations, whether derived conceptually or teleologically, is nevertheless derivative.

If a view of treaty entitlements as property, invested with objective right, implies the subordination of national sovereignty to international order, one might suppose that the view that treaties establish mere subjective liability entitlements entails the converse. The next two Chapters will be devoted to exploring this conjecture.

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293. *Id.* at 27.

294. Duguit, *Objective Law IV, supra* note 209, at 256.

VI. The Erosion of a Property Rule

A. *Treaty Conflict Before the International Law Commission*

Over the next two Chapters, we will explore the sources and implications of a view of treaty expectations as liability entitlements rather than property entitlements. Even though this view has, in recent years, gained more acceptance than the property view, its rationale is harder to characterize. This is in part because the liability view has only recently been articulated. The property view, as we have seen, was developed in an era of systematic theorizing about international law, in which jurists were inclined to make explicit the links between their views on particular doctrinal questions and a more general normative vision of the international system. Within the normative framework developed by the leading natural law theorists, treaty conflict was a violation of good morals.[295] That misgivings about this position developed during the twentieth century is evident from the unwillingness of international tribunals to enforce it.[296] These misgivings were articulated by members of the International Law Commission in the course of their efforts to codify the law of treaties. While the alternative developed by the International Law Commission is arguably a liability rule, the legislative history of this rule offers only the barest hints as to why members of the Commission might have found a liability rule appealing. The rule ultimately preferred by the Commission developed piecemeal, as a gradual accretion of exceptions and qualifications to a property rule.[297] The defenses

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295. This is not to say that the idea of good faith had not been introduced—indeed, it had been present in the natural law treatises of Wolff and Vattel. *See*, C. Wolff, *supra* note 242, at §§ 376-380, 550, 559; E. de Vattel, *supra* note 244, at §§ 219-221.

296. Sir Humphrey Waldock, Special Reporter to the International Law Commission on the Law of Treaties, noted that in both the *Oscar Chinn* and *European Commission of the Danube* cases, the Permanent Court of International Justice was unwilling to consider the question of treaty conflict because it was not raised by a party to only the earlier treaty. *See* text accompanying notes 150-62. Waldock concluded from this that the court considered conflicting treaties sources of liability rather than viewing them as void. If, he reasoned, treaty conflict was a violation of a peremptory norm of international law, it would have been incumbent upon the court to raise the issue even if the parties did not. Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 56-58, U.N. Doc. A/CN.4/SER.A/1963/Add.1-3. *See supra* notes 159-60.

297. Some would argue that greater consistency cannot be expected of a legislature:

> [One] view of the legislative process that is realistic and individualistic, assumes that the legislature is simply a "market-like" arena in which individuals and special interest groups trade with each other through representatives to further

for these changes offered by their authors seem disingenuous: the author of each successive draft of the article on conflicting treaties claimed merely to have better realized the intentions of his predecessor. The statements offered by other members of the Commission in support of these changes were laconic and vague. Working from this scanty data, we will try to triangulate the normative vantage point from which treaty expectations look like they ought to be treated as liability entitlements.

This Chapter will focus on the efforts of Special Reporters to the International Law Commission to draft an article on treaty conflict. It will suggest that the arguments offered by these Special Reporters, and accepted by the Commission, become intelligible on two assumptions: first, that the Commission declined to attribute to existing institutions of international law anything like the authority attributed to such institutions by proponents of a view of treaty expectations as property entitlements; and second, that the Commission assumed that a liability rule for protecting treaty expectations would be incompatible with the development of such institutions. In Chapter VII, we will examine the sources of the laconic arguments made by Commission members in support of the Special Reporters, with the aim of explaining why support for a liability rule implies antagonism towards international authority.

B. *Lauterpacht*

The deliberations of the International Law Commission in codifying the law of treaties were shaped by a series of Special Reporters, each of whom successively prepared and defended drafts for a convention. The first Special Reporter to approach the problem of treaty conflict was Sir Hersch Lauterpacht, the principal modern exponent of the property view of treaty entitle-

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> their own private ends. There is no "public interest," no identifiable "social good"; there are only bargains struck between those helped by legislation and those who are harmed. Under this "public choice" model of the legislative process . . . it makes no sense . . . to speak of "evaluating the rationality" of legislative action.

Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 19 (1980), citing Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L. J. 145, 148-57 (1978). In my view, this position is more individualistic than realistic. If the search for legislative intent is inherently futile, individual intent proves equally elusive. The discourse of both individuals and groups is shaped by language and culture, however, and these may be described.

ments. In 1953, he forwarded a report to the Commission recommending a property rule.[298] The rule prescribed that, in general, the latter of two conflicting treaties would be considered invalid.[299] Nevertheless, Lauterpacht permitted two exceptions which would eventually prove to swallow the rule.

First, citing McNair, Lauterpacht allowed that a state, party to only the second of two conflicting treaties, might be entitled to damages if it were unaware of the conflict.[300] Yet he minimized the importance of this exception by assuming that the League of Nations' requirement of publicity for all treaties would prevent innocent participation in the creation of treaty conflict.[301]

The second exception to a general property rule carved out by Lauterpacht simply exempted certain types of subsequent conflicting treaties from the sanction of nullity. These were "multilateral treaties . . . partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which . . . have been concluded in the international interest."[302] It will be recalled that Lauterpacht's contemporaries justified the jus cogens doctrine in instrumental terms, that is, as a means of advancing the interests of the international community and preserving the integrity of institutions which advanced those interests.[303] Hence, Lauterpacht carved out an exception to his general rule, that the obligation to obey treaties should be treated as a peremptory norm of international law, for cases in which that obligation became inconsistent with the development of new peremptory norms.

These two exceptions were to provide opponents of Lauterpacht's property approach with the requisite leverage to overthrow it.

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298. Law of Treaties, [1953] 2 Y.B. INT'L L. COMM'N 90, 156, U.N. Doc. A/CN.4/SER A/63/1953.

299. "A treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties." *Id.* (text of art. 16, para. 1).

300. "A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty." *Id.* (text of art. 16, para. 2).

301. *Id.* (commentary para. 3 to art. 16).

302. *Id.* (text of art. 16, para. 4).

303. *See supra* notes 275-88 and accompanying text.

C. *Fitzmaurice*

In 1958, Gerald Fitzmaurice replaced Lauterpacht's property rule with a proposal to accord "priority" to the earlier of two conflicting treaties.[304] This would involve an approach intermediate between a property and a liability rule: the state party to both treaties would be obligated to perform the earlier treaty and to compensate other parties to the later treaty, provided they were unaware of the conflict.[305] Nullity would be retained as a sanction for two exceptional classes of treaties: (1) Those "necessarily" involving "direct" conflict with a prior treaty, or involving conflict with a prior multilateral treaty that explicitly prohibited "contracting out;"[306] and (2) those involving conflict with a prior multilateral treaty of an "interdependent" or "integral" nature.[307] By an "interdependent" treaty, Fitzmaurice meant a treaty in which noncompliance by any one signatory would render the entire treaty ineffectual, such as an arms control treaty.[308] By an "integral" treaty, he meant one in which the obligation to perform would be independent of the compliance of other parties, such as a human rights treaty.[309]

Fitzmaurice's proposal appears substantially consistent with Lauterpacht's in its effect, diverging only in its point of reference. Fitzmaurice adopted, as his general rule, the procedure recommended by Lauterpacht only for the exceptional case in which the state party solely to the later treaty is ignorant of the conflict. He

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304. Law of Treaties, [1958] 2 Y.B. INT'L L. COMM'N 41, U.N. Doc. A/CN.4/SER.A/115/1958 (commentary para. 83 to art. 18) (distinction between "priority" and "invalidity").

305.

> In so far as there is any conflict, the earlier treaty prevails in the relations between the party or parties to the later treaty who also participated in the earlier one, and the remaining party or parties to that earlier one: but the later treaty is not rendered invalid *in se* and if, on account of the conflict, it cannot be or is not carried out by the party or parties also participating in the earlier treaty, there will arise a liability to pay damages or make other suitable reparation to the other party or parties to the later treaty not participating in the earlier, provided the other party concerned was not aware of the earlier treaty and of the conflict involved.

Id. at 27 (text of art. 18, para. 6).

306. *Id.* (text of art. 18, para. 8).

307. *Id.* at 27-28 (text of art. 19).

308. *Id.* at 44 (commentary para. 91 to art. 19).

309. *Id.*

justified this change by disputing Lauterpacht's empirical assumption that such cases would be exceptional. Due to the proliferation of treaties, Fitzmaurice argued, the U.N. requirement of publicity of treaties could not guarantee that all parties would be aware of potential conflict.[310] Lauterpacht, it would seem, placed too much reliance on the effectiveness of international institutions and insufficient weight on the complexity of the international system to suit Fitzmaurice. As a result, instances of treaty conflict in which all parties to the later treaty are aware of the conflict were to be considered the exception rather than the rule. In those rare instances, Fitzmaurice, like Lauterpacht, would have denied liability for damages to the other signatories of the later treaty.[311] While he did not explicitly recommend that the later treaty be invalidated in such cases, the first class of conflicts for which Fitzmaurice reserved the sanction of nullity was probably designed to capture these cases, and was so interpreted by Fitzmaurice's successor.[312]

The second class of exceptions seems to have been aimed at reproducing Lauterpacht's special solicitude for legislative treaties. Lauterpacht's proposal to exempt such treaties from the sanction of nullity was obviated by Fitzmaurice's abandonment of nullity as a regular sanction. But the result was that legislative treaties would be left with less protection against future conflict. Thus, Fitzmaurice retained the sanction of nullity for this class of cases. In so doing, he arguably handled conflicts involving multilateral, "legislative" treaties in the same way as Lauterpacht.

Yet a closer examination of this point reveals the extent of his transformation of Lauterpacht's scheme. In Lauterpacht's view, valid treaties had to be performed, and the decision to treat subsequent conflicting, multilateral treaties of a legislative character as valid implies an obligation to perform them. Fitzmaurice's scheme, on the other hand, while recognizing the later treaty as valid, would require the performance of the earlier one. Thus, if

310. *Id.* at 41-42 (commentary para. 83 to art. 18).

311. *See supra* note 299-301.

312. Waldock, Fitzmaurice's successor as Special Reporter, made such an interpretation when this exception was reintroduced during the International Law Commission debates, after he had excised the exception from his draft of the law on treaties. Law of Treaties, [1963] 1 Y.B. INT'L L. COMM'N 201-02 U.N. Doc. A/CN.4/SER.A/1963 & Addenda (comments at paras. 69-76). *See infra* note 333 for the proposal Waldock was commenting on.

we take Fitzmaurice's notion of priority seriously, we get a result inconsistent with Lauterpacht's concern for the development of international institutions. However, Fitzmaurice did not himself take the idea of priority seriously, because of his skepticism about existing international institutions. He admitted that:

> In practice . . . there may be no way of preventing the State concerned from electing to honour the later rather than the earlier obligation. If this occurs, the other party to the later treaty must carry out its own obligations under the treaty, while the other party to the earlier treaty will have a right to damages or other due reparation. This does not mean that international law confers a "right of election," but only that, in the existing state of international organization, it may not be possible to prevent a *power* of election from being in fact exercised. In these circumstances, international law predicates a right to reparation in favour of whichever of the other two parties concerned fails to obtain performance of the obligation, provided that party was itself acting innocently and in good faith.[313]

The practical effect of Fitzmaurice's proposal, in other words, would be to place the two conflicting treaties on par with one another, and to allow the party responsible for creating conflict to decide which treaty it would honor. This means that a party to a multilateral, legislative treaty could perform an earlier conflicting treaty instead, and it means that a party to an ordinary treaty conflicting with an earlier treaty could perform the later rather than the earlier. The same skepticism about the effectiveness of international legal institutions that caused Fitzmaurice to view most treaty conflicts as innocent, caused him to view sanctions against treaty conflict as mostly unenforceable. The result was the substitution of a liability rule for a property rule, except for a class of particularly apparent conflicts.[314]

Even this exception for obvious conflicts seems to have been preserved without enthusiasm. In the context of Fitzmaurice's overall proposal it seems at best incongruous and at worst irrational. If the purpose of the exception was to punish states that knowingly formed treaties in violation of the previous obligations of other parties, it was overinclusive: the fact that a treaty creates obligations explicitly or "directly" prohibited by a previous treaty does not guarantee that parties to the later treaty will be aware of the conflict. In fact, if Fitzmaurice's empirical assumptions were

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313. Law of Treaties, *supra* note 304, at 42 (commentary para. 85 to art. 18).

314. *See supra* text accompanying notes 306, 310-12.

correct, parties to the later treaty would not likely know that it is in "direct" conflict with another party's previous treaty obligations because they would not likely know of the previous treaty. If, on the other hand, the purpose of the exception was to punish states that had knowingly undertaken conflicting obligations, the exception was underinclusive: the state creating the conflict would likely be aware of it even if it were indirect or implicit. If nullity was the appropriate sanction for knowingly forming a conflicting treaty, then there was no reason to abandon a property rule. Thus, the first exception served no purpose consistent with Fitzmaurice's overall plan. Fitzmaurice defended it, not with argument or explanation, but merely with citation of authority.[315] All of his analysis on this point was directed *against* invalidating conflicting treaties in regular cases, rather than *for* invalidating them in exceptional cases.[316] This suggests that the exception is mere lip service—an atheist's oath of faith, sworn on a bible he doesn't believe in.

D. *Waldock*

In his initial treatment of the treaty conflict problem, Humphrey Waldock, Fiztmaurice's successor, simplified Fitzmaurice's proposal by excising the sanction of nullity altogether. Waldock recommended that in instances of conflict, the earlier treaty "prevail" as between parties to that treaty, but that normal rules of state responsibility with respect to treaties apply between parties to the later treaty.[317] The one exception to this rule was reserved for constitutive treaties of international organizations

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315. Law of Treaties, *supra* note 304, at 43 (commentary para. 88 to art. 18).

316. *Id.* at 43-44 (commentary para. 89 to art. 18).

317.

> (*a*) Where one or a group of the parties to a treaty, either alone or in conjunction with third States, enters into a later treaty, the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty.
>
> (*b*) in any such case the conflict between the two treaties shall be resolved—
>
> (i) if the effectiveness of the second treaty is contested by a State party to the earlier treaty which is not a party to the later treaty, upon the basis that the earlier treaty prevails;
>
> (ii) if the effectiveness of the second treaty is contested by a State which is a party to the second treaty, upon the basis of the principles governing the interpretation and application of treaties, their amendment or termination.

Second Report on the Law of Treaties, *supra* note 296, at 53-54 (text of art. 14, para. 2).

which limit the treatymaking powers of the members. Waldock reserved the question whether treaties conflicting with such multilateral treaties could be invalidated,[318] but argued vigorously against such a result.[319] Waldock's proposal reverted to the basic structure of Lauterpacht's original proposal, but substituted Fitzmaurice's ambiguous notion of "priority" for Lauterpacht's conception of "validity."[320] Only those treaties to which Lauterpacht was willing to accord validity would now be, in principle if not in practice, specifically performable. In contrast to Lauterpacht and Fitzmaurice, however, Waldock argued that all the treaties in question should be viewed as valid.

Waldock defended this position by invoking the distinction between jus cogens, or peremptory norms, and jus dispositivum, or conventional norms.[321] Treaties, he implied, may not be invalidated for violating a norm created by treaty, else it would be impossible to modify treaties.[322] In reasoning thus, Waldock confused a consensual revision of a treaty with a unilateral breach of treaty effected by agreement with a third party.[323] He did this by

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318. *Id.* at 53 (text of art. 14, para. 1 (a)).

319. *Id.* at 58-60 (commentary paras. 23-30 to art. 14, especially para. 25). *See* text accompanying notes 326-28 for a discussion of the nature of Waldock's argument against invalidating such treaties.

320. *See supra* note 304.

321. "It is undeniable that the majority of the general rules of international law do not have [the] character [of jus cogens] and that states may contract out of them by treaty." *Id.* at 53.

322. Waldock did not make this point explicitly, but he suggests that an identification of all legal norms as peremptory would prevent inter se modification of customary law:

> Unless the concept of what is "illegal under international law" is narrowed by reference to the concept of jus cogens, it may be too wide. The general law of diplomatic immunities makes it illegal to do certain acts with regard to diplomats; but this does not preclude individual states from agreeing between themselves to curtail the immunities of their own diplomats.

Id. at 53. This choice of example suggests that he viewed most customary law as involving consensual reciprocal obligations of the sort that would ordinarily arise as a result of the formation of a treaty. Later he divided treaties into two types: those embodying jus cogens and those embodying jus dispositivum. *See supra* note 321. The implication was that multilateral treaties not embodying a peremptory norm of international law could be considered just so many bilateral treaties, and that prohibiting inter se modification of multilateral treaties would, in effect, mean the prohibition of consensual modification of bilateral treaties.

323. Thus Waldock argued that inter se modification of multilateral treaties should be permitted, on the one hand because it would not effect obligations to third parties, and on the other hand, because it would change those obligations in accordance with the demands of progress. Interpreting Fitzmaurice's earlier report, he wrote:

characterizing the norm violated in treaty conflict as the specific obligations undertaken in a treaty rather than the obligation to perform in good faith. He assumed, without attempting to demonstrate, that the obligation to perform treaties cannot itself be a peremptory norm of international law.[324] The invalidity of a treaty for violation of a peremptory norm, he asserted, implies the "illegality of the object" of the treaty, not the want of capacity to make the treaty.[325] In other words, the treaty can only be illegal

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> The second treaty is only binding upon the parties to it and does not in law diminish or affect the rights of the other States' parties to the earlier treaty. It may do so in fact by undermining the regime of the earlier treaty and this may in some cases raise the question of the validity of the second treaty. But there is, in his view, another important consideration pointing the other way: "The right of some of the parties to a treaty to modify or supersede it in their relations *inter se* is one of the chief instruments, increasingly in use today, whereby a given treaty situation can be changed in a desirable and perhaps necessary manner, in circumstances in which it would not be possible or would be very difficult to obtain—initially at any rate—the consent of all the States concerned. To forbid this process—or render it unduly difficult—would be in practice to place a veto in the hands of what might often be a small minority of parties opposing change. In the case of many important groups of treaties involving a "chain" series, such as the postal conventions, . . . and other technical conventions, it is precisely by such means that new conventions are floated. In some cases the basic instruments of the constitutions of the organizations concerned may make provision for changes by a majority rule, but in many cases not, so that any new or modifying system can only be put into force initially as between such parties as subscribe to it.

Second Report on the Law of Treaties, *supra* note 296, at 56 (citation omitted). He also insisted that in cases of this kind "it is often quite possible for the second treaty to be applied as between its parties without disturbing the application of the earlier treaty as between them and the other States' parties to that treaty." *Id.* Waldock was trying to have it both ways.

324.

> It is to be emphasized that conflict with a rule of *jus cogens* is a ground of invalidity quite independent of any principle governing the legal effect of treaties that conflict with prior treaties. True, the *jus cogens* rule may be one that has been embodied in a prior general multilateral treaty. Under the present article, however, the relevant point is not the conflict with the prior general treaty, but the conflict with the rule having the character of *jus cogens*." The problem of resolving conflicts between successive treaties dealing with the same matters may sometimes overlap with the question of conflict with a *jus cogens* rule; but the rule in the present article is an overriding one of international public order, which invalidates the later treaty independently of any conclusion that may be reached concerning the relative priority to be given to treaties whose provisions conflict.

Id. at 53.

325. Article 13 of Waldock's draft deals with treaties that are void for illegality. The general principle of this article is that "[a] treaty is contrary to international law and void if

because of the type of obligation it creates, not because of the identity of the obligated state; for example, a separate peace agreement could be invalidated for infringing a state's inalienable right of collective self-defense, but could not be invalidated for conflict with a particular mutual defense pact. Waldock's implicit image of a peremptory norm was one that established an inalienable entitlement, not a property entitlement. In his view, the capacity to make conflicting treaties could not be alienated; thus, a treaty which purported to preclude future conflicting treaties would itself presumably violate a peremptory norm.

Accordingly, Waldock was unwilling to give effect to the provisions of multilateral, "legislative" treaties that would limit the treatymaking capacities of such parties.[326] In his view, only when international legislation embodied a peremptory norm could it be protected by the sanction of nullity. Thus, Waldock thought that the United Nations Charter, and some of the treaties referred to by Fitzmaurice as "integral," might be protected by this sanction if these treaties were viewed as embodying peremptory norms.[327] The nullity of the conflicting treaties would, however, be premised on the violation of the norm, not on the violation of a treaty.

Waldock apparently did not expect the type of treaty referred to by Fitzmaurice as "interdependent" (e.g., arms control agreements) to embody such peremptory norms. Nevertheless, he ex-

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its object or its execution involves infringement of a general rule or principle of international law having the character of *jus cogens*." *Id.* at 52-60. Article 14-3(a), which reserves the question of the validity of treaties violating a provision of a legislative treaty that limits the treaty making powers of the parties, does not refer to the ideas of jus cogens, which is instead discussed in Article 14-4. *Id.* at 54. Article 14-3(a), claimed Waldock, referred to "a question of capacity, not invalidity." *Id.* at 60.

326. *Id.* at 60.

327. Waldock took the view that Article 103 of the Charter

> does not pronounce the invalidity of treaties between Member States conflicting with the Charter, but only that in the event of a conflict between the obligations of Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter are to prevail. The rationale of Article 103 clearly is that priority is to be given to the Charter, not that invalidity is to attach to a treaty which conflicts with it.

Id. at 55. Elsewhere, he suggested that some provisions of the Charter might embody peremptory norms. *Id.* at 52. He acknowledged that Lord McNair viewed treaties conflicting with the Charter as void for want of capacity, but declined to accept McNair's view. *Id.* at 60.

pressed the view that the recognition of conflicting treaties would facilitate rather than retard such international legislation.[328] The implicit assumption is that the formation of new treaties will be of greater value to international order than the preservation of existing ones. This judgment seems consistent with Fitzmaurice's skepticism about the effectiveness of international legal institutions. If the international legal system has not yet developed strong institutions, it may lack not only the requisite legitimacy to preserve the status quo, but an incentive to do so.

Waldock rejected the first class of exceptions recognized by Fitzmaurice on the ground that it was overinclusive.[329] All treaties forbid the formation of inconsistent treaties, he argued, whether or not they do so explicitly.[330] Similarly, he argued, the terms "necessary" and "direct" would not exclude any instance of treaty conflict that was likely to become controversial.[331] If, therefore, one were to take seriously Fitzmaurice's proposal to nullify all treaties violating an explicit prohibition in a previous treaty, or otherwise conflicting "necessarily and directly" with a previous treaty, the result would be the reintroduction of the sanction of nullity for all instances of treaty conflict which might matter to someone. While we have speculated that Fitzmaurice introduced this exception in order to create the appearance of fidelity to Lauterpacht's property rule, Waldock rejected it for precisely this reason. The retention of such an exception would have frustrated Fitzmaurice's proposed substitution of remedial priority for Lauterpacht's attribution of exclusive validity to temporally prior treaties. Waldock could therefore justify the excision of this exception from Fitzmaurice's plan on the principle of fidelity to his predecessor's intention—the same principle that compelled Fitzmaurice to insert the exception in the first place.[332]

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328. *See supra* notes 307-08 and accompanying text.

329. *See supra* notes 305-06, 315-16 and accompanying text.

330. Second Report on the Law of Treaties, *supra* note 296, at 57-58 (commentary para. 19 to art. 14).

331. *Id.*

332.

> [I]f the general view be adopted—as it was by the previous special Rapporteur—that a later treaty concluded between a limited group of the parties to a multilateral treaty is not normally rendered void by the fact that it conflicts with the earlier treaty, his second tentative exception to the rule does not appear to justify itself.

Id.

This maneuver of Waldock's met with resistance in the deliberations of the International Law Commission. The proposal that treaties necessarily involving a direct conflict with a previous treaty be nullified was reintroduced by Eduardo Jimines de Aréchaga of Uruguay and Rhadabinhod Pal of India, supported by a citation to Lauterpacht.[333] Waldock absorbed this proposal by interpreting it as a device aimed at discouraging deliberate complicity in the creation of treaty conflict, rather than an effort to resuscitate a general conception of treaties as property entitlements.[334] In his subsequent revision of the draft article on treaty conflict, he reintroduced a special exception that appeared to be responsive to this concern, but he did so in a context which deprived the exception of any consequence.

Waldock's revised position was that the earlier treaty "prevailed" as between parties to the earlier treaty and that the later treaty "prevailed" as between parties to the later treaty, unless the party not party to the earlier treaty was aware of the earlier treaty.[335] This exception does not imply that the conflicting treaty is void, but merely that it does not "prevail" between the parties. Based on the usage established in previous drafts, this means that the later treaty would not be even in principle specifically enforceable. Yet this interpretation does not distinguish such treaties from any other treaties considered by Waldock. According to his

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333. The amendment would have added the following sentence to 14-2(a):

> Provided, however, that if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty, of such a kind as to frustrate the object and purpose of the earlier treaty, then any party to it whose interests are seriously affected shall be entitled to invoke the nullity of the second treaty.

Law of Treaties, [1963] 1 Y.B. INT'L L. COMM'N 196, U.N. Doc. A/CN.4/SER.A/1963 & Addenda.

334. *Id.* at 201.

335. Article 65-4:

> When two treaties are in conflict and the parties to the later treaty do not include all the parties to the earlier treaty —
>
> (a) as between a state party to both treaties and a state party only to the earlier treaty, the earlier treaty prevails;
>
> (b) as between states parties to both treaties, the later treaty prevails;
>
> (c) as between a state party to both treaties and a state party only to the later treaty, the later treaty prevails unless the second state was aware of the existence of the earlier treaty and that it was still in force with respect to the first state.

Law of Treaties, [1964] Y.B. INT'L L. COMM'N 35, U.N. Doc A/CN.4/SER.A/1964/Add.1.

revised proposal, *neither* conflicting treaty can be specifically enforced because each "prevails" between the parties to it. If "prevails" had continued to mean "specifically enforceable," then Waldock's proposal would have required that *both* conflicting treaties be specifically performed—a logical impossibility. Waldock apparently abandoned the notion that *any* treaty could be specifically enforced. Under these circumstances, it is hard to tell what the difference is between treaties that "prevailed" and those that didn't. Waldock's justification of this result was the principle, embodied in Article 34 of the final draft of the Vienna Convention, that "a treaty does not create either obligations or rights for a third state without its consent."[336] On this basis, he argued, the earlier treaty should not diminish the enforceability of the later treaty.

In the Commission's deliberations, both supporters and opponents of a property rule pointed out that the result of Waldock's proposed rule was that, in the event of conflict, neither treaty had priority over the other, since the party obligated under both could decide which treaty to perform and which to breach.[337] The consensus arose that the rule could only be sensibly interpreted as a general liability rule. On the basis of this consensus, the Drafting Committee substituted the phrase "governs their mutual rights and obligations" for "prevails" in the draft finally adopted by the Commission.[338] Supporters of this result argued that it would facilitate state autonomy[339] and the "progressive development of in-

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336. S. ROSENNE, *supra* note 26, at 224.

337. Law of Treaties, [1964] 1 Y.B. INT'L L. COMM'N 120, U.N. Doc.A/CN.4/SER.A/186/1964 (Verdross of Austria, supporting Waldock); *id.* at 123, 130 (de Aréchaga of Uruguay, objecting to Waldock's proposal); *id.* at 127 (Reuter of France, supporting a simplified version of Waldock's proposal); *id.* at 128 (Yasseen of Iraq, supporting simplification); *id.* at 131 (Ago of Italy, and Waldock himself, both supporting a simplification).

338. Law of Treaties, [1966] 1 Y.B. INT'L L. COMM'N (pt. 2) 212, U.N. Doc.A/CN.4/SER.A/186/1966 & Addenda. *See* Third Report on the Law of Treaties, [1964] 2 Y.B. INT'L L. COMM'N 40, U.N. Doc.A/CN.4/SER.A/167/1964 & Add.1-3 (commentary para. 22 to art. 65) (defining "prevails" and "applies").

339. Bartoš of Yugoslavia commented that:

> He had no wish to encourage States to act in bad faith, but he believed that in order to meet the needs of ordinary political life and facilitate international relations, States should not be obliged to remain bound by vestiges of treaties that were still formally in force, but no longer corresponded to reality. A State must be free to exercise its treaty-making capacity, subject only to the proviso that in doing so it engaged its international responsibility.

Law of Treaties, [1964] 1 Y.B. INT'L L. COMM'N 126, U.N. Doc. A/CN.4/SER.A/167/1964

ternational law."[340] Some argued against any exception to this rule for deliberately created treaty conflict, on the ground that such an exception would undermine the rule. The basis of this argument was an empirical assumption that the exception would apply to most cases of treaty conflict—that the case it described, in other words, was the rule and not the exception.[341] This empirical assumption, which they used to justify the expulsion of the last vestiges of a property rule from the regulation of treaty conflict, was the assumption which Lauterpacht had originally used to justify a property rule.[342] It was by means of the rejection of this assumption that Fitzmaurice had justified the rejection of Lauterpacht's proposed property rule.[343]

Yet Fitzmaurice's rejection of Lauterpacht's assumption had been based on a skepticism about international institutions which the Commission retained. This skepticism had in fact blossomed from a belief that these institutions could not prevent inadvertent conflict to a belief that they could not prevent deliberate conflict. Where Fitzmaurice merely questioned the efficacy of international law, Waldock and his supporters seemed to question its legitimacy. This increased skepticism explains the shift in attitude towards Lauterpacht's empirical assumption that most treaty conflict was deliberate. For Lauterpacht, treaty conflict was deviant and willful, but infrequent and preventable. For Fitzmaurice, by contrast, treaty conflict was deviant but inadvertent, frequent, and unpreventable. Both thinkers, however, viewed damages as only appropriate to compensate innocent third parties—victims of bad faith. Their disagreement concerned how often the occasion for damages was likely to arise. In Waldock's view, however, treaty conflict was frequent and generally willful, but normal and not in need of prevention. His defense of a liability rule, therefore, fo-

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[hereinafter cited as Law of Treaties, [1964]]. For similar statement by Bartoš, see Law of Treaties, [1963] 1 Y.B. INT'L L. COMM'N 200, U.N. Doc.A/CN.4/SER.A/156/1963. Such a sentiment was expressed by de Luna of Spain in Law of Treaties, [1966] 1 Y.B. INT'L L. COMM'N (pt. 2) 98, 102, U.N. Doc. A/CN.4/SER.A/186/1966 & Addenda.

340. Law of Treaties, [1964] 1 Y.B. INT'L L. COMM'N 126, 128, U.N. Doc.A/CN.4/SER.A/167/1964 (comment of de Luna of Spain at para. 26). *See also* Law of Treaties , [1963] 1 Y.B. INT'L L. COMM'N 88, 199, U.N. Doc.A/CN.4/156/1963 & Addenda (comments of Yasseen of Iraq).

341. Law of Treaties, [1964], *supra* note 339, at 129 (comment of Liu of Taiwan at para. 34); *id.* at 130 (comment of Rosenne of Israel at para. 41).

342. *See supra* text accompanying notes 300-01.

343. *See supra* text accompanying notes 310-11.

cused on a different feature of such a rule than did Fitzmaurice's. For Waldock, the key advantage of a liability rule lay not with its capacity to compensate innocent victims of treaty conflict, but in its capacity to empower the perpetrators of treaty conflict. Thus, Waldock and his supporters defended a liability rule on the grounds that it would facilitate state autonomy and systemic flexibility, but not on grounds of equity.

The approach to treaty conflict ultimately chosen by the Commission leaves the rights of potential victims of treaty conflict unclear. While Waldock argued patiently that the second of two conflicting treaties should receive as much protection as the first, he was careful never to specify what sort of protection that might be. Fitzmaurice had assumed that reparation was the appropriate remedy for treaty breach; Waldock, however, avoided mention of any specific remedy, referring only to "liability" or "state responsibility for breach."[344] This approach was ultimately followed by the International Law Commission in its treatment of treaty conflict. The specification of remedies was left to other sections of the Convention.[345] These sections establish a procedure for non-binding conciliation for disputes arising from breach. Assuming that this procedure was invoked and that its results were abided by, it could generate any remedy for breach, including damages or specific performance.[346] Moreover, if a dispute over breach involves a

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344. Third Report on the Law of Treaties, *supra* note 338, at 40 (comment at para. 22); Law of Treaties, [1964] 1 Y.B. INT'L L. COMM'N 126, 132, U.N. Doc.A/CN.4/SER.A/167/1964 (comment at para. 64).

345. The article ultimately adopted by the Commission read in pertinent part as follows:

> 4. (b) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations.
> 5. Paragraph 4 is without prejudice to . . . any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

S. ROSENNE, *supra* note 26, at 208-10.

346. Article 66(b) provides that either of the parties to a dispute concerning the termination of a treaty may set in motion a formal procedure for conciliation, described in an Annex to Article 66. *See id.* at 336-42. Paragraphs 4 through 6 of this Annex set forth the powers of the conciliating body so established:

> 4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.
>
> 5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable

peremptory norm, it may be brought before the International Court of Justice (I.C.J.) by any of the parties. It is conceivable, though unlikely, that this court could declare the good faith observance of treaties a peremptory norm in a dispute involving treaty conflict.[347]

Assuming that the scheme set forth in the convention would provide some protection for treaty entitlements, it is not clear that it would be in the form of liability rather than property entitlements. In fact, it is unlikely that this scheme would provide any protection at all against treaty conflict. Under this plan, neither informal conciliation nor I.C.J. adjudication could be initiated unless one party announces its intention to terminate a treaty, and the other party objects.[348] This means that if the breaching party

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settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

Id. at 342.

347. Article 66(a) provides for I.C.J. adjudication of disputes involving jus cogens at the request of either one of the parties. Such a dispute could arise in the context of treaty conflict in one of two ways: A party could announce an intention to terminate the latter of two conflicting treaties on the ground that it was invalidated by a "peremptory norm" of good faith performance of treaties. If the other party objected, either could bring it before the I.C.J. On the other hand, a party to conflicting treaties could announce an intention to terminate the first in order to permit performance on the second; if another party to the first objected on the ground that performance of the first would violate a peremptory norm, either party to that treaty could bring the dispute before the I.C.J. Article 53 defines a peremptory norm as "a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted." *Id.* at 290. Presumably, the fact that Article 30 treats subsequent conflicting treaties as valid implies that the principle of good faith observance of treaties was not viewed as a peremptory norm of international law by the International Law Commission. Nevertheless, Article 64 provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* at 330. Of course, given the I.L.C.'s criterion for a peremptory norm, as long as the scholarly and diplomatic community remains divided over the question of treaty conflict, it would be inappropriate for the I.C.J. to recognize the obligation to perform treaties as a peremptory norm.

348. Article 60, cited in paragraph 5 of Article 30, provides only that in the event of breach, an injured party may unilaterally terminate or suspend the treaty. *Id.* at 314-16. Article 65-3 and Article 66 together provide for formal conciliation of a dispute, according to the procedure described in the Annex to Article 66, only if one party objects to another's proposed termination or suspension of a treaty. *Id.* at 334-36.

does not acknowledge its intention to breach, an injured party's only remedy is unilateral termination of the treaty—a result to which a breaching party may well be indifferent. Under such circumstances there is effectively no sanction for breach.

The effect of Waldock's attack on the property conception of treaty entitlements was to undermine their status as entitlements altogether, reopening the question as to whether treaty conflict is in fact illegal at all. While attributing the purpose of establishing a general liability rule to Fitzmaurice, Waldock abandoned the feature of such a rule—compensation of victims—that originally recommended it to Fitzmaurice.

E. *Patterns of Interpretation in the International Law Commission Debates*

Waldock's misreading of Fitzmaurice's position reenacts Fitzmaurice's earlier misreading of Lauterpacht's position. In each case, recognition of treaties as liability entitlements was interpreted as reflecting an intention to recognize the validity of a conflicting treaty.

Lauterpacht's position attributes exclusive validity to the earlier of two conflicting treaties. The damages he would allow an innocent party to a conflicting treaty are based on a breach of good faith, not based on the existence of a second valid treaty, for a valid treaty would be specifically enforceable. Lauterpacht, in short, proposed a liability rule for the purpose of occasionally protecting reliance, as a supplement to a property rule which would protect treaty entitlements; but he did *not* propose that the later treaty be recognized as valid.

Fitzmaurice, however, interpreted this proposal as reflecting an intention to recognize conflicting treaties as valid, but subordinate to earlier treaties. This entailed a view of treaty entitlements as being sometimes property entitlements and sometimes liability entitlements, depending on the circumstances; thus, if a treaty could not be specifically enforced for any reason, it could be enforced by a damage remedy. Fitzmaurice gave what he called "priority" to the earlier of two treaties, but seemed to view the property and liability conceptions of treaty entitlements as equally valid.

Waldock in turn interpreted Fitzmaurice's proposal as reflecting an intention to accord equal validity to each of the two con-

flicting treaties, which meant that treaty entitlements could at best be protected by only a liability rule. There are two ways of understanding this result: We may understand it as a preference in principle for a liability rule, rarely enforceable in practice; alternatively, we may understand it as a rejection of both rules in favor of an approach affording treaty expectations no protection.

Let us assume that Waldock interprets his predecessors as favoring a liability rule. In this case, the liability rule, originally introduced as a *supplement* to a property rule, has *replaced* it entirely. The mechanism for effecting this change was a process of identifying a contradiction within an existing position and interpreting it as a frustrated intention. The choice between a view of treaty expectations as property entitlements and a view of treaty expectations as liability entitlements involves a choice between the exclusive validity of the first treaty and the equal validity of both. In their reports to the International Law Commission, Waldock and Fitzmaurice identified ambivalence between the property view (which attributes validity to the first treaty) and the liability view (which attributes validity to the second treaty) with indifference as to which of the two treaties should be performed. As a result, ambivalence between the property and liability views has been interpreted as an attribution of equal validity to both treaties; yet the equal validity of both treaties would entail a view of treaty expectations as liability entitlements. As a consequence, the very presence of disagreement between proponents of the property and liability views has been offered as an argument in support of the liability view. Accordingly, Waldock interpreted the international court's evasion of the treaty conflict problem as a rejection of the property view.[349] Doctrinal conflict has thus been marshalled to legitimate treaty conflict.[350]

Why was such an argument persuasive to the International Law Commission? We can see the appeal of this argument if we assume that the success of the property view requires that it com-

349. *See supra* notes 159, 160 & 296.

350. A connection between doctrinal conflict (scholarly disagreement between the property and liability views of treaty entitlements) and the encouragement of treaty conflict (the triumph of the liability view) is built into the International Law Commission's criterion for recognition of a peremptory norm of international law. Since the I.L.C. requires that such norms be recognized as such "by the international community for states as a whole," *see supra* note 347, disagreement over whether the obligation to perform treaties is a peremptory norm of international law precludes it from being accepted as such.

mand nearly universal support. Such a constraint was foisted upon proponents of the property view as a result of the ambivalent attitude the International Law Commission had adopted toward the doctrine of jus cogens.

Recall that enthusiasts of this doctrine ground it in the supremacy of international law. National sovereignty, they claim, is conditioned upon compliance with international law. The legitimacy of international law is rooted in the will of an international community characterized by common interests and shared values. On controversial questions of international law, such a community has no voice. Norms commanding wide support, however, reflect the will of this community. Acts violating such norms are, in turn, invalid. Enthusiasts of the doctrine of jus cogens have often viewed the obligation to perform treaties as a peremptory norm, because it commands such wide support.

The International Law Commission did not reject the possibility of peremptory norms in principle, but it rejected the notion that the values of an international community place any limitation on the sovereignty of states. Accordingly, it refused to recognize as peremptory those norms generally adhered to by the international community. Instead, it decided to recognize as peremptory only those norms adhered to *and recognized as peremptory* by "the international community of states."[351] This means that the treatymaking capacities of a state may not be limited unless virtually all states agree to be so limited. The validity of peremptory norms is dependent upon convention, rather than the other way around; similarly, the authority of international law is dependent upon the sovereignty of states rather than vice versa.

Given this criterion for the recognition of peremptory norms, it is easy to see why ambivalence as between the property and liability views could be interpreted in favor of the liability view. The property view is dependent upon the claim that performance of treaties is a peremptory norm of international law. Ambivalence about the property view in the reports to the International Law Commission reflected disagreement within the Commission as to whether the obligation to perform treaties was a peremptory norm. According to the Commission's criteria for the recognition of peremptory norms, therefore, the obligation to observe treaties

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351. *See supra* note 347 and accompanying text (emphasis added).

could not be a peremptory norm. On the assumption that strong institutions of international law were lacking, the presence of substantial support for the liability view seemed to disqualify the property view in favor of the liability view.

Yet Waldock's final proposal may be understood as not so much a rejection of a property rule in favor of a liability rule as a decision not to protect treaty entitlements at all. Such a result could be defended as a synthesis of both positions. This argument would involve identifying the property view with support for strong institutions of international law. Proceeding from such an assumption, Waldock and Fitzmaurice interpreted the proscription of treaties conflicting with prior treaties as reflecting an intention to render unenforceable treaties conflicting with legislative treaties establishing international institutions. The choice of a property rule for effectuating this purpose, however, reflects an empirical assumption: only if such institutions have already been formed by treaty will a property rule protect them. This assumption—that strong institutions of international law already exist—is one that we have already identified with the property view; it is also one that the International Law Commission rejected. Accordingly, Fitzmaurice rejected a property rule, but accepted the principle that any treaty conflicting with a legislative treaty—whether a prior one or a subsequent one—should not be enforced. Waldock retained this principle, but synthesized it with a principle supported by proponents of a liability rule: that two conflicting treaties should both be equally enforceable. The result was a scheme which arguably equalized conflicting treaties by rendering all treaties unenforceable. The goal of establishing strong institutions of international law would seem to preclude liability for breach of treaty.

In Chapter V, we saw that a view of treaties as property entitlements seemed to rest upon an assumption that national sovereignty was a creature of international law. In this Chapter, we saw that the International Law Commission seemed to reject this assumption. Given that international law could not dictate the will of states, the presence of substantial support for a liability rule seemed to discredit the view of treaty expectations as property entitlements. Yet the rejection of a property rule does not automatically entail the acceptance of a liability rule, and it is not clear that a liability rule is what the International Law Commission adopted.

The normative case for a liability rule must involve something more than the claim that the institutions of international law are not sufficiently potent to enforce a property rule, since such an argument could be turned against a liability rule with equal effect. Thus the International Law Commission's rejection of the premises of the property view does not really tell us that much about the premises of the liability view. More intriguing is the fact that they seemed willing to accept the assumption that a liability rule would be inconsistent with the project of developing potent institutions of international law. In the next Chapter, we will explore the normative vision which apparently inspires support for a liability rule, and sketch the social conditions under which that vision is incompatible with potent institutions of international law.

VII. THE NATIONALIST DILEMMA: LIABILITY RULE OR LAISSEZ FAIRE?

A. *Rationalizing Breach*

We have seen that a venerable tradition of academic writers on international law has viewed the treaty to break a treaty as void ab initio, and has based this conclusion on the assumption that international law was the ultimate source of municipal law. We have also seen the International Law Commission reject this view. The rule adopted by the Commission, however, is ambiguous: it may be understood either to recognize treaty expectations as liability entitlements, or to deny them recognition as entitlements in any form. Moreover, the Commission members seemed to assume that the latter interpretation was more compatible with the development of vital international institutions. In this Chapter, we will explore the origins of the arguments given by Commission members in support of the Commission's solution to the treaty conflict problem, with a view to accomplishing two objectives: first, to distinguish which arguments support the recognition of treaty expectations as liability entitlements and which do not; second, to determine in what sense the view of treaty expectations as liability entitlements is antagonistic to the development of international institutions.

Whether the solution adopted by the Commission is construed as a liability rule or a regime of laissez faire in treaty relations, it faces one crucial difficulty: it implicitly condones breach. A regime of laissez faire would mean that breaches would not be punished; but even a liability rule means more breaches than a property rule, since it gives promisors the option to perform or pay damages. Thus, supporters of the Commission's approach had to counter the argument that it would undermine the order, stability, and predictability of international relations sought by proponents of a property rule. They did so by identifying three types of values maintained by breach: (1) the interests of the breaching promisor, generally referred to in terms of the principle of "state autonomy"; (2) the relationship embodied in the latter of two conflicting treaties, generally referred to in terms of the principle of "good faith"; and (3) the development of new international institutions, generally referred to in terms of the "progressive development of international law."

Members of the International Law Commission did not explain these principles or the relationship among them. In this Chapter, I will show that these three principles can be understood as different aspects of a tradition of political theory associated with European nationalism. Seen from this standpoint, the principle of state autonomy involves the rejection of international authority, but can be viewed as consistent with either a liability rule or a regime of laissez faire governing treaty relations. The principle of good faith mandates a liability rule, while the principle of progressive development mandates a regime of laissez faire. I will argue that within the world view of European nationalism, international relations based on good faith are possible, but can not be universalized. From such a perspective, international relations may be divided into relations of mutuality based on good faith, and unregulated relations of exploitation. As a result, the apparent ambivalence of the International Law Commission between a liability rule and a regime of laissez faire can be explained as a reflection of a nationalist perspective on international relations.

B. *State Autonomy: An Inalienable Entitlement*

Solicitude for the interests of breaching promisors expressed itself in the Commission's deliberations as a commitment to state autonomy.[352] The term "autonomy," closely identified with the concept of sovereignty, might be taken to mean that a state may do whatever is in its power and need answer to no one. Given the purpose of Commission members in using the term, however, such an interpretation will not do. Commission members invoked this term in support of a liability rule, and against a property rule. A liability rule restricts a state's actions in ways that a property rule does not. Let us imagine that two states wish to enter an agreement enforceable by money damages (assuming that an institution exists which could enforce such a sanction). They could do so under a property rule by drafting a treaty requiring each party either to perform certain actions or to pay the other a specified fee. Now, let us suppose instead that they wish to enter an agreement that is specifically enforceable; that is, they wish to alienate their capacities to breach or to enter conflicting treaties. Under a liability rule, they may not do this; such a rule requires that the

352. *See supra* note 339.

capacity to make and break treaties be inalienable. When invoked in support of a liability rule, a term like "state autonomy" or "state sovereignty" represents an inalienable entitlement.

The function of "state autonomy" in a defense of a liability rule can be understood by analogizing it to the value of personal liberty in the jurisprudence of contract law. While contracts for the disposition of real property have been the paradigmatic contexts for specific enforcement in all legal systems, contracts for personal service have been the least controversial arena for the substitution of money damages as a remedy.[353] The practice of exempting such contracts from specific performance can be traced to Roman law, but was only rediscovered with the ultimate repudiation of feudalism in the nineteenth century. In France, the Roman law doctrine was dusted off by scholars and inserted into the Code Civil.[354] In America, a similar doctrine was identified with the natural law tradition of antipathy toward contracts of enslavement.[355] In each case, the rationale for barring specific enforcement of a personal service contract was the protection of personal liberty, even against consensual alienation.

Within the natural law tradition, liberty of person was viewed as an inalienable entitlement having priority over liberty of contract. Defining liberty of person largely in terms of bodily integrity and personal mobility, Locke and Blackstone viewed it as a fundamental natural right.[356] Liberty of contract, by contrast, represented a distinct and even antithetical principle. For Locke, the natural liberty to dispose of one's property and person was constrained by a natural obligation to preserve that same liberty which proscribed its permanent alienation.[357] For Blackstone, the

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353. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).

354. *Id.*

355. The Case of Mary Clark, a Woman of Color, 1 Blackf. 122, 139 (Ind. 1821).

356. 1 W. BLACKSTONE, COMMENTARIES *130-34; J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT paras. 22, 23 (1948) (1st ed. London 1690).

357. "But though this be a state of liberty, yet it is not a state of license; though man in that state has an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself . . . ." J. LOCKE, *supra* note 356, at para. 6.

> This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man not having the power of his own life cannot by compact, or his own consent, enslave himself to anyone, nor put himself under the absolute arbitrary power of another to take away his life when he pleases.

right of contract was a civil right, derivative from the institutions of civil society. These institutions, established to protect property, implied a partial alienation of personal liberty.[358]

Charles Beitz has argued that defenses of state autonomy in modern international legal discourse have been based on an analogy between states and individuals. States are viewed as having an inalienable right to protect their own national interests, he has argued, in an analogy to the individual rights of life and personal liberty recognized by the natural law tradition.[359] Gary Wills would reverse this analogy:

> A human right is now most often thought of as a power the individual retains over-against the state. But its earlier use was a power exercised in the name of the state. "Right" was right order, the *rectum* or *directum*. It was the power of dominion or position . . . .
>
> Insofar as a sovereign had right or rule over something, it was properly his (*proprium*), an *alienum* to others. To transfer, he must "alien" it—and the juridical literature first used "alienable" about the power to surrender territory or peoples while retaining rule over the *proprium*. Fiefs and domains were defined in terms of their alienability from the prince or crown. The same legal language was used for any title-transfer over an estate or property . . . . Whatever subsidiary holdings might be disposed of, the sovereign could never alien the realm's very substance.[360]

Regardless of which came first, the recognition of state autonomy and personal liberty as inalienable have a common heri-

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Id. at para. 23.

358.

> The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.

W. BLACKSTONE, *supra* note 356, at 134.

359.

> Perceptions of international relations have been more thoroughly influenced by the analogy of states and persons than by any other device. The conception of international relations as a state of nature could be viewed as an application of this analogy. Another application is the idea that states, like persons, have a right to be respected as autonomous entities. This idea, which dates from the writings of Wolff, Pufendorf, and Vattel, is a main element of the morality of states and is appealed to in a variety of controversies in international politics.

C. BEITZ, *supra* note 135, at 69.

360. G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 213 (1979).

tage in the Aristotelian conception of nature. For Aristotle, the life of an organism consisted of a patterned activity that was characteristic of its species, but peculiar to itself. Preserving life meant preserving this characteristic activity. Thus, nature endowed all living organisms with an imperative not only to preserve themselves, but to preserve their identities. All subsequent invocations of inalienable "natural" right have drawn on this conception of nature. Natural "rights" are inalienable because natural "*right*" imposes a duty on all beings to keep whatever they need in order to remain what they are. These needs define an organism's inalienable natural rights. For Aristotle, it was the nature of human beings to live politically. Human beings could not achieve their full nature outside of a political community and such a community—a state—was a living organism with its own particular nature.[361] Both state and individual were equally under obligation to nature to preserve their own identities, and for Aristotle (though not necessarily for subsequent thinkers) these two projects mutually implicated one another. Human beings were trustees of nature's bounty, and their self-dominion, whether individual or collective, was inalienable for that reason. If autonomy consists of the fulfillment of one's nature, it entails responsibilities. Aristotle's conception of autonomy as a duty rather than a license explains its inalienability.

Aristotle's image of the state as an organism was modeled on the Greek polis, an intimate republic characterized by broad citizen involvement in political and cultural life. The notion that the state was an organism, obliged to fulfill its *own* nature as well as that of its citizens, reflected a belief that the virtue of a state rested upon the integrity of its particular culture. Political wisdom in the wake of the Peloponnesian War counseled insularity, as Athenian imperialism had recently brought disaster not only on Athens, but on all of Greece. James B. White recounts that:

> Thucydides explains . . . [the] wave of civil war [that followed the Peloponnesian War] . . . [as] the direct result of the war between Athens and Sparta, because without such a war the factions within a city would have no pretext for calling in outsiders, nor were outsiders necessarily ready to act; but the disaffected party could always appeal to the power with whom their city was not allied, who would always intervene.[362]

361. G. SABINE, A HISTORY OF POLITICAL THEORY 119-22 (1961).
362. J. WHITE, WHEN WORDS LOSE THEIR MEANING 81 (1984).

Treatymaking not only increased a republic's dependence on its friends, it invited intervention by their enemies. Moreover, the possibility of treaty conflict—alliance with two states whose interests come into conflict—threatened the republic with internal conflict. The republic's obligation to maintain its integrity restricted its authority to make treaties.

Aristotle's conception of the state as an organism was inapplicable to an empire governing many peoples. As a consequence, the stoic philosophers of the Hellenistic empires abandoned his conception of human nature as communal in favor of a conception of human nature at once more universal and individual.[363] For the Romans of the Empire, human nature was realized through introspection, asceticism, and obedience to authority; Roman virtue was stoic rather than civic, individual rather than collective.[364] The role of the state could still be conceived as the realization of human nature, but that nature required the demarcation of a realm of privacy. Hence Roman law introduced the distinction between public law and private law, and erected within the latter category an elaborate system for the protection and transfer of property. The empire was conceived of, like other corporate bodies in Roman law, as an artificial person, rather than an organism.[365] It was distinct from its citizens and exercised unreviewable discretion to legislate their behavior: "[T]hat which seems good to the Emperor has also the force of law." Nevertheless, it legislated on behalf of the people; it represented them: "For the people, by the *Lex Regia*, which is passed to confer on him his power, make over to him their whole power and authority."[366] As a result of this concession, the emperor ruled the em-

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363. *See* G. SABINE, *supra* note 361, at 141 (rise of conceptions of individual and of universal brotherhood in Hellenistic period); *id.* at 146-47 (Emperor the only unifying force in the Hellenistic states); *id.* at 148-49 (stoicism valued individual self-sufficiency, but also devotion to duty); *id.* at 153 (Roman adaptation of stoicism promoted notion of universal human rights).

364. *Id.* at 149 (description of stoic virtues); *id.* at 153 (description of corresponding Roman values); *id.* at 155-63 (stoic influence on Roman law).

365. *Id.* at 166 (the empire as a corporation); Heiman, *Introduction* to O. GIERKE, ASSOCIATION AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES at 27-31 (1977) (exposition of ideas of corporation and artificial personality in Roman law); *id.* at 34 (Roman distinction between public and private law premised on belief that only individuals can have real personality); *id.* at 39 (groups "can manifest themselves only through guardians and legally appointed spokesmen" in Roman law).

366. THE INSTITUTES OF JUSTINIAN 1.1.4 (T. Sanders trans. 1956) (1st ed. n.p. 533)

pire as the Roman father ruled the household: with absolute dominion, but bound by fiduciary duty.[367] The content of that fiduciary duty was expressed by natural law; Roman private law was the product less of the will of the sovereign than of the opinions of thoroughly Hellenized jurists.[368] The function of nature in their view was not so much to provide goods as to articulate human needs for which it was the function of the empire to provide. Thus the distinction between public and private in Roman law reflected the coexistence of untrammeled legislative discretion with subjection to natural law.[369] While imperial "sovereignty" (the power of legislation) was absolute, it was bound by a fiduciary duty not only to preserve, but also to create, individual property entitlements. Implicit in this conception of sovereignty as guardian was an argument against its alienability; an argument that would be developed by later thinkers.

Neither the term "state" nor the term "sovereign" was employed to designate legitimate power until the sixteenth century.[370] In fact it seems strange to apply the term sovereignty to dominion over persons in medieval society because that dominion was so thoroughly inalienable. Dominion over neither property nor persons was unambiguously in the hands of any one individual. Dominion over both was coextensive: any feudal relationship could be described either in terms of fealty or ownership.[371] Commerce took place within these hierarchical relationships. Weber characterized medieval contracts as functioning to establish social and political relationships rather than merely facilitating economic exchange and risk distribution.[372] Yet because each such relationship was embedded in a feudal hierarchy, each fiefdom had many masters. In this context, the formation of a contract was less expressive of the will of an individual than of that person's

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quoted in O. Gierke, *supra* note 365, at 31.

367. *Id. See also* G. Sabine, *supra* note 361, at 171.

368. *See* G. Sabine, *supra* note 361, at 165-72.

369. *Id.* at 155, 164-66, 170-71.

370. A. d'Entrèves, The Notion of the State 28-30 (1967) (introduction of "state" generally attributed to Machiavelli); *id.* at 99 ("sovereign" introduced by Bodin).

371. M. Cohen, Law and the Social Order 41-42 (1982).

372. 2 M. Weber, Economy and Society 668 (1968). "By means of such a contract a person was to become somebody's child, father, wife, brother, master, slave, kin, comrade-at-arms, protector, client, follower, vassal, subject, friend, or, quite generally, comrade." *Id.*

place in the hierarchy. To dispose of one's person or property would be to infringe the sovereignty of everyone further up in the hierarchy. In a sense, nothing was owned; all power represented a concession or bailment by a higher authority. This applied even to the possessions of the king: in medieval England, kings were not entirely free to alienate royal property, for their sovereignty was dependent upon it. That sovereignty, in turn, was merely a bailment of divine authority, and was not the sovereign's to dispose of.[373] Divine authority, moreover, was implicit in every hierarchical relation throughout the feudal order, and universal throughout the empire of Christendom.

The implicit presence of an eternal God in the temporal world of medieval Christianity is one source of the valorization of stability as a value in political thought.[374] Medieval political thought combined the Roman claim to universality with the Aristotelian imperative that political institutions foster and maintain the virtue of their peoples.[375] Yet the immanence of God[376] meant that the latter criterion was easily met. Christian virtue was stoic: it consisted merely of fidelity to the divine plan (a fate which an inhabitant of a harmonious world could hardly avoid) completed by grace (the prize for voluntary obedience). For sovereign and citizen alike, the practice of virtue imposed little in the way of individual responsibility—but neither did it offer much in the way of individual opportunity.[377] Virtue was omnipresent in the feudal

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373. E. KANTOROWICZ, THE KING'S TWO BODIES 143-92 (1958) (essay on Bracton).

374. J. POCOCK, POLITICS, LANGUAGE AND TIME 82-85 (1971). *See also* J. POCOCK, THE MACHIAVELLIAN MOMENT 3-9 (1975).

375. "The revival of Aristotelian philosophy carried with it the problem of reconciling the Hellenic view that man was formed to live in a city with the Christian view that man was formed to live in a communion with God." J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 374, at 84.

> Dante . . . saw the delivery of Florence from faction rule as part of the restoration of Italy to political and spiritual health within a universal empire . . . . Because the hierarchy of the empire reflects that of the cosmos, it is the manifestation of principles that do not change. . . . He saw secular rule as the empire in which the eternal order was repeated and restored, not as the republic in which a particular group of men resolved what their particular destiny should be.

Id. at 50.

376. For a provocative discussion of the tension between immanence and transcendence in medieval Catholicism, see A. LOVEJOY, THE GREAT CHAIN OF BEING 67-98 (1960).

377. J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 374, at 49-50 (conception of secular rule described in passages quoted in note 375 does not encourage civic action).

world and, since everything was virtuous, nothing could be changed.

Against the backdrop of this static, universalistic world view, the rise of autonomous, centralized states was deeply troubling. The prospect of numerous autonomous sources of power fractured the myth of monolithic necessity upon which the legitimacy of power was based. If the world was composed of discrete particulars, rather than a harmonious whole, then God—who was a unity—could not be immanent in this world. This in turn meant that particular institutions were contingent rather than necessary and could easily disappear.

Thus, proponents of the modern state faced a dual task: justifying its legitimacy, and defending its capacity for survival. The first task required that the autonomy of state power be restrained by a link to some source of virtue. The second task involved conceptualization of the state as a permanent entity. These two tasks were connected: since medieval scholasticism identified the eternal with the necessary, the durability of a state could testify to its virtue. Conversely, the virtue of a state provided a compelling normative argument against permitting its dissolution. Accordingly, proponents of autonomous, centralized state power did not conceive it as unrestricted: possession of state power was conditioned on its inalienability. In explaining the inalienability of state power in the absence of an immanent God, political theorists reverted to the two models of the state provided by classical antiquity: the republic and the empire.

C. *The Republican Model*

The republics of the Renaissance were descendants of urban communes that here and there disrupted the hierarchical unity of medieval society. These communes, organized by artisans, were initially characterized by egalitarian, cooperative, and parochial values. Soon, however, they attracted merchants, bent on acquisition and contact with other lands.[378] They sometimes resolved the tension between these goals by forming cooperative alliances with

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378. The conflicting interests of artisans and merchants in the emergent communes are described in M. TIGAR & M. LEVY, LAW AND THE RISE OF CAPITALISM 80-96, 131-43 (1977).

a few other communes.[379] These themes—a conflict between the parochial and the cosmopolitan, resolved by an extension of the commune to include allies—shaped the republican vision of relations between states.

The first systematic use of the term "state" to refer to the apparatus of government is generally ascribed to Machiavelli.[380] Because Machiavelli recognized no higher source of virtue, it has generally been assumed that he recognized no international obligations as binding. Accordingly, breach of treaty has often been viewed as paradigmatically Machiavellian behavior.[381] In fact, this characterization is unfair: Machiavelli counsels the maintenance of good faith with allies as both prudent and courageous.[382] For a

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> The urban *conjuratio*, founding pact of the commune and one of the nearest actual historical approximations to a formal "social contract," embodied a new principle altogether—a community of equals. . . . In practice the commune was, of course, restricted to a narrow elite within the towns; while its example inspired inter-city Leagues in North Italy and the Rhineland. . . .

P. ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 194 (1978).

380. *See supra* note 370.

381. THE OXFORD ENGLISH DICTIONARY (1971) defines Machiavellian as "practicing duplicity in statecraft," and offers as an example of its use: "the true way of treaties is with Christian, not Machiavellian policy." Sabine described Machiavelli's prince as "little more than an idealized picture of the Italian tyrant of the sixteenth century." G. SABINE, *supra* note 361, at 346. "Never has the game of diplomacy been played more fiercely than in the relations between the Italian states of Machiavelli's day. Never have the shifts and turns of negotiations counted for more." *Id.* at 339. "Whether a policy is . . . faithless or lawless [Machiavelli] treats as a matter of indifference. . . ." *Id.* "He openly sanctioned the use of . . . perfidy." *Id.* at 343. This reading is based on such passages as the following:

> The experience of our times shows those princes to have done great things who have had little regard for good faith . . . as [men] are bad and would not keep their faith with you, so you are not bound to keep faith with them. Nor have legitimate grounds ever failed a prince who wished to show colourable excuse for the non-fulfillment of his promise. Of this one could . . . show how many times peace has been broken, and how many promises rendered worthless, by the faithlessness of princes, and those that have been best able to imitate the fox have succeeded best.

N. MACHIAVELLI, THE PRINCE 92-93 (L. Ricci trans. 1952) (1st ed. Roma 1532).

382.

> A prince is further esteemed when he is a true friend or a true enemy, when, that is, he declares himself without reserve in favour of some one or against another. This policy is always more useful than remaining neutral. For if two neighbouring powers come to blows, they are either such that if one wins, you will have to fear the victor, or else not. In either of these two cases it will be better for you to declare yourself openly and make war, because in the first case if you do not declare yourself, you will fall a prey to the victor, to the pleasure and satisfaction of the one who has been defeated, and you will have

civic humanist like Machiavelli, prudence and courage were essential components of virtue.

J.G.A. Pocock has sought to explain the Renaissance identification of virtue with creative activity as part of an attempt to justify state autonomy in the face of the static and universalistic world view of medieval Catholicism. He has argued that Machiavelli and other civic humanists sought to detach Aristotelian political theory from the pious imagery of imperial Rome in order to legitimize the political independence of the Italian republics from papal and imperial power.[383] This required that God be

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> no reason nor anything to defend you and nobody to receive you. For, whoever wins will not desire friends whom he suspects and who do not help him when in trouble, and whoever loses will not receive you as you did not take up arms to venture yourself in his cause. . . .
>
> And it will always happen that the one who is not your friend will want you to remain neutral, and the one who is your friend will require you to declare yourself by taking arms. Irresolute princes, to avoid present dangers, usually follow the way of neutrality and are mostly ruined by it. But when the prince declares himself frankly in favour of one side, if the one to whom you adhere conquers, even if he is powerful and you remain at his discretion, he is under an obligation to you and friendship has been established, and men are never so dishonest as to oppress you with such a patent ingratitude. Moreover, victories are never so prosperous that the victor does not need to have some scruples, especially as to justice. But if your ally loses, you are sheltered by him, and so long as he can, he will assist you; you become the companion of a fortune which may rise again. In the second case, when those who fight are such that you have nothing to fear from the victor, it is still more prudent on your part to adhere to one; for you go to the ruin of one with the help of him who ought to save him if he were wise, and if he conquers he rests at your discretion, and it is impossible that he should not conquer with your help.
>
> And here it should be noted that a prince ought never to make common cause with one more powerful than himself to injure another . . . for if he wins you rest in his power. . . .

N. MACHIAVELLI, *supra* note 381, at 111-12. Machiavelli's emphasis on state independence paradoxically dictates that states show loyalty to their allies, even in defeat. Reliable alliances with states of equal or lesser power represent an important check against the vagaries of fortune. Only if an ally is more powerful does the alliance become a threat to national independence. It is in light of this distinction that one should read Machiavelli's admonition that "a prudent ruler ought not to keep faith when by so doing it would be against his interest, and when the reasons which made him bind himself no longer exist." *Id.* at 92. If allies become too powerful, the justification for the alliance disappears; instead of supporting a state's independence, such an alliance threatens it. Flexibility is the price of maintaining a balance of power, and Machiavelli seemed to urge breaking faith with the strong rather than the weak.

383.

> The whole image of human authority and its history to which Florentines were supposed to look was being drastically reconstructed, deprived of its continuity and—in a most important sense—increasingly secularized. In what may be

exorcised from the temporal world; that virtue, in short, become contingent upon events. Civic humanists confronted the feudal order with what Pocock has called an apocalyptic sense of time.[384] In their view divine will stood apart from the temporal world, and did not inhabit it—divine intervention, in fact, signalled the end of time. Rather than a static and orderly whole, history was a chaotic struggle ending in divine judgment. Virtue in an entropic world involved prefiguring divine will by imposing order over the maelstrom of fortune.[385]

> termed the imperialist vision of history, political society was envisaged as the existence among men of the hierarchical order existing in heaven and in nature; its legitimation and its organizing categories were alike timeless, and change could exist in it only as degeneration or recovery. Affiliation with the empire, then, like affiliation with monarchy generally, was affiliation with the timeless. Those who sought, whether from a papalist point of view or one committed to political realism, to emphasize that empire or monarchy were of the *civitas terrena* might indeed stress their secular character. But in the newer vision, the republic of Florence, stated as a high ideal but existing in the present and in its own past, was affiliated only with other republics and with those moments in past time at which republics had existed. The republic was not timeless, because it did not reflect by simply correspondence the eternal order of nature; it was differently organized, and a mind which accepted republic and citizenship as prime realities might be committed to implicitly separating the political from the natural order. The republic was more political than it was hierarchical; it was so organized as to assert its sovereignty and autonomy, and therefore its individuality and particularity . . . . But to assert the particularity of the republic to this extent was to assert that it existed in time, not eternity, and was therefore transitory and doomed to impermanence, for this was the condition of particular being. . . . The one thing most clearly known about republics was that they came to an end in time, whereas a theocentric universe perpetually affirmed monarchy, irrespective of the fate of particular monarchies. . . . To affirm the republic, then, was to break up the timeless continuity of the hierarchic universe into particular moments: those periods of history at which republics had existed and which were worthy of attention, and those at which they had not and which consequently afforded nothing of value or authority to the present. The idea of "renaissance" after an age of barbarism would seem to owe something to a patriotic insistence on confronting the Florentine with the Roman republic and dismissing the intervening centuries of Roman and Germanic empire as an interlude of tyranny as well as barbarism.

J. POCOCK, *supra* note 374, at 53-54.

384. *Id.* at 34 (millenarism traditional Christian mode of justifying rebellion against established church vested with secular power); *id.* at 44-45 (Augustinian defense of established institutions of church and monarchy depended upon suppressing apocalyptic tradition in Christian thought); *id.* at 104-11 (apocalyptic preaching of Savonarola was an important source of Florentine nationalism and influence on contemporary republican theorists, including Machiavelli).

385. *Id.* at 46-48 (providence identified as the divine will ordering fortune; human virtue identified with divine providence); *id.* at 156-57 (republic as model of universe; civic

It was in this conceptual context that civic humanism pointed to the republic as an island of order in a turbulent sea. Yet the republic's particularity provided a major liability in fulfilling this function, for medieval scholasticism identified only the universal as eternal. Civic humanism attempted to link the republic to universal values by uniting a host of particular values in a balanced whole.[386] Within the context of such a balanced whole, the pursuit of particular values was virtuous. As a result, the civic humanists understood civic virtue as the simultaneous pursuit of particular values and the maintenance of that balance.[387] Accordingly, the virtuous citizen himself embodied a balance between private ambition and public commitment. This was the proverbial renaissance man, a (male) citizen who would develop not only those talents that would please himself, but also those that would be of service to the republic.

Just as virtue served the republic, the republic facilitated the exercise of virtue by creating a stable and predictable world. The civic humanists conceived of virtue and fortune as agonistic forces; each was prolific and each threatened the other with domination.[388] Order was virtue's weapon in this struggle and disorder was fortune's weapon. Accordingly, fortune was more easily mastered in a world already impregnated with order than in one corrupted by disorder. The republic made individual virtue possible by locating it in an orderly community of the virtuous.[389] The main responsibility of the virtuous was therefore the preservation of that community.

In this way, Renaissance political theory justified the autonomy of polities in terms of precisely the principle that, in medieval political theory, had guaranteed their interdependence: the inalienability of sovereignty. The Renaissance republic was an organism, and its essential activity consisted in the preservation of its identity.

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virtue as only defense against fortune in Machiavelli's thought).

386. *Id.* at 66-71 (Aristotelian view of the Polis as means of uniting particular goods); *id.* at 156 (republic as model of the universe).

387. *Id.* at 74-75, 89 (citizenship as pursuit of particular goods and maintenance of the republic); *id.* at 199-204 (Machiavelli's application of this idea in arguing that a citizen militia is preferable to a standing army of professional mercenaries).

388. *Id.* at 31-48 (developing opposition between fortune and virtue in humanist thought); *id.* at 80 (fortune threatening the republic).

389. *Id.* at 75, 157 (maintenance of republic necessary to individual virtue).

In the turbulent world of Italian politics, the preservation of the republic entailed purging it of all worldly corruption. In fact, so threatening a force was fortune, that preservation of the republic seemed to require mastery of as much of that corruption as possible. The search for stability in an entropic context seemed, in a Pynchonesque paradox, to require constant war, and the God in whose image the republic was created, brought the sword.[390]

The inevitability of conflict rendered alliance—though dangerous—necessary. Because some form of interaction with the outside world was unavoidable, it was incumbent upon the republic to render that world as orderly and predictable as possible. Alliance at once reduced the threat of war from the republic's neighbors, and increased the republic's military resources in the event of conflict. Machiavelli shared with Thucydides the sense that such dependence on a foreign power threatened the integrity of the republic; but he also shared Thucydides' sense that once conflict was abroad in the world, such threats were unavoidable. The difference between the two lay in Thucydides' assumption that international conflicts and resulting alliances were unnatural aberrations. Machiavelli, by contrast, assumed that such conflict was inevitable: the problem was not to avoid it, but to master it.[391]

Why did Machiavelli and his contemporaries view conflict as inevitable, where Thucydides and his contemporaries viewed it as aberrant? Machiavelli viewed conflict as unavoidable because he viewed international relations as unavoidable; and international relations were increasingly unavoidable in the sixteenth century because of the proliferation of trade.

Trade was a disruptive force because it was a system of distribution at odds with the rhythms of communal life. Polanyi argued that it was not until the nineteenth century that a single international market for most goods was established. Before that time, most distribution and production took place within close-knit, organic, cultural and economic units, and was regulated by ritual.[392] Contact between these units was infrequent in medieval times, and when goods were needed from another community, it was custom-

390. *Id.* at 197-99 (Machiavelli's argument for imperialism combines a "concern, typical of his generation, with the republic's ability to control its external environment," with an aim of "arming the people" in order more broadly to distribute civic virtue).

391. *See supra* notes 381-82.

392. K. Polanyi, *supra* note 117, at 56-67.

ary to resort to war. Polanyi suggested that trade was developed as a more reliable alternative to war; yet backed, as it was, by the threat of war, it was not necessarily any less coercive.[393] Nor was it any more compatible with traditional modes of production and distribution. The more a community traded, the more it produced for export and the more dependent it became on foreign markets. A threat to these markets could therefore embroil the community in war.

Machiavelli viewed the world beyond the republic as dangerous because it was the domain of dependence and war; but it could not be shunned because commerce beckoned from its shadows. On the other hand, while commerce offered to enrich the republic, it had a dark side as well: it threatened to undermine the republic's integrity and independence.

While suspicion of commerce has been a persistent theme in the republican tradition, it received its most explicit and influential expression in the republican theory of Rousseau. Rousseau, generally acknowledged as the intellectual progenitor of nineteenth century nationalism,[394] viewed commerce with utter loathing:

> It is the bustle of commerce and the crafts, it is the avid thirst for profit, it is effeminacy and the love of comfort that commute personal service for money. Men give up a part of their profits so as to increase the rest at their ease. Use money thus, and you will soon have chains. The word "finance" is the word of a slave; it is unknown in the true republic. In a genuinely free state, the citizens do everything with their own hands and nothing with money.[395]

Rousseau's hostility to commerce stemmed from his conception of the republic as an organic association. Because the republic was an organism, its chief concern was self-preservation.[396] For

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393. *Id.* at 58-59; for descriptions of the relationship between trade and warfare in medieval Europe, see generally P. ANDERSON, *supra note 379*; G. DUBY, EARLY GROWTH OF THE EUROPEAN ECONOMY: WARRIORS AND PEASANTS FROM THE SEVENTH TO THE TWELFTH CENTURY (1978).

394. *See, e.g.*, G. SABINE, *supra* note 361, at 593-94; A. D'ENTRÈVES, *supra* note 370, at 178-79.

395. J. ROUSSEAU, THE SOCIAL CONTRACT 140 (M. Cranston trans. 1968) (1st ed. Amsterdam 1762).

396.

> [T]he state, or the nation, is nothing other than a legal person the life of which consists in the union of its members and . . . the most important of its cares is its own preservation . . . . Just as nature gives each man an absolute power over

Rousseau, as for Aristotle and Machiavelli, the preservation of the republic required the maintenance of civic virtue among the citizenry. For Rousseau, however, this was true by definition: the sovereign—the body whose will was law—consisted of all citizens, provided that all citizens were virtuous. Virtue consisted of the subordination of a citizen's private interests to the interest of all citizens.[397] When citizens were virtuous in this sense, they collectively composed the sovereign. Each citizen, in acting as a fiduciary for all, participated in sovereignty. For Rousseau, all property was owned by the community as a whole, and could legitimately be held by individual citizens only as a public trust.[398] When any citizen pursued his private interest at the expense of his public duties,[399] he withdrew his participation. Rousseau scorned commerce because commerce threatened to erode sovereignty by encouraging citizens to pursue their private interests.

The reason Rousseau was so concerned that sovereignty be maintained is that he saw it as a prerequisite to freedom. By making each citizen the agent for all, Rousseau thought he could insure that no citizen would be subject to the will of another. While the life of each citizen would be affected by collective decisions, those collective decisions would not promote the interests of any individual over those of any other. For such freedom to be preserved it was crucial that all citizens participate in decisionmaking. If a citizen did not participate, he would be represented by other citizens, and in Rousseau's eyes such representatives would be either masters or slaves. They would be masters if they acted on their own authority, slaves if they acted on the authority of others.[400] The only condition under which freedom could be

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> all his own limbs, the social pact gives the body politic an absolute power over all its members; and it is this same power which, directed by the general will, bears . . . the name of sovereignty.

Id. at 74.

397. *Id.* at 72 (definition of the general will); *see also id.* at 63-64.

398. *Id.* at 65-68.

399. Rousseau, like the Renaissance republicans, viewed women as a source of corruption, incapable of civic virtue. *See generally* S. OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 99-194 (1979); D. Silberstein, "A History of Pornography" (on file with the Buffalo Law Review).

400. *See, e.g.*, J. ROUSSEAU, *supra* note 395, at 141.

> Sovereignty cannot be represented, for the same reason that it cannot be alienated . . . . Thus the people's deputies are not, and could not be, its representatives; they are merely its agents; and they cannot decide anything finally. Any

maintained is if sovereignty were inalienably vested in the citizenry.

Rousseau saw representation as a form of slavery in part because he saw it as a form of commerce, a bargain between representative and constituent.[401] For Rousseau, the arms length bargain was inherently coercive. His own social contract was not an arms length bargain between distinct individuals, but the creation of a new organism—an association.[402] In becoming part of such an organic association, however, an individual would not alienate his liberty, because he would retain the power to exercise his will, both as voter and as public official. Rousseau's criterion of freedom is the exercise of will in the public interest, not the pursuit of self-interest.

One consequence of Rousseau's insistence upon universal participation is a requirement that politics be practiced on an intimate scale. Rousseau believed that states should be small in terms of both population and territory; that the citizens should know one another; and that they should have common customs and possibly common ancestry.[403] Because of its small size, Rousseau's republic would be beset by threats from abroad.[404] Like Machiavelli, however, Rousseau did not shrink from armed conflict.[405] Also like Machiavelli, Rousseau saw alliance with other small republics as a prudent strategem for defense of the republic.[406] Rousseau

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> law which the people has not ratified in person is void; it is not law at all. The English people believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as the Members are elected, the people is enslaved. . . .

Id.

401. *Id.* at 140.

402.

> [T]he act of association consists of a reciprocal commitment between society and the individual, so that each person, in making a contract, as it were, with himself, finds himself doubly committed, first as a member of the sovereign body in relation to individuals, and secondly as a state in relation to the sovereign.

Id. at 62.

403. *Id.* at 89-93.

404. *Id.* at 138.

405. *See, e.g., id.* at 184. Rousseau's favorite ancient state was Sparta rather than Athens. Cranston, *Introduction* to J. ROUSSEAU, *supra* note 395, at 17.

406. Rousseau notes that an alliance of Greek republics defeated the Persian Empire, and that the Swiss Cantons defeated the Habpsburg Empire. J. ROUSSEAU, *supra* note 395, at 138. On the other hand, he views friendship between large and small states as dangerous to the independence of the small states. *Id.* at 95.

viewed treaties as binding as long as they did not involve alienation of sovereignty or diminution of independence.[407]

The French Revolution provided the inspiration for nationalist movements in nineteenth century Europe. As a result of Rousseau's influence on the French Revolution, republicanism provided one of the intellectual underpinnings of nineteenth century nationalism, and provided nineteenth century nationalists with a normative rationale for viewing state autonomy as an inalienable entitlement. Nevertheless, the republic was not the only model of the nation-state provided by the French Revolution. The French republic, like the Greek and Roman republics so admired by Rousseau, was succeeded by an empire; and the actual nation-states of nineteenth century Europe were more committed to imperialism than they were to republicanism. In pursuing empire, however, the European powers embraced a tradition of governance which also provided a rationale for viewing state autonomy as an inalienable entitlement.

D. *The Imperial Model*

Napoleon consciously identified his empire with that of ancient Rome; from his own viewpoint, his greatest achievement was the enactment of a comprehensive civil code modeled on Roman law. Yet Roman jurisprudence had already exerted a formative influence on European conceptions of the nation-state. The first European countries to develop centralized nation-states were France and England. In each country, this development was rationalized by a skilled political theorist: Bodin in sixteenth century France,

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407.

> The sovereign, bearing only one single and identical aspect, is in the position of a private person making a contract with himself, which shows that there neither is, nor can be, any kind of fundamental law binding on the people as a body, not even the social contract itself. This does not mean that the whole body cannot incur obligations to other nations, so long as those obligations do not infringe the contract; for in relation to foreign powers, the body politic is a simple entity, an individual.
>
> However, since the body politic, or sovereign, owes its being to the sanctity of the contract alone, it cannot commit itself, even in treaties with foreign powers, to anything that would derogate from the original act of association; it could not, for example, alienate a part of itself or submit to another sovereign. To violate the act which has given it existence would be to annihilate itself; and what is nothing can produce nothing.

Id. at 62-63.

and Hobbes in seventeenth century England. Both theorists looked to the Roman Empire, rather than ancient republics, to provide a model for their emergent states. Nevertheless, both viewed the sovereignty and autonomy of these states as inalienable.

While Machiavelli introduced the term "state" into modern political discourse, Bodin introduced the term "sovereignty" in his influential *Six Books of a Commonweale*.[408] Like Machiavelli, Bodin sought to justify the independence of his government from religious authority; yet he did so for a very different reason. Sixteenth century France was riven by religious wars. In the face of religious division, Bodin was convinced that only a centralized monarchy, characterized by religious tolerance, could bring peace and prosperity to France.[409] Since the function of Bodin's state was to unify disparate groups with differing customs, Bodin had little use for Aristotelian republicanism. Bodin's state could not be an organism. Accordingly, he defined the state as a government of many families.[410] What Bodin meant by a "family" was an association possessed of common property, characterized by bonds of mutual affection, and subject to the dominion of a patriarch.[411] While the sovereign exercised a similar dominion over those families,[412] the sovereign was not a patriarch because the families governed by a single sovereign did *not* share property, and were *not* bound by mutual affection.[413] The families subject to a single sovereign need not be members of the same nation and need not be subject to the same laws; they were unified only by being subject to the same sovereign.[414] Bodin's state, like the Roman Empire, was a corporation, not an organism.

Bodin's sovereign had two crucial functions. The one which

408. J. BODIN, THE SIX BOOKS OF A COMMONWEALE 1 (K. McRae ed. 1962) (1st ed. Paris 1576). *See supra* note 381-83 and accompanying text.

409. G. SABINE, *supra* note 361, at 399-400.

410. J. BODIN, *supra* note 408, at 1.

411. *Id.* at 8.

412. *Id.*

413. "[A] community of all things is impossible and incompassible with the right of families: for if in the family and the city, that which is proper, and that which is common, that which is public, and that which is private, be confounded; we shall have neither family nor yet Commonwealth." *Id.* at 11 (converted to modern English). *See also id.* at 12.

414. *Id.* at 13 (different laws permissible for different families); *id.* at 9-10 (identity of the commonwealth not dependent upon the identities of its members, but on that of the sovereign).

has elicited the most comment is the legislative function: the absolute power to enact law, vested by the Roman people in their emperor. The other function, though articulated at the very outset of the *Six Books of a Commonweale*, has been virtually ignored: the sovereign as the administrator of public property.[415] For Bodin, the distinction between public property and private property is the sine qua non of the state, and is decreed by the law of nature:

> [Plato] understood not that by making all things thus common, a Commonwealth must needs perish: for nothing can be public, where nothing is private: neither can it be imagined there to be anything had in common, if there be nothing to be kept in particular; no more than if all the citizens were kings, they should at all have no king; neither any harmony, if the diversity and dissimilitude of voices cunningly mixed together, which make the sweet harmony, were all brought into one and the same tune. Albeit that such a Commonwealth should be also against the law of God and nature, which detest not only incests, adulteries, and inevitable murders, if all woman should be common; but also expressly forbids us to steal, or so much as to desire anything that another man's is.[416]

If private property was a necessary condition for the existence of public property, public property was necessary for the preservation of private property. Public property served not only to support the common defense;[417] it made possible (1) the indemnification of property holders against losses from war and natural disaster;[418] and (2) the support of the poor by means of alms or employment in public works.[419] Bodin's commonwealth is a wel-

415. *Id.* at 11.
416. *Id.* at 11 (converted to modern English).
417. *Id.* at 677.
418. *Id.* at 109-10.
419.

> [T]he surest preservation and defense of treasure, were Almes deeds, and liberality to the needy . . . . And if the treasure be well furnished, a part would be employed to repair towns, to fortify upon the frontiers, to furnish places of strength, make the passages even, build bridges, fortify the ports, send ships to sea, build public houses, beautify temples, erect colleges for honor, virtue, and learning: for besides necessity of reparations, it brings great profit to the Commonwealth. For by this means arts and artificers are entertained, the poor people are eased, the idle are set to work, cities are beautified and diseases expelled: finally hatred against princes (which does oftentimes stir up the subjects to rebellion) is quite suppressed, when as the impositions which he had levied, redounds not only to the general, but also to every private mans good. . . . This which I have said is more expedient [if] . . . the subjects being many, are with more difficulty maintained in peace and union by few commanders: unless the multitude being employed in public works, may make some gain. . . .

fare state. Bodin vested legislative discretion solely in the sovereign; but Bodin's sovereign, as much as Rousseau's, was bound to exercise that discretion in the interest of the subjects' welfare.

Bodin is typically criticized as being confused because he identifies the will of the sovereign as the sole source of law, yet subjects the sovereign to natural law.[420] Much of the confusion disappears, however, once we understand that for Bodin, natural law consisted chiefly in the injunction that the sovereign seek the welfare of his people.[421] Bodin interchangeably approved of coronation oaths binding the sovereign either to obey the law of God, or to care for the people God had placed in the sovereign's custody; he viewed as invalid only those oaths which bound the sovereign to maintain existing law or obey future law.[422] This distinction makes perfect sense: to the extent that higher law recognizes the sovereign as trustee of the welfare of his people, he could not obligate himself to maintain any law that might in time prove harmful to that welfare. Similarly, the new sovereign was bound by his predecessor's treaties only to the extent that they served the welfare of his people, or were supported by the people.[423] The sover-

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Id. at 676-77 (converted to modern English). Bodin proclaimed material inequality as a necessary condition for prosperity, but viewed outright poverty as a threat to peace. *Id.* at 569-70.

420. *See, e.g.*, G. SABINE, *supra* note 361, at 171.

421. Bodin viewed the sovereignty of queens as inconsistent with the patriarchy decreed by the law of nations. *See* J. BODIN, *supra* note 408, at 752.

422. *Id.* at 91-95.

423. Bodin believed that the prince was bound as a private individual—by the law of nature to keep his covenants. *Id.* at 107. The law of nature similarly bound a prince's heirs to keep their ancestors' covenants. But the prince was not so bound as *sovereign*. Thus

> we must distinguish, whether the appointed heir will accept the state in the quality of an heir by testament appointed; or renouncing the succession of the testator, demand the crown by virtue of the custom and law of his country. For in the former case the successor is bound unto all the hereditary obligations and actions of his predecessors, as if he were a private inheritor; but in the second case, he is not bound unto the dome of his predecessor, albeit that his predecessors were thereto sworn. For neither the oath nor the obligation of the dead predecessor, binds the successor in the law, more than so far as the obligation made by the testator tends to the good of the Commonwealth, and so far he is bound. . . . [I]t is an old proverb with us, that the king never dies, but that as soon as he is dead, the next male of his stock is seized of the kingdom, and in possession thereof before he be crowned, which is not conferred unto him by succession of his father, but by virtue of the law of the land . . . . Wherefore let us this hold, that the king which is by lawful right called unto his kingdom, is so far bound unto the covenants and promises of the kings his predecessors, as is for the good of the Commonwealth: and so much the more if

eign power of legislation—which included the power to treat with foreign states[424]—was inalienable because Bodin's sovereign, like the emperor in Roman law, was a trustee of the private interests of his subjects.

In advocating the consolidation of English state power, Hobbes also invoked the imperial model of the state. Writing in the wake of the Civil War in England and the Thirty Years War on the Continent, Hobbes—like Bodin—saw religious dissension as a major threat to tranquility.[425] As a consequence, he opposed republican efforts to link the legitimacy of government to the virtue of the citizenry.[426] Where citizens were as deeply divided on religion as were the seventeenth century English, no single conception of virtue could organically unify society. Accordingly, Hobbes

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> the contracts were made by the consent and good liking of the people in general, or of the states, or high court or parliament: which is not only seemly for a king to keep, but also necessary, although it be hurtful unto the Commonwealth, considering that it concerns the faith and obligation of his subjects. But if the sovereign prince had contracted either with strangers, or with his subjects, for such things as concern the Commonwealth, without the consent of them we have before said, if any great harm redound unto the Commonwealth by such contract, it is not reason the lawful successor to be bound thereto . . . . But by what right soever the prince shall have received his kingdom . . . . It is reason that the successor should perform all such contracts of his predecessor or, as redounded to the profit of the Commonwealth: for otherwise it should be lawful for him contrary to the law of nature, by fraud and indirect means to draw his own profit out of others harms; but it much concerns a Commonwealth, so much as in it lies, to preserve and keep that public faith, lest in extreme dangers thereof, all the means for the relief thereof should be shut up.

Id. at 112-13 (converted to modern English).

424. *Id.* at 162.

425. G. SABINE, *supra* note 361, at 455-56; Peters, *Thomas Hobbes*, 4 ENCYCLOPEDIA OF PHILOSOPHY 30, 44 (1972).

426. Hobbes lists, as ideas tending to the dissolution of the commonwealth, "[t]hat every private man is judge of good and evil actions. . . . [T]hat whatsoever a man does against his conscience, is sin; . . . [T]hat faith and sanctity are not to be attained by study and reason, but by supernatural inspiration, or infusion." T. HOBBES, *supra* note 222, at 211-12 (emphasis omitted).

> And as to rebellion in particular against monarchy; one of the most frequent causes of it, is the reading of the books of policy, and histories of the ancient Greeks, and Romans; from which, young men, and all others that are unprovided of the antidote of solid reason, receiving a strong, and delightful impression, of the great exploits of war, achieved by the conductors of their armies, receive withal a pleasing idea, of all they have done besides; and imagine their great prosperity, not to have proceeded from the emulation of particular men, but from the virtue of their popular form of government.

Id. at 214.

developed a conception of the state as a mechanism for unifying a people without virtue.[427] Like Bodin, Hobbes suited his sovereign to an atomized people more given to the pursuit of private wealth than public service.[428] For Hobbes, as for Bodin, sovereignty was less a bulwark against commerce than it was an adaptation to it.

The mechanism Hobbes chose for unifying an atomized, acquisitive people was the Roman corporation. Hobbes' sovereign would aggregate its subjects into an artificial person by "personating" or "representing" them.[429] For this unity to be maintained, it was crucial that Hobbes' sovereign, like the Roman emperor, have a monopoly on the legislative function;[430] in addition, Hobbes' sovereign would acquire this monopoly in the same way as did the Roman emperors—from the people.[431]

The Hobbesian sovereign represented the people not only in the sense that it acted in their place, but in the sense that it was constrained to serve their interests.[432] While the Hobbesian sover-

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427. *Id.* at 84 (only fear and avarice incline men towards peace); *id.* at 110 (cooperation impossible without subjection); *id.* at 107 ("[a] multitude . . . made *one* person, when they are by one . . . person, represented").

> [T]here be somewhat else required, besides covenant, to make their agreement constant and lasting; which is a common power, to keep them in awe, and to direct their actions to the common benefit. The only way to erect such a common power, . . . is, to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.

Id. at 112.

428. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 53-70 (1979).

429. T. HOBBES, *supra* note 222, at 105-08 (discussion of "artificial personation," "actors," "authors," and "authority").

> Of persons artificial, some have their words and actions *owned* by those whom they represent. And then the person is the *actor*; and he that owneth his words and actions, is the AUTHOR: in which case the actor acteth by authority. . . . So that by authority, is always understood a right of doing any act; and *done by authority*, done by commission, or license from him whose right it is.

Id. at 105-06. Hobbes defines the commonwealth as

> one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense. And he that carrieth this person, is called SOVEREIGN, and said to have *sovereign power*; and every one besides, his SUBJECT.

Id. at 112.

430. *Id.* at 173-76.

431. *Id.* at 112.

432. "A good law is that, which is *needful*, for the *good of the people*, and withal perspicuous." *Id.* at 227. Such laws include provision for public charity and public employment.

eign is subject to no positive law, its *function* is defined by natural law. The function of Hobbes' commonwealth is to impose upon its subjects what the law of nature decrees, which human nature would not otherwise permit.

> The final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is . . . getting themselves out from that miserable condition of war, which is necessarily consequent . . . to the natural passions of men, when there is no visible power to . . . tie them by fear of punishment to the performance of their covenants, and observation of [the] laws of nature. For the laws of nature, as *justice, equity, modesty, mercy*, and, in sum, *doing to others, as we would be done to*, . . . without the terror of some power, to cause them to be observed, are contrary to our natural passions.[433]

The commonwealth artificially imposes altruism and public responsibility on a people without unity or virtue, so as to make possible the fulfillment of essentially private passions. The right to make law is merely the right to impose one's judgment as to how best to accomplish that purpose.[434]

Hobbes' commonwealth is established by covenant among the subjects.[435] What makes this covenant binding, if contracts in a state of nature are unenforceable? The answer is that such a covenant can only be enforced once it is first performed. Once the subjects have placed sufficient power in the hands of the sovereign, the sovereign can ruthlessly suppress all challenges to the unity of the commonwealth. Should the power of the sovereign

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See also id. at 219-20 (duties of sovereign to people).

433. *Id.* at 109. As a consequence

> [t]he law of nature, and the civil law, contain each other, and are of equal extent. For the laws of nature . . . are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey them.

Id. at 174.

434. In forming the commonwealth, subjects agreed to submit "their judgments to his judgment." *Id.* at 112. "The sovereign is judge of what is necessary for the peace and defense of his subjects." *Id.* at 116. "[A]nnexed to the sovereignty [is] the right of making war and peace with other nations, . . . that is to say, of judging when it is for the public good." *Id.* at 117. *See generally* Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 BUFFALO L. REV. 599, 606-12 (1980) (elaboration of the notion of judgment as the function of the sovereign).

435. T. HOBBES, *supra* note 222, at 112.

ever dissipate, the unity of the commonwealth would immediately be threatened. Thus the sovereign, in order to protect the welfare of its subjects, must first and foremost preserve its power. Accordingly, all power must be inalienably vested in the sovereign.[436] The sovereign's power cannot be conditioned on fulfillment of the terms of a covenant, because no covenant is enforceable except by means of superior power, and no such power can coexist with the commonwealth. Since the alienation of sovereign power precipitates the dissolution of the commonwealth, any covenant that involved the alienation of the power to make law would threaten the continued existence of the sovereign as an artificial person.[437] According to Hobbes, covenants calling for self-annihilation are not merely unenforceable; they are void, according to the law of nature.[438] Hence, sovereigns may not, as may individuals, form valid covenants with one another to subject themselves to a higher authority. Sovereigns interact in a state of nature[439] which they are powerless to leave.[440] They may not convey to any other institution the right to coerce their subjects.

Where partisans of the republican state viewed commerce as a threat to the integrity of the community, partisans of the imperial state viewed commerce as, for good or ill, the central purpose of social life. Accordingly, they rejected the republican model of society as an organic unity and the republican identification of sovereignty with the will of such an organic unity. Nevertheless, republicans and imperialists shared a common conception of the sovereign as trustee. To exercise the lawmaking func-

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436. *Id.* at 114 (sovereign power cannot be forfeited by any wrongdoing); *id.* at 118 (sovereign power indivisible); *id.* at 119 (grant of any part of sovereign power to another is void).

437. *Id.* at 219. *See also id.* at 144 (sovereign intended to be immortal).

438. *Id.* at 86-87.

439. *Id.* at 232.

> [T]he law of nations, and the law of nature, is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice . . . where not man, but God reigneth; whose laws . . . as he is the author of nature, are *natural.*

Id. See also id. at 83 (international relations is Hobbes' model of a state of nature).

440. Sovereignty may be seized by the sovereign of another commonwealth as a result of war, but apparently should not otherwise be given up. *Id.* at 145.

tion—whether in legislation or treatymaking—meant to render authoritative judgment as to the welfare of all subjects of the sovereign. Because republicans and imperialists alike viewed sovereignty as a trust, both traditions viewed sovereignty as inalienable. Each tradition found expression in the French Revolution, and each shaped conceptions of the nation-state in nineteenth century Europe. As political philosophers struggled to synthesize the two traditions during the nineteenth century, the principle that sovereignty was inalienable assumed great importance. The most ambitious and influential synthesis was Hegel's.

E. *Hegel's Synthesis*

Modern imperialists and republicans shared an image of trade as a potentially disintegrative force. Each tradition developed a contrasting image of the state as an integrative force. Each tradition protected the integrative function of the state from the market by defining state power as inalienable. Republicans, viewing freedom as collective, tended to identify it with the state. Imperialists, viewing freedom as individual, tended to identify it with the market. Republicans viewed the proliferation of trade as catastrophic; imperialists viewed the proliferation of trade as inevitable. Hegel identified freedom with both the state and the market; he viewed the proliferation of trade as both catastrophic and inevitable. He was, in short, a republican and an imperialist.

This contradiction was built into a conception of freedom Hegel shared with many thinkers of the romantic period. For these thinkers, freedom required both self-expression and self-constitution.[441] The first seemed to require a celebration of one's particular subjectivity; the second to require an escape from one's particular subjectivity. The first seemed to require "submission" to the passions; the second seemed to require subordination of the passions to reason.

Hegel developed his dialectical logic as a tool for resolving this contradiction. The fundamental axiom of this logic was that finite things could not exist independently.[442] Everything that ap-

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441. *See* C. TAYLOR, HEGEL AND MODERN SOCIETY 1-14 (1979).

442. *Id.* at 45-46. Hegel believed this to be true of a world endowed with *Geist* (spirit), that is, capable of being understood by human thought. Taylor summarizes:

> *Geist* can only be in a world in which the parts are essentially related in this way. . . .

peared to be a discrete particular was really part of a seamless totality. The identity of any particular was socially constructed; this identity could only be defined by contrasting that particular with something else.[443] To see the true nature of any particular, however, meant to see it in relation to the totality of which it was a part. This meant that for a person to identify herself as a particular required her to define herself by contrast to others. By identifying individual self-expression as a conscious process, Hegel could reason that self-expression required self-consciousness and self-consciousness required an awareness of others. Because self-expression required an understanding of one's social context, the process of self-expression would actually induce a broadening of perspective. This change in one's subjectivity would compel new efforts at self-definition, and require still further investigation of one's context. By reflecting on the extent to which one's identity was shaped by other people, each person could come to understand her true nature as an aspect of society as a whole. Accordingly, the project of expressing one's subjectivity would produce a reconstitution of the self, in which subjectivity would be transcended.[444] Yet in transcending one's particularity, one would not completely lose it. As a result of this dialectic of self-consciousness, an individual's identity would become a function of the history of her consciousness—the particular process by which she came to realize a common human nature. Hegel's dialectic of self-

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> [T]he underlying principle of these ascending dialectics in which Hegel will show that finite things cannot exist on their own, but only as part of a larger whole. . . . is contradiction; and the contradiction consists in this, that finite beings just in virtue of existing externally in space and time make a claim to independence, while the very basis of their existence is that they express a spirit which cannot brook this independence. The ascending dialectic reveals the contradiction in things and shows from the nature of the contradiction how it can only be understood and reconciled if things are seen as part of the self-movement of the Absolute. . . .
>
> Contradiction is thus fatal to partial realities, but not to the whole. . . . [T]he whole as Hegel understands it lives on contradiction. It is really because it incorporates contradiction and reconciles it with its identity that it survives.

Id; *see also id.* at 66-67 for a discussion of Hegel's "proof" of the inherent contradiction of finite entities.

443. *Id.* at 43. "Thus *Geist* cannot exist simply—Hegel would say 'immediately.' It can exist only by overcoming its opposite. It can exist only by negating its own negation." *Id.*

444. *See generally* G. HEGEL, THE PHENOMENOLOGY OF MIND 215-67 (J.B. Baillie trans. 1967) (chapters on self-consciousness); A. KOJÉVE, INTRODUCTION TO THE READING OF HEGEL 3-30 (1980).

expression and self-transcendence, therefore, required that society be viewed both as an organic unity and as a collection of discrete individuals.

Because Hegel saw human identity as ultimately social, he followed Aristotle's view that virtue was possible only in an organic state.[445] Yet Hegel could not agree with Rousseau that the maintenance of that organism justified suppressing the pursuit of private interest.[446] Virtue might require identification with others, but freedom required that such identification be achieved only as an outgrowth of efforts at self-expression. In Hegel's view, private control of property was the essential medium for self-expression. If virtue required an organic state, freedom required a separate realm of "civil society" for the accumulation and exchange of private property—in short, a market.[447]

Unlike modern republicans, Hegel saw commerce as intrinsically valuable; yet he shared republican apprehensions about commerce's disintegrating effects. Hegel perceived, at the dawn of the industrial revolution, that the proliferation of commerce was leading to a division of labor and the accumulation of capital.[448] The accumulation of capital, he felt, would make possible ever increasing automation.[449] The resulting decrease in the demand for labor would mean declining wages, and poorer working conditions: "The amount of labour decreases only for the whole, not for the individual: on the contrary, it is being increased, since the more mechanized labour becomes, the less value it possesses, and the more must the individual toil."[450] Technological innovation also threatened to reenforce the entropic effects of commerce. As earlier republicans had foreseen, the spread of commodity production reduced the independence of producers, so that events in distant places could determine the value of their product. Technological innovation meant that economies of production for particular goods could change suddenly, driving independent arti-

445. *See* C. TAYLOR, *supra* note 441, at 84.

446. *See supra* notes 394-402 and accompanying text.

447. HEGEL'S PHILOSOPHY OF RIGHT §§ 41-53 (T. Knox trans. 1967) (1st ed. Berlin 1821) (individual freedom requires appropriation and use of property); *id.* §§ 189-201 (description of market).

448. *Id.* at § 199; *see also* S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE 96 (1972).

449. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 447, § 198.

450. G. HEGEL, JENAER REALPHILOSOPHIE I: DIE VORLESUNGEN VON 1803-1804, at 237 (1932), *quoted in* S. AVINERI, *supra* note 448, at 94.

sans out of business. Similarly, economies of resource exploitation and transportation could change suddenly, resulting in the abandonment by investors of communities that had grown dependent upon them.

> The connection between the particular sort of labour and the infinite mass of needs becomes wholly imperceptible, turns into a blind dependence. It thus happens that a far-away operation often affects a whole class of people who have hitherto satisfied their needs through it; all of a sudden it limits [their work], makes it redundant and useless.[451]

> Whole branches of industry which supported a large class of people suddenly fold up because of a change in fashion or because the value of their products fell due to new inventions in other countries. Whole masses are abandoned to poverty which cannot help itself. There appears the contrast between vast wealth and vast poverty . . . . This inequality of wealth and poverty . . . turn[s] into the utmost tearing up . . . of the will, an inner indignation . . . and hatred.[452]

Necessary as commerce may be for collective self-realization, if unrestrained, it would lead to the disintegration of society and self alike.

Hegel proposed that organic associations could help maintain the integrity of society. Corporations, trade unions, churches and community groups would provide the isolated individual with social insurance, and spiritual fulfillment.[453] Such associations would arise naturally as the struggles of the marketplace would draw together those threatened by the same forces. Because these groups would be in conflict with one another, however, they could not by themselves maintain the integrity of society. In Hegel's eyes only the state could integrate the interests of all the various associations in society. The most important function of an association, therefore, was to provide the individual with a political voice.[454]

Like Bodin's state, Hegel's functioned to provide social insurance not provided by the market; yet for Hegel, the catastrophe redressed by the state was the market itself. This catastrophe could not be redressed simply through redistribution of goods

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451. G. HEGEL, *supra* note 450, at 239 (translated and quoted in S. AVINERI, *supra* note 448, at 93).

452. G. HEGEL, *supra* note 450, at 232-33 (translated and quoted in S. AVINERI, *supra* note 448, at 97).

453. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 449, §§ 252, 253.

454. *Id.* §§ 303, 308, Addition to § 290.

from rich to poor, for freedom required that the poor be provided not only with subsistence, but with means of self-expression. Like Rousseau, Hegel believed that a free people "does everything with its own hands."[455] What the poor needed was not welfare, but work. Preferable responses to poverty, therefore, were public employment or public subsidization of industry.[456] Yet even these responses could not solve the problems of poverty and social unrest:

> In this event the volume of production would be increased, but the evil consists precisely in an excess of production and in the lack of proportionate number of consumers who are themselves also producers, and thus it is simply intensified by . . . the methods . . . by which it is sought to alleviate it. It hence becomes apparent that despite an excess of wealth, civil society is not rich enough, i.e., its own resources are insufficient to check excessive poverty and the creation of penurious rabble.[457]

Under these circumstances, the only solution to poverty is the appropriation of resources from other societies: "This inner dialectic of civil society, thus drives it . . . to push beyond its own limits and seek markets, and so its necessary means of subsistence, in other lands which are either deficient in the goods it has overproduced, or else generally backward in industry."[458] This program can be facilitated by exporting the dissident unemployed: "Civil society is thus driven to found colonies. Increase of population alone has this effect, but it is due in particular to the appearance of a number of people who cannot secure the satisfaction of their needs by their own labor once production rises above the requirement of consumers."[459] In the face of industrial capitalism, the maintenance of republican virtue at home seemed to require imperialism abroad.

The function of Hegel's state was the maintenance of the freedom and virtue of all of its citizens. The realization of that function, in his view, required simultaneously permitting the development of industrial capitalism and guaranteeing the productive employment of all the state's citizens. The fulfillment of these conditions, however, required the economic exploitation or politi-

455. *See* note 395 and accompanying text.
456. *Id.* § 245.
457. *Id.*
458. *Id.* § 246.
459. *Id.* Addition to § 248.

cal domination of citizens of other states. Necessarily then, in Hegel's view, not all people could be virtuous and free; not all states could fulfill their functions. Inevitably, the vital interests of different peoples would come into conflict, and states would be driven into war.[460]

Like Machiavelli and Rousseau, however, Hegel saw war as being perfectly compatible with the maintenance of virtue.

> War is the state of affairs which deals in earnest with the vanity of temporal goods and concerns . . . by its agency . . . the ethical health of peoples is preserved . . . just as the blowing of the winds preserves the sea from the foulness which would be the result of a prolonged calm, so also corruption in nations would be the product of prolonged, let alone 'perpetual' peace.[461]

War strengthens social cohesion by calling forth sacrifice on behalf of the collectivity.[462] "It is the moment wherein the substance of the state—i.e., its absolute power against everything individual and particular, against life, property, and their rights, even against societies and associations—makes the nullity of these finite things an accomplished fact and brings it home to consciousness."[463] Just as the individual realizes her own identity in the struggle with others, and just as group identity is formed in the struggle with other groups, so, too, national identity is established in the struggle with other nations.

For Hegel, the nation-state was the ultimate source of virtue on earth, and its very identity depended on conflict with other nations.[464] While the state made it possible for individuals to transcend their own egoism, there was no higher principle governing the relations of states than national interest. The pursuit of national interest was the sole reason for states to form treaties, and the validity of a treaty for a state extended so far as the treaty served that state's national interest.[465] The maintenance of state autonomy required that states not alienate their capacity to break a treaty.

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460. "[I]f states disagree and their particular wills cannot be harmonized, the matter can only be settled by war." *Id.* § 334.

461. *Id.* § 324.

462. *Id.* §§ 325-28.

463. *Id.* § 323.

464. "The nation state is mind in its substantive rationality and immediate actuality and is therefore the absolute power on earth. It follows that every state is sovereign and autonomous against its neighbours." *Id.* § 331.

465. *Id.* §§ 336, 337.

> The fundamental proposition of international law . . . is that treaties, as the ground of obligations between states, ought to be kept. But since the sovereignty of a state is the principle of its relations to others, states are to that extent in a state of nature in relation to each other. Their rights are actualized only in their particular wills and not in a universal will with constitutional powers over them. The universal promise of international law therefore does not go beyond an ought-to-be, and what really happens is that international relations in accordance with treaty alternate with the severance of these relations.[466]

States could establish relationships based on cooperation, but any attempt to universalize such cooperation would be ultimately doomed:

> With that end in view, Kant proposed a league of monarchs to adjust differences between states. . . . But the state is an individual, and individuality essentially implies negation. Hence even if a number of states make themselves into a family, this group as an individual must engender an opposite and create an enemy.[467]

Like civil associations and nations, alliances among states are cemented by struggle against a common enemy. Thus Hegel envisions an international system characterized by two different types of relationships among nations: associative relationships based on mutual cooperation, and instrumental relationships based on exploitation. In a world permeated by commerce, Hegel believed, no state could maintain itself without exploiting other nations, and universal legal institutions could not be developed on the basis of cooperative relations alone.

This dualistic vision of international society accurately characterizes the nineteenth century international system explored in Chapter Three. Relations among the major powers of Europe were based on cooperation: decisions regarding European affairs were made by consensus rather than war, and domestic economic policies were coordinated to permit a regime of free trade on the continent. Relations between European powers and the preindustrial nations of Africa and Asia were characterized by military coercion and economic exploitation. By the end of the nineteenth century, even Russia could be characterized as an industrialized European power, holding a vast undeveloped Asian empire by military force. Only the Ottoman Empire posed a problematic case

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466. *Id.* § 333.
467. *Id.* Addition to § 324.

for this categorical scheme, because it stood at the geographic and political margin between the two categories. Like other empires, it contained territory both within and beyond Europe. But unlike the other empires it lacked an economically and militarily viable center of power. Too important to be allowed to fall subject to a single power, too large and powerful to be peacefuly partitioned, yet too weak to defend itself effectively, the Ottoman Empire became a kind of collective protectorate. The method chosen for accomplishing this—admitting the Ottoman Empire to the European Concert—required that the empire be treated as a cooperating major power. Yet the admission of the Ottoman Empire to the European Concert was coerced rather than consensual, and the Empire could not hold its own as a major power. Inevitably, the pursuit of imperial ambitions impelled individual powers to form bilateral relations with the Ottoman Empire inconsistent with its status as a member of the European Concert. This resulted in the treaty conflicts examined in Chapter Three. The dual status of the Ottoman Empire as Concert member and colony was the Achilles' heel of the Concert of Europe system. Hence treaty conflict in *fin de siècle* Europe reflected the conflict between the two different forms of international relations implicit in an international system combining state autonomy with international commerce.

In rejecting a property rule for the resolution of treaty conflict, members of the International Law Commission invoked the principle of state autonomy. The alternative adopted by the International Law Commission for the resolution of treaty conflict reflected a tension between two different conceptions of international relations similar to that envisioned by Hegel. The Commission's article on treaty conflict could be viewed as either a liability rule for the protection of treaty entitlement or a license to breach. The Commission's approach was ambiguous as to whether treaties established relationships entailing mutual responsibility.[468] This ambiguity seemed to reflect disagreement among Commission members. Some opponents of a property conception of treaty entitlements seemed to prefer a conception of treaties as establishing "subjective rights" based on relations of good faith. Others invoked a Darwinian vision of progress toward interna-

468. *See supra* text accompanying notes 344-47.

tional order that seemed incompatible with such relations. Each of these conceptions of international relations can be seen as the development of a different aspect of Hegel's nationalist perspective on international society.

F. *State Autonomy and State Responsibility*

We have sketched the development of the idea of state autonomy up to the point of its integration into the modern system of international law. We have seen how this idea militates against a property rule for protecting treaty entitlements. In this section, we will see how the idea of state autonomy can be combined with the idea of good faith to generate a justification for a liability rule.

In explaining the appeal of a liability rule protecting treaty expectations, we face a dilemma. On the one hand, we need to justify the rejection of a property rule in favor of a rule which permits treaty conflict to occur; on the other hand we need to explain why treaty conflict should, nevertheless, occasion sanctions. We need to explain why breach should occur but also incur liability.

The principle of state autonomy disengages us from one horn of the dilemma because it identifies a value preserved by permitting treaty conflict. If we permit treaty conflict, we run the risk that treaties will be broken, but we enhance the capacity of states to preserve their legitimacy. States may preserve their legitimacy by protecting the interests of their subjects (the imperial model) or the solidarity of their citizens (the republican model). Proponents of both approaches have argued that preserving the sources of their legitimacy requires that states retain their capacity to breach. This is the principle of state autonomy which requires rejection of a property rule.

If the principle of state autonomy is to contribute to the justification of a liability rule, however, it must not force us onto the second horn of our dilemma. If the exercise of state autonomy requires an unrestricted license to breach, it pushes us too far. The principle of state autonomy can only help us understand the appeal of a liability rule to the extent that it is compatible with responsibility to other states.

Upon initial reflection, the effort to reconcile national autonomy with international responsibility may seem hopeless. Yet after tracing the development of the idea of state autonomy, it is clear

that it need not be antithetical to international responsibility. The value supposedly served by the principle of state autonomy is the preservation of sovereignty—that is, legitimate power. We have seen that in both the republican and the imperial traditions, the legitimacy of power depends upon the fulfillment of responsibility to others. For Hobbes and Bodin the judgment of the sovereign is unreviewable, but that judgment must be exercised on behalf of the welfare of its people.[469] For Rousseau, the judgment of a virtuous electorate is unreviewable, but his criterion of virtue requires that such judgment be exercised on behalf of the welfare of all.[470] The exercise of sovereignty seems to imply responsibility to other persons—but what about other nations? Can one sovereign nation be bound by responsibility to another? On this question, the imperial and republican models yield different answers.

The imperial model demands that sovereign and subject be distinct. The sovereign can be bound by obligations to the subject, so long as the subject does not share in sovereignty; on the other hand, the sovereign can have no binding obligations toward other sovereign states.[471]

The republican model, by contrast, requires that sovereign and citizen be one.[472] For Rousseau, in fact, it is crucial that sovereignty be shared. The other persons to whom the sovereign is responsible must themselves be sovereign. In Rousseau's republic, all citizens have fiduciary obligations to one another, yet all citizens are sovereign because they retain the faculty of judging how best to fulfill their obligations to all. Could *republics* also form associations while retaining their sovereignty? While it would be a distortion to claim that Machiavelli or Rousseau advocated integrating republics into larger federations, both seem to have admired loyalty to one's allies more than did Bodin, Hobbes, or even Hegel. Moreover, the medieval communes that spawned the republics of the Renaissance did form federations, which they

469. *See supra* text accompanying notes 416-24, 432-34.

470. *See supra* text accompanying notes 397-99.

471. This is true of Hobbes' sovereign; Bodin's sovereign poses a more complicated case. *See supra* text accompanying notes 422-24.

472. Rousseau requires that sovereign and subject be united in the citizen. *See supra* notes 396-402 and accompanying text. Ancient Greek republicans were perfectly content with the idea of noncitizen subjects, or even slaves. *See* D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 69-72 (1966).

viewed as extensions of the communal ideal.[473]

Rousseau's republic provides us with a model of an association that combines universal autonomy of action with mutual responsibility. The apparent conflict between autonomy and responsibility is resolved by identifying autonomy with the exercise of judgment, and defining responsibility as an obligation to seek, in good faith, the welfare of the association as a whole. If Rousseau's republic was an organism, good faith was its *èlan vitale*.

This model of association—the organic group[474]—became a persistent theme in nineteenth century European political and legal thought, particularly in Germany, "the most fertile soil . . . for the development of political theory in the nineteenth century."[475] Hegel was not alone in envisioning the state as such an organism. He followed close on the heels of Friederich Schelling and J. J. Wagner,[476] and was succeeded by the political theorists Krause[477] and Bluntshcli,[478] and the historical jurists Gerber[479] and Gierke.[480]

These thinkers differed from Rousseau in two related respects: their historicism and their pluralism. Frightened by the excesses of the French Revolution, they believed that the Jacobin effort to create a new society *ex nihilo* had merely annihilated an existing one. The fallacy inspiring this effort, they believed, was the assumption that institutions could derive their legitimacy from a universal human nature, rather than the values and customs of existing communities. Accordingly, many nineteenth century German thinkers rejected the eighteenth century conceit that society was the product of a contract, viewing it instead as the outgrowth of an organic development. Since they saw the great mistake of the French Revolution as the destruction of those communities, customs and institutions that bound society together, these thinkers joined Hegel in insisting that the legitimate state coexist with other organic associations.[481] Rousseau, however, was suspicious

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473. *See supra* text accompanying notes 378-79.
474. *See generally* R. UNGER, *supra* note 1, at 236-91.
475. C. MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 90 (1900).
476. *Id.* at 90-92 (Schelling expressed this view in 1802, and Wagner in 1804).
477. *Id.* at 95 (in 1828).
478. *Id.* at 100 (in 1844 and 1852).
479. *Id.* at 113 (in 1869).
480. *Id.* at 114 (in 1868, 1873, 1874, 1881 and 1887).
481. *Id.* at 90 (Wagner), 95 (Krause), 116-17 (Gierke).

of associations within the state, viewing them as vehicles for the assertion of private interest.[482] Gierke, by contrast, was much more sanguine about both privacy and divided loyalty:

> Gierke . . . argues that the fellowship is brought about by the transference of the association segment of the single individual. Although this segment becomes part of a communal organism, the process does not eliminate the entire personality of the individual. . . . [T]here remains at every man's disposal a realm in which his private will is supreme. He is free to join one or more fellowships simultaneously, but no amount of associative activity will fully occupy his time or satisfy all his individual needs and ambitions.[483]

Since, for Gierke, the state derived its legitimacy from the associative behavior of its members, it had no higher claim to legitimacy than any other association: "The notions of an artificial personality and the concessive legitimization of the association were entirely alien to Germanic law."[484] Accordingly, there was no intrinsic reason why an individual could not participate in many associations, including the state. Since these associations were "real persons" according to Gierke,[485] they could participate in associations as well. It thus becomes possible to imagine entire states forming organic associations with one another, without giving up their own claims to legitimacy; and if an individual can participate in multiple associations, then so, presumably, could a state. If a state could undertake obligations to another state without losing its autonomy, perhaps it could undertake obligations to many states.

If we view the treaty as such an organic association, animated by good faith, we can begin to see why it could create an entitlement to liability but not specific performance. Absent a property rule, each party may determine whether or not it wishes to perform a treaty. If a breaching party is required to compensate the other parties for the violation of their expectations, it is constrained to take into account the interests of all other parties to the treaty in deciding whether or not to breach. If, for example, a breaching state could somehow be compelled to provide the other parties with compensation of greater value to them than actual performance of the treaty, then breaches would only occur when

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482. J. ROUSSEAU, *supra* note 395, at 137, 147, 150.
483. Heiman, *supra* note 365, at 22-23.
484. *Id.* at 19.
485. *Id.* at 6-18.

they would make all parties better off.

It may be argued that the same result could be obtained by means of a property rule. Under a property rule, any party could avoid performing if it succeeded in buying the consent of all other parties. Presumably, if the breaching party was willing to make the other parties better off, then it would be rational for them to consent to nonperformance. Both property and liability rules can insure that breaches make all parties better off; but only a liability rule can do so consistent with party autonomy. Under a liability rule, each party would be constrained to benefit the other parties, but would retain the right to judge how to best do so. One consequence of this would be that states could form new associations, even if it violated the expectations of their existing allies. A view of treaties as fiduciary associations would permit the simultaneous proliferation of treaties and profligation of their terms. If association is valued, an image of treaties as associations can serve to rationalize treaty conflict as the cost of fostering association.

G. *The Principle of Good Faith in International Law*

We have seen that a view of treaties as organic associations animated by good faith could justify the recognition of treaty expectations as liability entitlements. As we have noted,[486] the Concert of Europe functioned as such an association throughout the nineteenth century. Yet the partisans of organic association during this period showed little interest in international associations. One might think that this was because treaties were commonly analogized to contracts, which these admirers of organic development were inclined to view as artificial. Yet though Gierke was unwilling to conceive of associations as contracts, he was willing to treat the contract as a kind of association.[487] As a result of Gierke's contribution to the process of drafting Germany's civil code, this approach has profoundly influenced German contract law.[488] It is through the influence of German contract law that the image of a fiduciary association has emerged in the law of treaties. This image has come into sharpest focus with the increasing invo-

486. *See supra* text following note 467.
487. Heiman, *supra* note 365, at 50.
488. *Id.* at 62.

cation by Socialist and Third World states[489] of the doctrine of *clausula rebus sic stantibus*—a doctrine adapted from German contract law.

The doctrine of *clausula rebus sic stantibus* may be easily misunderstood by one approaching it from the vantage point of a common law legal system. It is generally explained in terms of one of two theories: the consent theory and the performance theory. Common law scholars, viewing these issues as separate because they are temporally distinct, often misunderstand both theories.

The consent theory holds that the assumption of conditions remaining the same is an implicit condition of all treaties.[490] This notion of an implicit condition is expressed in Article 62 of the Vienna Convention on the Law of Treaties as follows:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty.[491]

Taken in isolation, this passage implies that the basis for terminating the treaty is the intention of both parties to be bound only under certain conditions. This makes the application of the doctrine a matter of interpretation rather than substantive review. It also raises two problems. First, a logical problem: if the validity of the treaty is impliedly limited by certain conditions, the treaty should terminate automatically when those conditions obtain. It should, in other words, become not merely voidable at the will of one of the parties, but void irrespective of that will.[492]

The second problem is not logical but practical. It is that par-

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489. *See infra* notes 502-08, 579-612 and accompanying text.

490. This view is favored by a number of English-speaking writers. *See* C. FENWICK, INTERNATIONAL LAW 454-58, 545 (3d. ed. 1948); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 156 (1962); Hill, *The Doctrine of Rebus Sic Statibus in International Law,* U. Mo. STUD. 10 (1934); Lissitsyn, *Treaties and Changed Circumstances,* 61 AM. J. INT'L L. 895 (1967); McNair, *Terminaison et Dissolution des Traites,* 22 RECUEIL DES COURS 476 (1928). For further discussions of this view, see A. DAVID, THE STRATEGY OF TREATY TERMINATION 20 (1975); G. HARASZTI, *supra* note 28, at 372-74.

491. S. ROSENNE, *supra* note 26, at 324.

492. A. DAVID, *supra* note 490, at 20; Briggs, *The Attorney General Invokes Rebus Sic Stantibus,* 36 AM. J. INT'L L. 89, 93 (1942); Second Report of G. Fitzmaurice on the Law of Treaties, [1957] 2 Y. B. INT'L L. COMM'N 58, U.N. Doc. A/CN.4/SER.A/107/1957.

ties cannot be expected to agree on unexpressed intentions.[493] Of course, these two criticisms undercut each other—because unexpressed (perhaps uncontemplated) intentions are not easily ascertained, interpretation is necessary; because interpretation is necessary, voidness cannot be automatic. This relationship between the two criticisms does not answer them—but it does point to the existence of a relationship between interpretation and invalidation which suggests that the criticisms may be based on an incomplete understanding of the *rebus sic stantibus* doctrine.

The second theory of *clausula rebus sic stantibus* focuses on the cost of performance. It is expressed in Article 62 as follows: A change in circumstances does not terminate a treaty unless "(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."[494] Taken in isolation, this criterion for the invocation of the *rebus sic stantibus* doctrine is easily assimilable to the common law defense of impossibility. It is therefore subject to all of the usual critiques: that it really amounts to exterior substantive review of the terms of the bargain, that it fails to give effect to the intentions of the parties, and that it is arbitrary and intrusive.[495]

All of the above criticisms of the doctrine of *clausula rebus sic stantibus* assume that the two expressions of the doctrine represent distinct and incompatible criteria for its application. This view is based on a metaphysics of contract law which is foreign to the tradition within which the *rebus sic stantibus* doctrine derives its meaning. We may call the theory of contract upon which this critique is based the classical theory. According to this theory, a contract is formed by a "meeting of the minds" as to all terms and conditions of the bargain. The contract consists of all the terms and conditions agreed to. One may dispute whether or not the written memorandum of the contract completely expresses the intentions of the parties at the time of contract formation, and one may argue about what the intentions of the parties were; but whatever those intentions were is what the contract requires.

Given this view of contract, adjudication of contract disputes

493. *See* A. DAVID, *supra* note 490, at 36, 44.

494. S. ROSENNE, *supra* note 26, at 324; *see also supra* text accompanying note 491.

495. A. DAVID, *supra* note 490, at 31-32; F. WHARTON, WHARTON'S COMMENTARIES ON LAW 237-38 (1884); *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 1097-1101 (Supp. 1935).

may take one of two forms: (1) it may discover and give effect to the intentions of the parties—this is interpretation; or (2) it may violate the intentions of the parties by engaging in substantive review of the terms of the contract. Given this scheme, the first criterion for the application of the *rebus sic stantibus* doctrine is a criterion of interpretation, and the second is a criterion of substantive review—and both cannot be invoked simultaneously. Yet Article 62 in fact requires that both be invoked simultaneously. The relationship between the two criteria is conjunctive rather than disjunctive. Thus, from the standpoint of classical contract theory, the doctrine of *rebus sic stantibus* as expressed in Article 62 is a conundrum, requiring substantive review of a nonexistent contract. That the classical view of contract, however, seems incompatible with the doctrine of *rebus sic stantibus* should not be surprising. While no major legal system continues to adhere to the classical view without qualification, the French and Anglo-American legal systems retain its basic conceptual framework. Neither system recognizes the doctrine of *rebus sic stantibus*.[496]

The private law tradition in which this doctrine is most vital is the German.[497] The German tradition has developed a very different metaphysics of contract, influenced by the organic imagery of romantic political thought. A proper understanding of this view of contract requires some background in the history of the German private law system.

The German reaction to the French codification of private law was as ambivalent as the reaction of German intellectuals to the French Revolution generally: they were envious of French achievements, but did not wish to share in them.[498] The origina-

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496. A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 1099-1103 (1977); *see also id.* at 1049-65 (French cases on impossibility and *force majeure*).

497. While the doctrine of *clausula rebus sic stantibus* is sometimes associated with Roman law, *see, e.g.*, Rogenmoser v. Tiefengrund, 59 B.G.II 372 (Swiss Federal Court, 1st Civil Div. 1933), *reprinted and translated in* R. SCHLESINGER, COMPARATIVE LAW 505 (1970), it seems to have received its first modern exposition from Aquinas. *See* T. AQUINAS, 41 SUMMA THEOLOGIAE 161 (T. O'Brien ed. 1972) (1st ed. n.p.n.d). *See* G. HARAZSTI, *supra* note 28, at 328; de Taube, *L'inviolabilité des Traités*, 32 RECUEIL DES COURS 291, 361 (1930). The doctrine found expression in 19th century civil codes in Bavaria and Prussia, and was invoked in the international context by Prussia and Austria in the eighteenth century, and by Saxony in the early nineteenth century. *See* G. HARAZSTI, *supra* note 28, at 331-33.

498. A. VON MEHREN & J. GORDLEY, *supra* note 496, at 61-62 (German historical school of jurisprudence rejects adoption of French Civil Code); *see also* G. IGGERS, THE GERMAN CONCEPTION OF HISTORY 7, 16, 20 (1983) (German historicism a reaction to post-revolution-

tor of the historicist tradition in German jurisprudence, Friedrich Karl Von Savigny, summed up this attitude best by urging against precipitous codification. A legal system can only legitimately exist, Savigny argued, as the expression of the customs and values of a community. Germany, he claimed, had not yet sufficiently developed an indigenous jurisprudence to justify codification; any premature codification would simply reflect illegitimate foreign influence.[499] Three implications of Savigny's argument found their way into German contracts jurisprudence: (1) The law, because it is embodied in the consciousness of the community, transcends its written expressions.[500] (2) The law develops historically toward concepts rather than being derived logically from them.[501] (3) The law gives effect to communal, rather than merely individual, will.[502]

In response to Savigny's directives, German private law scholarship flourished in the nineteenth century, first developing a classical theory of contract derived from Roman law, then, under the leadership of Gierke, a more fluid, collectivist vision. The German Civil Code, adopted in 1896, combined elements of both.[503] During the economic crises of the 1920's and 1930's, German courts interpreted the flexible standards of the Code to permit contractual liability arising out of unconsummated negotiations, invalidation of coercive contracts and termination or modification of contracts on the basis of the doctrine of *rebus sic stantibus*.[504]

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ary French domination).

499. A. VON MEHREN & J. GORDLEY, *supra* note 496, at 61-66.

500. Fletcher, *supra* note 23, at 984-95.

501. G. IGGERS, *supra* note 498, at 10 (hostility toward conceptual thinking in historical tradition); A. VON MEHREN & J. GORDLEY, *supra* note 496, at 73 (anticonceptualism among "germanist" and "historicist" scholars); *see, e.g.*, Heiman, *supra* note 365, at 56-63; R. VON IHERING, LAW AS A MEANS TO AN END (1913).

502. Heiman, *supra* note 365, at 3-24. *See also* R. VON IHERING, *supra* note 501, at 59-70; Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 673-92 (1980); Kommers, *Politics and Jurisprudence in West Germany: State Financing of Political Parties*, 16 AM. J. JURIS. 215-23 (1971).

503. A. VON MEHREN & J. GORDLEY, *supra* note 496, at 75-79.

504. *Id.* at 1003-24; Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 402-07 (1964) (20th century German courts develop Von Ihering's proposal that contractual liability be recognized as a result of unconsummated negotiations). *See also* A. VON MEHREN & J. GORDLEY, *supra* note 496, at 1073-99; Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976) (coerced and coercive contracts invalidated or modified pursuant to

The vision of contract that has emerged within this tradition is a very different one from that which inspired the classical tradition. Where the classical tradition views the contract as identical to the terms agreed upon by the parties, the romantic tradition distinguishes between the contract and the terms in which it is expressed. The contract is conceived not as a momentary meeting of the minds, but as an enduring relationship between the parties. The intent to form a contract is not so much a matter of consent to a particular bargain as the will to enter into a relationship characterized by good faith and fair exchange. The function of the contract terms is to indicate what the parties considered a fair exchange under the circumstances obtaining at the time of contract formation. Under radically different circumstances, a different exchange or no exchange might be in order. To attempt to enforce the original terms under such conditions is a violation of good faith.[505] In the terms of the analytic framework set forth in Chapter Three, the contractual relationship is a source of objective right; the terms of the contract give the parties subjective rights against one another. If one abuses these rights by attempting to enforce them in violation of good faith, these subjective rights may be modified or revoked in furtherance of objective right.

If one rereads Article 62[506] in the romantic spirit, its two criteria become a synthesis rather than a contradiction. When, in paragraph 1(a), the International Law Commission requires that the absent circumstance have "constituted an essential basis of consent of the parties to be bound by the treaty," it should be understood to mean that the circumstance is essential to the parties' consent to be *bound by the terms* of the treaty. Thus, if the essential circumstance is absent, the treaty does not terminate automatically; rather its terms are no longer binding. The significance of paragraph 1(b) is that it provides a criterion for the application of 1(a)—that is, the circumstances essential to their intent to be bound are those which effect the fairness of the bargain between the parties. In reviewing the fairness of the bargain, an in-

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"general clauses" of German Civil Code); Cohn, *Frustration of Contract in German Law*, 3 J. COMP. LEGIS. & INT'L L. (3d s.) 15-25 (1946); Dawson, *Effects of Inflation on Private Contracts in Germany, 1914 - 1924*, 33 MICH. L. REV. 171 (1934) (*rebus sic stantibus* read into Article 138 (on good faith) of German Civil Code).

505. *See supra* notes 215-17.

506. *See supra* notes 491-94 and accompanying text.

ternational tribunal would not violate the intent of the parties but would give it effect. The mistakes made by common law readers of Article 62 are (1) the assumption that the essential circumstance is a condition for the validity of the treaty rather than the applicability of its terms; and (2) that the intent imputed to the parties is an intent to terminate the treaty in the event of changed circumstances rather than an intent to deal in good faith regardless of the circumstances.

During the International Law Commission's deliberations on the question of treaty conflict, some members defended a liability rule in terms of the idea of good faith and the doctrine of *clausula rebus sic stantibus*, or "changed circumstance." Consider the following arguments offered by Mr. Bartoš of Yugoslavia against a property rule:

> A party might . . . claim that the conclusion of a later treaty conflicting with prior obligations had been due to a change of circumstances. That was the main argument against a strict rule. There had been cases in which states had been compelled, sometimes to the detriment of prior obligations for certain parties, to change their position by reason of later treaties. During the liberation movement, for example, the development and progress of the liberated nations would have been impossible without new treaties which, strictly speaking, conflicted with peremptory norms. On that point an analogy could be drawn to personal freedom. Individuals assumed obligations which conflicted with their earlier obligations, and could be held answerable for their conduct, together with any accessories, if they had acted in bad faith. The *pacta sunt servanda* rule imposed an obligation to perform the contract faithfully, but it did not involve renouncing freedom of action.[507]

Bartoš believed that the idea of good faith had to be interpreted in light of the tension between state autonomy and responsibility to other states:

> It had been asked during the discussion whether a party to a new treaty made with a third State must have acted in good faith if both treaties were to have effect. He had no wish to encourage States to act in bad faith, but he believed that in order to meet the needs of ordinary political life and facilitate international relations, States should not be obliged to remain bound by vestiges of treaties that were still formally in force, but no longer corresponded to reality. A State must be free to exercise its treaty-making capacity, subject only to the proviso that in doing so it engaged its international responsibility.[508]

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507. Summary Records of the 703rd Meeting, [1963] 1 Y.B. INT'L L. COMM'N 200-01, U.N. Doc. A/CN.4/SER.A/1963.

508. Summary Records of the 742nd Meeting, [1964] 1 Y.B. INT'L L. COMM'N 126,

Such rhetoric reflects a view of treaties as fiduciary associations. If the interest generated by a treaty is identified with the relationship between the parties rather than the precise terms of the treaty, valid treaties can coexist, notwithstanding the fact that their terms conflict.

We have seen that rejection of the view of treaty entitlements as property can be defended in terms of the principle that states must preserve their autonomy in order to exercise power legitimately. In addition, we have seen that the protection of treaty entitlements by a liability rule can be reconciled with the principle of state autonomy, provided that treaties are conceived of as organic associations animated by mutual good faith. Finally, we have seen that members of the International Law Commission showed some support for this approach in the context of treaty conflict. Accordingly, we have completed one of the tasks we set for ourselves at the outset of this Chapter: we have reconstructed the case for a liability rule to resolve treaty conflicts, and confirmed that it is an outgrowth of the intellectual milieu of nineteenth century nationalism.

We have a remaining problem to consider, however. The International Law Commission did not adopt a liability rule, notwithstanding support for such a rule among its members. The rule it adopted seemed to be a compromise between a liability rule and a simple license to breach; yet the sanctity of treaty obligations is one of the fundamental principles of international law, reaffirmed in the preamble to the United Nations Charter.[509] How could a group of eminent international lawyers, convened for the purpose of codifying the law of treaties, under the auspices of the United Nations, countenance a license to breach? How can indifference to breach be reconciled with a commitment to international law? Surprisingly, an answer to this question, too, can be culled from the intellectual legacy of nineteenth century nationalism.

H. *State Autonomy and World History*

We noted earlier that a number of influential German jurists and political theorists of the nineteenth century viewed the state

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U.N. Doc. A/CN.4/SER.A/1964.

509. *See supra* note 81.

as an autonomous organic association. We noted also that by viewing the treaty as an organic association we could reconcile state autonomy with state responsibility. It should not be assumed, however, that nineteenth century admirers of the organic state viewed international relations as a forum for organic association. To the contrary, they were inclined to view the state as the largest possible association. Gierke, for example, followed Hegel in viewing the state as the "highest right on earth,"[510] not to mention the strongest power. "A will corresponding to such power is distinguished from every other, as a sovereign will, absolutely universal, determined only through itself."[511] Gierke apparently did not envision viable associations beyond the boundaries of the state.

We have seen that there is nothing intrinsic to the idea of an organic association requiring such myopia. Hegel was able to imagine international federations characterized by solidarity. What focused his attention on the problem of *national* solidarity was the sense that worldwide harmony was simply incompatible with industrial capitalism. Mutually fiduciary relations might be possible among groups of nations, but in the face of economic competition, such relations could never be universalized. For Hegel, an international association would be the functional equivalent of a state; the faith uniting such an association would still be an instance of particular rather than universal solidarity. Hegel saw international relations as fundamentally competitive rather than cooperative. Virtue was particular rather than universal, and so there could be no binding obligations between particular communities. Given Hegel's perspective on international relations, a license to breach treaties makes perfect sense.[512]

Nevertheless, Hegel's perspective on international relations is at odds with some of the basic premises of his philosophical system. That system, it may be recalled, required that only the universal be viewed as real. Accordingly, the identity and independence of any particular community, state or federation had to be viewed as ephemeral and, ultimately, illusory. Yet this meant that particular communities could not be the ultimate source of value

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510. Heiman, *supra* note 365, at 51.

511. C. MERRIAM, *supra* note 475, at 117.

512. Treaties do not have "the actuality of actual contracts . . . . Hence they should not be viewed according to the way of civil contracts." G. HEGEL, JENAER REALPHILOSOPHIE 261 (1967), *quoted in* S. AVINERI, *supra* note 448, at 201.

on earth. Despite Hegel's vision of international relations as a realm of irreducible conflict between particular values, his metaphysical premises committed him to a view of the world as a harmonious whole governed by a single framework of values. Hence skepticism about international obligations posed the same problem for Hegel that it later did for the members of the International Law Commission. In each case, such relativism seemed incompatible with a deeply held commitment to the realization of universal values.

Hegel's solution to this problem involved redefining cultural relativism as historical relativism. Since the values of particular communities could not be harmonized, their relationship to universal values could not be that of part to whole; instead Hegel imagined the value system of each nation as a candidate for universal acceptance. He imagined "world history" as a teleological process, culminating in the realization of universal values. In observing any struggle between nations, Hegel argued, it is impossible to determine which cause has the greater merit. Each is subjectively "right."[513] Only hindsight can reveal which side was favored by history.

> The principles of the national minds are wholly restricted on account of their particularity . . . . Their deeds and destinies in their reciprocal relations to one another are the dialectic of the finitude of these minds, and out of it arises the universal mind, the mind of the world, free from all restriction, producing itself as that which exercises its right—and its right is the highest right of all—over these finite minds in the "history of the world which is the world's court of judgment."[514]

From this exalted perspective, some nations count and others do not:

> The nation to which is ascribed a moment of the Idea is dominant in world history during this one epoch, and it is only once that it can make its hour strike. In contrast with this its absolute right of being the vehicle of this present stage in the world's mind's development, the minds of the other nations are without rights, and they, along with those whose hour has struck already, count no longer in world history.[515]

As a consequence, some nations are justified in exploiting others:

> The same consideration justifies civilized nations in regarding and treating

513. S. AVINERI, *supra* note 448, at 202.
514. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 447, § 340 (footnote omitted).
515. *Id.* § 347 (footnote omitted).

> as barbarians those who lag behind them in institutions which are the essential moments of the state. . . . The civilized nation is conscious that the rights of barbarians are unequal to its own and treats their autonomy as only a formality.[516]

By identifying universal value with progress rather than harmony or consensus, Hegel reconciled it with conflict and domination. Conflict had the dual merit of bringing out every nation's best,[517] and hastening the fall of those nations whose hour was past. Accordingly, one should neither condemn the aggressor, nor mourn the loser. "While absorbed in their mundane interests they are all the time the unconscious tools and organs of the world mind at work within them. The shapes which they take pass away, while the absolute mind prepares and works out its transition to its next higher stage."[518] "It is not the universal Idea . . . which puts itself in danger; it holds itself safe from attack . . . and sends the particular passion into the struggle to be worn down. We can call it the *cunning of reason* that the idea makes passions work for it."[519]

The notion that subjective passions could coincidentally contribute to the realization of collective values had become increasingly popular during the preceding century. Proponents of the imperial state offered it as a response to republican anxieties about the corrupting effects of commerce.[520] A well-constructed constitution, argued Montesqiueu, could maintain the stability of a polity without having to rely on the virtue of its citizenry.[521] In fact, argued Bernard Mandeville, free trade could transform private vices into public virtue.[522] Predictable punishment, argued Bentham, would put self-interest in the service of the law.[523] Finally, and most famously, Adam Smith argued that the guiding hand of avarice would continuously maintain the most efficient

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516. *Id.* § 351.

517. *See generally* S. AVINERI, *supra* note 448, at 197-99.

518. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 447, § 345.

519. G. HEGEL, REASON IN HISTORY 105 (Hoffmeister ed. 1955), *quoted in* C. TAYLOR, HEGEL AND MODERN SOCIETY 98 (1979).

520. *See, e.g.*, A. HIRSCHMANN, THE PASSIONS AND THE INTERESTS 14-42 (1977).

521. *See generally* 2 C. MONTESQUIEU, THE SPIRIT OF THE LAWS 149-83 (T. Nugen trans. 1949). *See also*, A. HIRSCHMANN, *supra* note 520, at 70-87.

522. *See* A. HIRSCHMANN, *supra* note 520, at 18; Sprague, *Bernard Mandeville*, 5 THE ENCYCLOPEDIA OF PHILOSOPHY 148 (Edwards ed. 1967).

523. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS (1789).

distribution of goods and division of labor.[524]

A crucial premise of these arguments was the expectation that the pursuit of particular interest would generate conflict or competition. Provided that the contending forces were *properly balanced*, they could contribute to the maintenance of an equilibrium.[525] Basic to these arguments, then, was the assumption that conflict, rather than community, was a source of stability. International relations was the first context in which this principle was articulated. After the Peace of Westphalia (1648), European politics were structured by the goal of maintaining a balance of power; but until the Congress of Vienna (just six years before Hegel published his *Philosophy of Right*), the preservation of this balance was a goal for which the major powers were frequently compelled to fight.[526] "Like the term 'interest' itself," wrote Albert Hirschmann,

> the notion of a *balance* of interests was transferred in England from its original context involved with statecraft—where it yielded the concept of "balance of power"—to the conflict-ridden domestic scene. After the Restoration and during the debate on religious toleration, there was much discussion about the advantages that might accrue to the public interest from the presence of a variety of interests and from a certain tension between them.[527]

Hegel's image of international relations was shaped by his observation of the balance-of-power system. What Hegel added to this scheme was the idea of progress. In Hegel's eyes, conflict would generate not stability, but continuous progressive change. This addition, however, altered the prospects of losers in a con-

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> It is thus that the private interests and passions of individuals naturally dispose them to turn their stock towards the employments which in ordinary cases are most advantageous to the society. But if from this natural preference they should turn too much of it toward those employments, the fall of profit in them and the rise of it in all others immediately dispose them to alter this faulty distribution. Without any intervention of law, therefore, the private interests and passions of men naturally lead them to divide and distribute the stock of every society, among the different employments carried on in it, as nearly as possible in the proportion which is most agreeable to the interest of the whole society.

A. SMITH, THE WEALTH OF NATIONS 594-95 (E. Canaan ed. 1937) (1st ed. London 1776), *quoted in* A. HIRSCHMANN, *supra* note 520, at 110-11.

525. *See supra* notes 117-34 and accompanying text.

526. K. POLANYI, *supra* note 117, at 6-7.

527. A. HIRSCHMANN, *supra* note 520, at 51 (footnote omitted).

flict. If the purpose of conflict was stability, private misfortune, like private vice, was a necessary cost. In a balance of power system, for example, it might be necessary to defeat an overly ambitious adversary, but it would never be rational to utterly destroy an enemy that might later be useful as an ally. If the purpose of conflict is progress, however, its destructive consequences are not necessarily counted as a cost. From such an evolutionary perspective, destruction is itself a benefit, steadily "improving" a system by purging its retrograde elements.

Hegel was not unique among nineteenth century thinkers in invoking progress as a justification for destruction, for it was during this period that the idea of progress came to play a crucial role in justifying the imperial state. Eighteenth century imperialists had promoted the idea of balance in order to defend commerce as a stabilizing force. Yet such a defense was required as a response to republican perceptions of commerce as destabilizing. This republican anxiety was expressed in terms of an increasing identification of commerce with corruption rather than fortune. Fortune was a universal entropic force, resistable by particular virtuous communities, via a collective will that was bent on maintaining order. Corruption, by contrast, was particular. Like virtue, it was characteristic of both individuals and associations. Virtue was helpless against it, because it appropriated the very will upon which virtue depended. Commerce, conceived as routinized corruption, was an algorithmic force for change.

With the advent of the industrial revolution, proponents of the imperial state no longer attempted to refute this charge. The destruction of personality and community already observed by Adam Smith in the late eighteenth century,[528] was accepted by Hegel as the price of industrialization.[529] Progress was the silver

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528. *See* Heilbroner, *The Paradox of Progress: Decline and Decay in* The Wealth of Nations, 34 J. HIST. IDEAS 242-62 (1973).

529. *See* S. AVINERI, *supra* note 448, at 93 (Hegel quoting Smith on the consequences of factory labor); Hegel did not agree with Smith's optimistic contentions, however:

> Hegel accepts Smith's view that behind the senseless and conflicting clash of egoistic interests in civil society a higher purpose can be discerned; but he does not agree with the hidden assumption which implies that everyone in society is thus being well taken care of. Poverty, which for Smith is always marginal to his model, assumes another dimension in Hegel. For the latter, pauperization and the subsequent alienation from society are not incidental to the system but endemic to it.

Id. at 148.

lining on the cloud that had threatened to spoil the enlightenment. Recognizing that progress was merely the bright side of corruption, Hegel was enough a republican to want it shipped overseas.

I. *The Progressive Development of International Law*

By identifying international conflict as an instrument of progress, Hegel was able to reconcile his commitment to universal value with his value relativism. As a consequence, he could applaud breach of treaty with complete indifference to the misfortunes of the promisee. In reconciling a license to breach with their commitment to international law, members of the International Law Commission adopted a similar strategy: they justified the formation of new treaties in violation of older treaties in the interest of "the progressive development of international law."

Lauterpacht and Fitzmaurice had both expressed misgivings about a property rule because it wouldn't adequately protect the interests of innocent parties to a later conflicting treaty. While Lauterpacht and Fitzmaurice disagreed about the nature of a liability rule, both agreed that its appeal lay in its capacity to simultaneously protect the parties to *both* treaties. The rule drafted under Waldock's guidance, however, provided little protection to the parties to *either* treaty.[530]

Waldock defended this result by stressing the potential importance of future treaties.

> [T]reaties today serve many different purposes, legislation, conveyance of territory, administrative arrangement, constitution of an international organization, etc. as well as purely reciprocal contracts; and, even if it be accepted that the illegality of a contract to break a contract is a general principle of law . . . it does not at all follow that the principle should be applied to treaties infringing prior treaties.[531]

Waldock valorized "legislation" and "constitution" as opposed to mere "contract." Treaties of the former type presumably would have value for the international legal system, whereas treaties of the latter type would be of value only to the parties. Waldock advised international lawyers not to obstruct the eventual legitimation of institutions which would advance their goals: "The imper-

530. *See supra* text accompanying notes 344-48.
531. Second Report on the Law of Treaties, *supra* note 296, at 56.

fect state of international organization and the manifold uses to which treaties are put seem to make it unnecessary for the Commission to be active in laying down rules which brand treaties as illegal and void."[532] There was a prudential concern here as well—Waldock was urging international lawyers not to undermine the legitimacy of existing institutions of international law by enunciating norms which those institutions could not enforce.

The principle of good faith may be reinterpreted as a veiled expression of such cynicism. Brierly, another of the International Law Commission's Special Reporters, exemplifies this view:

> It is a truism to say that no international interest is more vital than the observance of good faith between states, and the sanctity of treaties is a necessary corollary. On the other hand, the circumstances in which a treaty was made may change, and its obligations become so onerous as to thwart the development to which a state feels entitled; and when this happens, it is likely, human nature being what it is, that a state which feels strong enough will disregard them, whether it has a legal justification or not. . . . It may be . . . that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation.[533]

Brierly defends the principle of *clausula rebus sic stantibus* on the ground that international law can't prevent breach anyway. This is precisely the concern Waldock ascribed to Lauterpacht and Fitzmaurice in interpreting their expressions of respect for the principle of good faith. As a result, he assumed that the purpose of a liability rule was not to compensate victims, but to permit breach.

One of the delegates most vigorously supporting Waldock's position was Mr. de Luna of (then fascist) Spain. For de Luna, Waldock's proposal was preferable to both a property rule and a liability rule based on the principle of good faith. de Luna believed that a property rule would "build a veritable bastion of ul-

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532. *Id.*

533. J. BRIERLY, *supra* note 120, at 331-32. Another example of such an interpretation is provided by A. David:

> For all practical matters . . . the fundamental right theory of termination reaches the same conclusion as the implied term doctrine. This similarity of conclusions arising from diametrically opposed theories is symptomatic of the policy of flexibility of treaty obligations and adjustment to "circumstances" and "conditions" on the basis of short-term interest, upon which peace in the classical balance of power was commonly perceived to depend.

A. DAVID, *supra* note 490, at 19-20.

tra-conservatism or even reaction in international law,"[534] which would encourage "resort . . . to the rebus sic stantibus clause,"[535] paradoxically increasing "the danger of international anarchy."[536] de Luna perceived the *rebus sic stantibus* clause as a source of anarchy because it permits states to modify or terminate restrictive treaties based on substantive criteria of fairness. In an international system including both fascist Spain and the national liberation movements enamored of the *rebus sic stantibus* clause, "fairness" is a matter of controversy. de Luna preferred to join Waldock in licensing breach in the interest of the "progressive development of international law."[537] This meant that breach would be condoned where it received the acquiescence of other states, particularly the Western powers that played a leading role in the United Nations.[538] The pragmatic reasoning offered by Waldock, Brierly and de Luna suggests that they assumed that breach was best licensed according to a criterion much more readily discernible than fairness—the criterion of naked power.

The phrase "progressive development" is drawn from the United Nations Charter. It is employed in that context to describe one of the conditions for the legitimacy of colonial rule. Article 13 provides that members in control of dependent territories should "develop self-government, take due account of the political aspirations of the peoples and . . . assist them in the progressive development of their political institutions."[539] The implication is that until institutions are developed which an observer (Western?) would view as "progressive," colonial rule is legitimate. The role accorded the colonial power by this article—benevolent trusteeship—is an essential feature of the imperial model of the state. The phrase "progressive development" thus seems to be a cipher for domination of one nation by another. In the context of treaty law, the "progressive development of international law" seems to entail the complete (that is, uncompensated) subordination of the treaty expectations of some nations to the goal of preserving and

534. Summary Records of the 703rd Meeting, *supra* note 507, at 202.

535. *Id.*

536. *Id.* at 198.

537. *See supra* note 339.

538. *See generally* Stearns, *The Dilemma of Struggle Through the International Order*, 11 INT'L J. SOC. L. 65 (1983) (assessment of the United Nations as an instrument of Western powers).

539. U. N. CHARTER, art. 73, para. 6.

developing international institutions. According to Hegel, such an institution "would be the domination of one nation, or would merely be one people; its universality would be obliterated."[540] For the International Law Commission, as for Hegel, such domination was the price of international progress. Based on perceptions of the international system similar to Hegel's, certain members of the International Law Commission saw the development of international institutions as incompatible with treaty relations based on good faith.

J. *Alternatives to a Property Rule Summarized*

The rejection of a property rule for protecting treaty expectations is generally motivated by a commitment to the principle of state autonomy. That principle is the outgrowth of two distinct traditions in political theory, the republican and the imperial. The first tradition values community and condemns commerce; the second tradition values individuality and favors commerce. Despite their incompatibility, the two fused in nineteenth century nationalism, as exemplified by Hegel's political thought. Extension of the republic beyond the borders of a single state would involve a view of treaties as fiduciary associations; expectations generated by such treaties would be liability entitlements. Extension of the empire beyond the borders of the state would involve a view of treaties as relations of domination; expectations generated by such treaties would be unenforceable. Nineteenth century nationalists sought to protect the republican value of community from the effects of industrial capitalism by means of imperialism abroad. Such nationalism therefore required a dualistic system of international relations, combining association with exploitation. Ambivalence in the International Law Commission between a liability rule for the protection of treaty entitlements and a license to breach reflects this continuing dilemma of nationalism.

540. JENAER REALPHILOSOPHIE II DIE VORLESUNGER VON 1805-06, 261 (Hoffmeister ed. 1967) *quoted in* S. AVINERI, *supra* note 448, at 202 n.20.

VIII. NATIONALISM AND INTERNATIONALISM

We have identified two competing approaches to the problem of treaty conflict and explored the arguments supporting each approach. One approach entails a view of the creation of conflicting treaty obligations as the violation of objective right and the infringement of a property entitlement. We have found that while the arguments supporting this approach have been diverse, they have shared a common vision of a harmonious international society and a sovereign international legal order. This approach has traditionally found favor with academic commentators since the seventeenth century. The second approach rejects the first as violative of state autonomy. Instead, it entails ambivalence as between two responses to conflicting treaties: one which would recognize both treaties as sources of subjective liability entitlements; another which would treat both treaties as legally unenforceable.[541] This approach too is supported by a variety of arguments; these arguments converge on an ascription of sovereignty to states and a vision of the realm of international relations as fundamentally competitive and entropic. This latter approach found favor with the International Law Commission. Nevertheless, the former view retains the support of important participants in the international system.[542] This Chapter will offer an explanation for the persistence of these two approaches to the treaty conflict problem.

541. I am leaving open the possibility that one of the treaties might be enforceable by the coercion of the parties themselves. In the context of treaty conflict, the invocation of "progressive development"—which supports a license to breach— implies a clear preference for the later of two conflicting treaties.

542. The most important proponent of the property view in the international community is the Soviet Union. *See infra* text accompanying notes 613-14. During the I.L.C. debates on the problem of treaty conflict, the Soviet representative was joined by the representatives of Poland, India and Uruguay in expressing support for the property view. Summary Records of the 687th Meeting, [1963] 1 Y.B. INT'L L. COMM'N 86-88, U.N. Doc. A/CN.4/SER.A/1963 (Poland); *id.* at 88-89 (Soviet Union); *id.* at 91 (India); Summary Records of the 703rd Meeting, *supra* note 507, at 196-97 (India & Uruguay); *id.* at 197-98 (Soviet Union); Summary Records of the 742nd Meeting, *supra* note 508, at 120-21 (Soviet Union & Uruguay); *id.* at 122 (Poland); *id.* at 123 (Uruguay); Summary Records of the 743rd Meeting, [1964] 1 Y.B. INT'L L. COMM'N 129, U.N. Doc. A/CN.4/SER.A/1964 (Soviet Union). China has, at times, expressed support for the property view as well. *See* H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 54-56 (1972). Gyorgy Haraszti, Hungary's representative to the International Law Commission, has also expressed support for this view: "In our opinion a solution of the problem has to be approached from the peremptory norms of international law." G. HARASZTI, *supra* note 28, at 304.

It will suggest that the persistence of these two approaches can be ascribed to the persistence of the visions of international society underlying each. It will argue that, though these visions of international society are incompatible, both have persisted because both have been viewed as crucial to the legitimation of international law. As a result, proponents of *each* of the two approaches to treaty conflict simultaneously adopt *both* views of international society.

A. *Monism in International Law*

We shall begin by summarizing and contrasting the visions of international society underlying the property and liability views. I shall suggest that these social visions are reflected, but not fully expressed, by two recognized approaches to the problem of legitimating international law.

We have concluded that arguments for a view of treaty expectations as property entitlements relied on the doctrine of jus cogens. This doctrine, we have seen, is in turn dependent on the notion of an "objective" international law, from which the sovereignty of individual nations can be derived.

The view that national sovereignty is derivative from the international legal order is associated with a recognized school of thought within international legal theory. This school of thought is called "monism," because it sees international law and municipal legal systems as part of a single, consistent legal order.[543] Mo-

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543. Lauterpacht offers a fairly succinct characterization of monism:

> [T]he monistic doctrine denies, in the first instance, that the subjects of the two systems of law are essentially different and maintains that in both it is ultimately the conduct of individuals which is regulated by law, the only difference being that in the international sphere the consequences of such conduct are attributed to the State. Secondly, it asserts that in both spheres law is essentially a command binding upon the subjects of the law independently of their will. Thirdly, it maintains that International Law and Municipal Law, far from being essentially different, must be regarded as manifestations of a single conception of law. . . . The main reason for the essential identity of the two spheres of law is, it is maintained, that some of the fundamental notions of International Law cannot be comprehended without the assumption of a superior legal order from which the various systems of Municipal Law are, in a sense, derived by way of delegation.

1 L. OPPENHEIM, *supra* note 26, § 21. For other comparisons of monism and dualism, see K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 238-47 (1967), and Margolis, *Soviet Views on the Relationship Between National and International Law*, 4 INT'L & COMP. L. Q. 116-20 (1955). These authors refer the reader to the following expositions of monism: DUGUIT, TRAITÉ DE

nists see national sovereignty as contingent upon compliance with international law. Of course this principle requires some limitation, else it would threaten to deprive any state of sovereignty for the slightest violation of international law. Accordingly, monists would simply refuse recognition to *acts* violating international law rather than to the states committing such acts. Only those acts consistent with international law would be recognized as legally valid. Monists recognize that the state machinery of a nation may act contrary to international law, but hold that when it does, it acts without sovereignty. Monism views the international legal system as a kind of imperial super-state[544] and views the sovereignty of nations as the Romans viewed the legal personality of associations: as a concession from the emperor. Since sovereignty is a concession from the international legal order, an act contrary to international law is an act ultra vires.[545] Monists are proponents of an expansive doctrine of jus cogens: for them any rule of international law may become a peremptory norm.[546]

While monists would deny the municipal legality of acts violating international law, they insist that international law obligations are valid as municipal law. Accordingly, they view all treaties as self-executing—that is, as automatically incorporated into municipal law without any additional enabling legislation.[547]

B. *Monism as an Internationalist Social Vision*

Thus far I have presented monism as a set of positions on some important doctrinal issues in international law. Implicit in these positions, however, is a certain picture of international society. The reason that monism implies a peculiar perspective on in-

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DROIT CONSTITUTIONNEL 7 (1911); H. KELSEN, *supra* note 135, at 424, 551-88; H. KRABBE, THE MODERN IDEA OF THE STATE 55-57 (G. Sabine trans. 1930); G. SCELLE, PRECIS DE DROIT DES GENS 27-49 (1932); Bourquin, *Regles generales du Droit de la Paix*, 35 RECUEIL DES COURS 143-44 (1931); Kelsen, *Les Rapports de Systeme: entre le Droit Interne et le Droit International Public*, 14 RECUEIL DES COURS 227, 274 (1926); Krabbe, L'Idée Moderne de L'Etat, 13 RECUEIL DES COURS 577 (1926); Kunz, *La Primaute du Droit des Gens*, 6 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARE [R.D.I.L.C.] 556, 588-89 (3d series 1925).

544. *See supra* text accompanying notes 248-49, 294.

545. For a description of the ultra vires doctrine in corporate law, see Schaeftler, *Clearing Away the Debris of the Ultra Vires Doctrine: A Comparative Examination of U.S., European and Israeli Law*, 16 LAW & POLICY INT'L BUS. 71 (1984).

546. *See generally supra*, notes 260-94 and accompanying text.

547. *See* K. HOLLOWAY, *supra* note 543, at 240-47.

ternational society is because its conclusions are counterintuitive: the conclusion that the legitimacy of state governments is dependent upon international legal institutions, and that such states can have no legal system independent of such institutions does not square with observation. Even if it be admitted that many states could not govern their own populations without the recognition, support, tolerance and commerce of other states,[548] there is no reason to think that most nations are dependent upon international *law* and its institutions. No simple positivism can justify conceiving international legal institutions on such a grand scale.

We have, however, encountered two major traditions of political thought which accord authority to legal systems on the basis of normative rather than positive criteria. One of these is the natural law tradition. This tradition retained the universal and hierarchical structure that we have attributed to medieval political theory, and it played a role in the development of the imperial tradition in modern political theory. Within the natural law tradition, positive law is valid only insofar as it conforms to universal imperatives. In this sense, every sovereign is seen as a mere agent or fief of natural law, just as, in medievel political theory, every crown owed fealty to God. Within the modern natural law tradition, however, the source of common obligation is human nature rather than divine authority. Only one law is valid for all nations, because human nature is everywhere the same.

A second jurisprudential tradition that might conceivably be marshalled on behalf of monism is the romantic tradition associated with Rousseau, Savigny, Hegel and Gierke. This suggestion is clearly counterintuitive, in light of the nationalistic sentiments of those thinkers. Nevertheless, Hegel was committed to the realization of universal values. Since he saw the social conditions imposed by industrial capitalism as the chief barrier to the realization of such values in a world-state, it is worth speculating about what sort of social conditions might have rendered such a state possible.

The romantic tradition, though vigorously opposed to the natural law tradition in eighteenth and early nineteenth century Germany,[549] was just as vigorously opposed to positivism in the

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548. C. BEITZ, *supra* note 135, at 42-44.
549. G. IGGERS, *supra* note 498, at 4-6.

later nineteenth and twentieth centuries.[550] Romantic jurisprudence retained a republican insistence upon civic virtue as a prerequisite to sovereignty. In the eyes of Rousseau and Savigny, the mere maintenance of order did not indicate the presence of a legitimate legal system. In order to be recognized as legitimate, a legal system had to embody the will or spirit of an organic community.[551] If no such group spirit characterized a governed population, therefore, the institutions of its government could not be legitimate.[552] If, on the other hand, such an organic community

550. FLETCHER, *supra* note 23, at 984-85.

551.

> [T]he general will alone can direct the forces of the state in accordance with that end which the state has been established to achieve—the common good; for if conflict between private interests has made the setting up of civil societies necessary, harmony between those same interests has made it possible. It is what is common to those different interests which yields the social bond; if there were no point on which separate interests coincided, then society could not conceivably exist. And it is precisely on the basis of this common interest that society must be governed.

J. ROUSSEAU, *supra* note 220, at 69.

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.

F. SAVIGNY, VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814) (A. Hayward trans. 1831), *cited in* A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 62 (1977).

552.

> [W]hen the social tie begins to slacken and the state to weaken, when particular interests begin to make themselves felt and sectional societies begin to exert an influence over the greater society, the common interest becomes corrupted and meets opponents; voting is no longer unanimous; the general will is no longer the will at all.
>
> In the end . . . when the social bond is broken in every heart . . . then the general will is silenced . . . and the people enacts in the guise of law iniquitous decrees which have private interests as their only end.

J. ROUSSEAU, *supra* note 220, at 150. "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality." F. SAVIGNY, *supra* note 551, at 63;

> If we consider legal relations in abstraction from any particular content they may have we are left with a general entity which regulates the common life of many men in a definite way. If one goes no further than this abstract conception of many men one can easily be led to think that law is their invention, an invention without which the external freedom of individuals could not exist.

was present, the will of that community, rather than its enacted law or governing institutions, was its true law.

Like the natural law tradition, therefore, the romantic tradition offers a concept of law that transcends positive law. The difference is that it is explicitly particularistic and relativistic, rather than universal and absolute. Within romantic jurisprudence, legal validity is contingent on the will of a particular community identified with a particular historical experience. Romantic jurisprudence is obsessed with presence: the actual presence of an organic community is a prerequisite to legitimate institutions, and the immediate presence of its members to one another is part of what makes such a community organic. Within such a conceptual framework, international law could command exclusive legitimacy only in the presence of an actual universal community, characterized by some kind of collective consciousness.

Both the natural law tradition and the romantic tradition offer conceptions of law that transcend positive law. Accordingly, monists may appeal to either one in justifying the monumental role they accord to international law, in the face of its diminutive performance. Yet the application of either concept to international law requires adherence to a view of international society as fundamentally harmonious. Monism is not merely a doctrinal position, but an anthropological faith—for the monist must believe that all human beings, whether as a consequence of nature or history, are bound by the same values.

C. *Dualism in International Law*

Monism is commonly contrasted with a competing view of the relationship between national and international authority that is referred to as "dualism." The dualistic view, not surprisingly, holds that the actions of states in the international sphere are subject to dual authority. States are bound by both international and municipal law, according to dualists, but these obligations are in-

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> But such an accidental collection of an undefined aggregate of men is an arbitrary supposition totally lacking in truth. And if it ever had happened that men were thrown together in this way they would undoubtedly lack any power to produce law since necessity does not entail the power to satisfy it.

F. SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 18 (1840), *cited in* A. VON MEHREN & J. GORDLEY *supra* note 496, at 65.

dependent of one another.[553] The claim that international law and municipal law are separate spheres, expressed by Fitzmaurice,[554] exemplifies this posture. From a dualistic perspective, noted Lauterpacht, "the Law of Nations is a law not above, but between, sovereign states, and is therefore a weaker law."[555] H.E. Cohen offers as an example of dualism

> the theory of national sovereignty as formulated by [Adéhar] Esmein. To his mind [international law] was still incompletely formed; whatever validity it had was due to the strength of opinion or of the treaties into which the state enters. Apart from this, there is no international community forming a union superior to the states.[556]

For the dualist Georg Jellinek, as well:

> [I]nternational law was a law among states, not the law of a *civitas maxima* operating on individuals. Because this is so, the rules of international law

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553. Lauterpacht summarizes the dualistic position as follows:

> [T]he Law of Nations and the Municipal Law of the several States are essentially different from each other. They differ, first, as regards their sources. The sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted by the law-giving authority. The sources of International Law are custom grown up among States and law-making treaties concluded by them.
>
> The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of a State and the relations between the State and the individual. International Law, on the other hand, regulates relations between States.
>
> The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between, sovereign States, and is therefore a weaker law.
>
> [T]he Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law.

1 L. OPPENHEIM,, *supra* note 26, § 21; Margolis, *supra* note 543. For the most prominent expositions of dualism, see H. TRIEPEL, VÖLKERRECHT UND LANDESRECHT (1899) and Triepel, *Les rapports entre le droit international et le droit interne*, 1 RECUEIL DES COURS 77 (1923), and 1 D. ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 47-61 (1928).

554. *See supra* text accompanying note 203. Fitzmaurice claims that he is neither a monist nor a dualist, on the ground that both positions falsely assume that national and international law sometimes come into conflict—an assumption which is in fact validated by instances of treaty conflict. Fitzmaurice's effort to adopt a middle position between monism and dualism is reflected in his effort to construct a middle position between the property and liability approaches to treaty conflict. *See* Fitzmaurice, *supra* note 203.

555. 1 L. OPPENHEIM, *supra* note 26, § 21.

556. H. COHEN, RECENT THEORIES OF SOVEREIGNTY 86-87 (1937) (citing A. ESMEIN, ELEMENTS DU DROIT CONSTITUTIONNEL 36 (1896)).

> were subordinate to the interests of the states. "International Law was made for the states; not the states for International Law." Treaties and conventions are therefore subject to the higher, primary interests of the individual states. The strength of international law depends upon the will of the individual states . . . . It is, in other words, subordinate to state sovereignty.[557]

Because dualists view the spheres of municipal and international law as independent, they are not committed to the view that an international legal obligation implies any obligation under municipal law. Accordingly, they do not share the monist's view that treaties are automatically incorporated into municipal law.[558] Similarly, they need not assume that an act violating international law is without municipal validity.

While dualism does not compel acceptance of the liability view of treaty entitlements, it is an integral part of that view. To the dualist, the formation of a treaty and the performance of a treaty are separate functions: the decision whether or not to perform a treaty is within the scope of a state's sovereignty. Since that sovereignty is independent of the international legal order, it doesn't become forfeit when a state violates international law. From a dualistic perspective, international law is not in a position to call a conflicting treaty invalid as *municipal* law. Unlike monists, therefore, dualists are not compelled to call conflicting treaties invalid from the standpoint of international law. Neither, however, are they compelled to accord such treaties validity in international law. Dualism is a necessary, but not sufficient, condition for the treatment of treaty expectations as liability entitlements. That is why the comments of Fitzmaurice were so ambiguous on the question of treaty conflict. Yet to the extent that international law is dependent upon the consent of states, its rules are merely conventional. If dualists believe this, it is hard to see how they could accord international law the authority to invalidate other international conventions. Hence, the subordinate status accorded international law by dualists could encourage them to accept the validity of conflicting treaties. On the other hand, the skepticism of dualists regarding international law could lead them to question the validity of any treaty.

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557. H. COHEN, *supra* note 556, at 89 (citing G. JELLINEK, ALLGEMEINE STAATSLEHRE 349 (1960)).

558. *See* K. HOLLOWAY, *supra* note 543.

D. *Dualism as a Nationalist Social Vision*

As the previous Chapter revealed, the dualism of the opponents of a property rule is wedded to the images of international society which give it content. These images are themselves characterized by a dualistic opposition between national and international society. This may be demonstrated by a review of the rationales for alternatives to a property rule.

Both a liability rule and a simple license to breach are supported by the principle of state autonomy. That principle involves the assumptions that treatymaking, as an aspect of the general power of lawmaking, is an attribute of sovereignty; that the function of the sovereign power is the maintenance of some source of legitimacy; and that the sovereign power, as a conditional grant, is an inalienable entitlement. The alienation of the power to make a treaty would be an infringement of that entitlement. If treaties conveyed specifically enforceable property entitlements, they would alienate the power to make conflicting treaties. Accordingly, the principle of state autonomy, which entails the inalienability of sovereignty, requires that treaties convey nothing more than liability entitlements.

The principle of state autonomy is the offspring of two incompatible models of the state, the republican and the imperial. The republican model conditions legitimacy on the virtue of the people; the imperial model conditions legitimacy on the people's welfare. The republican model identifies the sovereign as an organic association characterized by solidarity and mutual fidelity; the imperial model identifies the sovereign as trustee of the interests of a collection of discrete individuals. Both traditions view commerce as a disintegrative force. The republican state is an innoculation against commerce; the imperial state is a balm for its most painful symptoms. Both models are structured by fundamental dichotomies. For the republic, commerce is external and the basic oppositions—stability and corruption, virtue and fortune, minuteman and mercenary, citizen and slave—all reflect a persistent tension between the republic and its external surroundings. For the empire, commerce is internal, and the tension between state and market expresses itself in the basic dichotomies of public and private, sovereign and subject, and positive law and natural law.

In the nineteenth century, features of both models were in-

corporated by theorists of the nation state. On one hand, the great powers of Europe sought to nurture the commerce favored by the imperial tradition. On the other hand, the unprecedented disintegration of society wrought by that commerce seemed to necessitate affirmative efforts to foster the solidarity valued by the republican tradition. Nationalists proposed that public welfare be insured by a series of associations culminating in the state. Because of their commitment to commerce, however, they proposed financing these welfare functions through economic exploitation of foreigners rather than solely by means of an internal redistribution of wealth. Nationalists wished to displace the conflict between collective sovereign and individual subject onto the relations between peoples. The result was a vision of social life sharply divided between altruistic association and exploitation.

This dichotomy expressed itself in the responses to treaty conflict that the members of the International Law Commission saw as compatible with the principle of state autonomy. On the one hand, they saw states as responsible to their partners for the consequences of treaty conflict. On the other hand, they denied international institutions any role in enforcing that responsibility. This doesn't mean that they despaired of controlling treaty conflict; rather they assumed that allies would compensate or otherwise mollify one another if they made conflicting treaties. If they didn't do so, that would be a good sign that their alliance had ended, and that international cooperation would be furthered more by the performance of the later treaty than by the performance of the earlier. In other words, they assumed that when states exercise their autonomy, they always act consistently with *either* the principle of good faith, *or* the progressive development of international law.

Monism reduces the complexity of international society to fantasy in order to reconcile it with international law; dualism reduces international law to tautology in order to reconcile it with the reality of conflict.

E. *The Relationship Between Monism and Dualism*

The view that treaty expectations are a form of property rests upon a monistic view of the relationship between municipal and international authority. This position in turn entails a static vision of international society. The view that treaty expectations are, at

best, liability entitlements, rests upon a dualistic conception of the relationship between municipal and international law, in turn inspired by a vision of international society which is diachronic and therefore dualistic.[559] The confrontation between these two social visions can be likened to a similar dispute within literary theory.

Robert Cover's recent Foreword to the *Harvard Law Review* began with the claim that the narrative structure of myth reveals the "nomos" of a community.[560] By "nomos," he meant a shared picture of the world, shaped by a group's common normative perspective.[561] In making such a claim, Cover implicitly identified himself with the structuralist tradition in anthropology, which assumes that the interpretation of myth requires familiarity with elemental patterns of signification peculiar to the culture producing it.[562] Adherents of hermeneutic approaches to interpretation would go still further, arguing that the interpretation of a culture requires not merely familiarity with, but entry into, the culture's fundamental ontology.[563] Many contemporary literary theorists,

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559. Note that I am not arguing that beliefs about the structure of international society determine positions on issues of international law in any mechanical way. In general, I doubt whether monistic positions in international law have been inspired by sincerely held beliefs that international society was already harmonious and unified: at best, such positions have been inspired by nostalgia for a harmonious world. Nevertheless, monistic positions in international law entail belief in such a world. As a result, those scholars committed to a view of international society as contentious or chaotic have confronted monistic positions on issues of international law. The monists have not really believed that international society was harmonious, but have hoped it would become so; the dualists have not necessarily objected to this hope, but have generally thought it vain.

560. 97 HARV. L. REV. 4, 5 (1983).

561. *Id.* at 4, 32.

562. *See* J. CULLER, STRUCTURALIST POETICS 40-54 (1975); V. LEITCH, DECONSTRUCTIVE CRITICISM 16-23 (1983); C. LEVI-STRAUSS, *The Structural Study of Myth*, in STRUCTURAL ANTHROPOLOGY (1983); C. LEVI-STRAUSS, THE SAVAGE MIND 135-61 (1966).

563. *See* W. DILTHEY, SELECTED WRITINGS 186-95, 218-31, 260-63 (H. Rickman ed. trans. 1976). Dilthey and subsequent partisans of hermeneutics have acknowledged that in making another culture one's own, one transforms it by entering into a dialogue with it. A popular modern exponent of the hermeneutic method of anthropology is Clifford Geertz, though he chafes at the label. *See generally* C. GEERTZ, THE INTERPRETATION OF CULTURES 14 (1973) ("*Verstehen*" is an overly "bookish" term for the method he recommends). Geertz criticizes Levi-Strauss' method as substituting analysis for genuine involvement. *Id.* at 345-60. Geertz' celebrated study "Deep Play: Notes on the Balinese Cockfight," *id.* at 412-53, is itself a mythic celebration of hermeneutic method. Upon arriving in a Balinese village, Geertz can learn nothing because, as an outsider, he is offered no social recognition. Because he does not exist for the culture, the culture cannot exist for him. All this changes when he joins the villagers in flight from a police raid during a cockfight. By submitting to the culture's norms, he had entered it. The village warms to him and yields to him its

however, view interpretation less as a form of understanding than as a process of transformation and change. Some have been particularly interested in the phenomenon of misunderstanding—the power of readers to generate a plethora of interpretations from a single text.[564] Others have focused on the experience of reading—the power of a text to suspend and surprise the reader. They have looked at narrative as the evocation of a change in the reader's consciousness, rather than the instantiation of a recognizable, prefigurative pattern.[565] Approaches to narrative that are aimed at accounting *for* interpretation require that the reader and text exist within a single nomos—they are as monistic as they are static. Approaches to narrative that are aimed at giving an account *of* interpretation—that are themselves narratives of the struggle between text and reader—are necessarily dualistic.[566] Whether gospel is dogma or prophecy depends on how you preach it.

Law has a similarly chameleonic nature, best summed up in the oxymoron "legitimate force."[567] The criterion by which we recognize its presence is coercion: a norm cannot be legal if it is

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secrets. As a result of this incident, too, he realizes that the cockfight is a key to the entire culture of the village; yet he is ultimately able to understand the cockfight only because of similarities between the village's culture and his own (e.g., "cock" is a phallic symbol in both). I identify Cover more with structuralism than with hermeneutics because of what I perceive to be an attitude of detachment towards the normative orders he describes, accompanied by a taxonomic impulse. Other readers may disagree. In any event, one of Cover's colleagues at the Yale Law School, Owen Fiss, has explicitly embraced a hermeneutic approach to the phenomenon of legal interpretation. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

564. The most notable of these is Harold Bloom. *See, e.g.*, H. BLOOM, THE ANXIETY OF INFLUENCE (1973); H. BLOOM, A MAP OF MISREADING (1975); H. BLOOM, KABBALAH AND CRITICISM (1975); H. BLOOM, POETRY AND REPRESSION (1976).

565. *See, e.g.*, R. BARTHES, THE PLEASURE OF THE TEXT (1973).

566. Jonathan Culler refers to the

> struggle between the monism of theory and the dualism of narrative. Theories of reading demonstrate the impossibility of establishing well-grounded distinctions between fact and interpretation, between what can be read in the text and what is read into it, or between text and reader, and thus lead to a monism . . . . Stories of reading, however, [require] dualisms: an interpreter and something to interpret, a subject and an object, an actor and something he acts upon or that acts on him.

J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 74-75 (1982).

567. Weber defines the modern state as an institution exercising a monopoly on legitimate force. *See* M. WEBER, 1 ECONOMY AND SOCIETY 56 (1978). He defines law as those norms guaranteed by state coercion, or occasionally, by "an organized coercive apparatus for the nonviolent exercise of legal coercion." *Id.* at 313-14.

merely a description of voluntary behavior; legal norms make people do something that they don't want to do. On the other hand, we justify legal systems in terms of a criterion of legitimacy: a norm cannot be legal if people obey only out of fear. People obey legal norms because they want to. The paradox is easily reconciled by any first year law student: legal norms change what people want to do.[568] Emphasize the phrase "change people," and the above story becomes a tragic story of coercion, conflict, and mind control.[569] Emphasize the phrase "what [they] want," and you have a snapshot of a happy family visiting the zoo—gratified children, gorged on ice cream, posed in front of equally docile animals, encaged. Daddy, of course, is taking the picture. Both accounts, moreover, may be equally accurate: if coercion is effective, consensus should be the result. Which account we see then depends only upon which side of the ledger we look at.

F. *The Internal Contradictions of Internationalism*

The paradoxical feature of international law discourse is that, consistently, both accounts show up on the same side of the ledger.[570] International law is simultaneously portrayed by the same participants as a product of coercion and as a manifestation of consensus; dualism shows up as both a profit and a loss. If the institutions of international law have failed to become effective, it is not simply because of a lack of consensus among the nations, as the dualists claim. Lack of consensus would merely indicate the need for coercion in establishing an effective legal system. If some nations supported the establishment of an effective international

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> Our jurisprudence . . . while not oblivious to deterministic components, ultimately rests on a premise of freedom of will. This is not to be viewed as an exercise in philosophic discourse, but as a governmental fusion of ethics and necessity, which takes into account that a system of rewards and punishments is itself part of the environment that influences and shapes human conduct.

U.S. v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972) (Leventhal, J.).

569. *See, e.g.,* A. Katz, Foucault, *supra* note 23 (arguing that the attempt to legitimate legal norms by reference to the "normal" behavior of populations helps produce the very behavioral norms on which it purports to rely).

570. I cannot claim with any confidence that international law is unique in this respect; it may be that other bodies of doctrine are greeted with equal ambivalence by most of those they govern. But international law does differ in this respect from, say, criminal law in the United States, perceptions of which vary, at least to some extent, with class status.

legal system and some did not, we could conclude that the supporters simply were not powerful enough to enforce their views. In fact, though, no powerful state seems unambivalently enthusiastic about international law. It is not so much that the coercion of some states has been inadequate to impose consensus on other states as that there has not been sufficient consensus *within* powerful states to motivate coercion against other states.

G. *Monism and Dualism in American Diplomacy*

If any state has seemed suited to the role of international legislator, surely the United States has. The United States emerged from World War I as the most prosperous of world powers; it emerged from World War II with its economy stimulated but still unscathed, with the gratitude and admiration of most of the world's population, and with a monopoly on what have come to be called "strategic arms"—in short, with something very like "a monopoly on legitimate force."[571] American presidents were the chief architects of the settlement of both world wars. At the close of World War I, the American president designed the first global legislature. At the close of World War II, American presidents reestablished such a legislature on American soil, and organized an international monetary system based on American currency.[572] Thus by the end of World War II, the leaders of this country seemed to have the will as well as the wherewithal to create an effective international legal system.

Nevertheless, the United States has not always taken positions on questions of international law that indicate support for international authority. It has flirted with monism on some occasions, dualism on others.

American officials have vigorously disapproved of international legal doctrines inspired by romantic nationalism. While American presidents have advocated independence for Third

571. *See supra* note 567 (legitimate force).

572. F. SCHURMANN, THE LOGIC OF WORLD POWER 3 (1974) (America dominated world at close of World War II; world system was shaped by U.N., new monetary system and atomic bomb); *id.* at 61-62 (U.N. was perceived originally as agent of U.S. power and nations joined it for protection); *id.* at 47, 67-68, 72-73 (American foreign policy at close of World War II viewed at home and abroad as exportation of New Deal; America admired throughout world, even by communists, as progressive force).

World territories colonized by European powers,[573] American diplomats have traditionally refused to recognize a right to national self-determination.[574] They have instead taken the position that sovereignty is conferred by the recognition of other nations and is a function of the capacity to govern and to meet international obligations.[575] In their view, decolonization could be justified on pragmatic grounds, to the extent that it could be expected to stabilize "developing areas," yet they feared that attributing sovereignty to the will of Third World peoples would have a destabilizing effect.[576] In fact, it was precisely in order to preclude the appearance of militant "national liberation movements"[577] that American policymakers encouraged colonial powers to hand over authority to "responsible" native regimes.[578] Where such national

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573. F. SCHURMANN, *supra* note 572, at 67 (Wilson); *id.* at 69 (Roosevelt).

574. There is a continuing debate over whether the principle of self-determination confers enforceable rights on every people or simply enunciates a United Nations policy. The principle is enunciated as a goal of the U.N. in its Charter. *See* U.N. CHARTER art. 1, para. 2. It was recognized as a right by the United Nations General Assembly in the "Declaration on the Granting of Independence of Colonial Countries and Peoples," although General Assembly resolutions have no binding force. *See* G.A. Res. 1514, 6 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). Nevertheless, the principle was applied by the International Court of Justice in a recent Advisory Opinion. *See* Advisory Opinion on Western Sahara, 1975 I.C.J. 12. Some scholars have argued that the principle has evolved into a conventional norm conferring a right. *See, e.g.*, R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 90, 106 (1963); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 129-47 (1977). Others have vigorously disputed this conclusion. *See, e.g.*, Gross, *The Right of Self-Determination in International Law*, in NEW STATES IN THE MODERN WORLD 136 (M. Kilson ed. 1975); Sinha, *Is Self-Determination Passé?*, 12 COLUM. J. TRANSNAT'L L. 260, 271 (1973). The traditional criterion of membership in the international community was the effectiveness of a nation's government as expressed by its ability to control a population, carry on international relations, and meet international commitments. *See* Tinoco Case (Gr. Brit. v. Costa Rica), 18 AM. J. INT'L L. 147 (1924). This continues to be the effective standard by which the international system generally operates, and the standard favored by the United States in most instances. *See* Schwenninger, *The 1980's: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 RUTGERS L. REV. 430 (1981); Rostow, Book Review, 82 YALE L. J. 826, 848, 853-54 (1973) (reviewing J. MOORE, LAW AND THE INDO-CHINA WAR (1972)).

575. *See supra* note 574. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 100, 101, 103 (1962).

576. *See* Rostow, *supra* note 574, at 846-54. In Rostow's view, treating self-determination of peoples as an enforceable right would (1) encourage Soviet and other foreign intervention in civil wars and (2) deter American and other foreign intervention in civil wars. Paradoxically, Rostow views the first consequence as destabilizing, but does not view the second consequence as stabilizing. *Id.*

577. *See infra* note 618.

578. F. SCHURMANN, *supra* note 572, at 69, 72, 93, 95 (America effectively assumes the

liberation movements have ultimately prevailed, they have sometimes sought to breach or renegotiate what they viewed as exploitative treaties imposed upon them by the "mother" country during the decolonization process, invoking the doctrine of *clausula rebus sic stantibus*.[579] American diplomats have therefore joined with monists[580] in condemning this doctrine, even though it was at least once invoked by an American Attorney General.[581]

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mantle of the British Empire after World War II, with the avowed aim of insuring security as well as independence). *See also* Ahmad, *The Neo-Fascist State: Notes on the Pathology of Power in the Third World*, in FIRST HARVEST: THE INSTITUTE FOR POLICY STUDIES 1963-83, at 68 (J. Friedman ed. 1983).

579. This rationale for termination or modification was first employed by the Soviet Union to justify reevaluation of Russian treaty commitments after the revolution, and has been embraced by Soviet scholars, except for a brief period, immediately after World War II, when they became particularly concerned about Western modification of post-war agreements without Soviet consent. G. HARASZTI, *supra* note 28, at 352-57; J. TRISKA & R. SLUSSER, THE THEORY, LAW, AND POLICY OF SOVIET TREATIES 131-41 (1962). The People's Republic of China adopted a similar position after its revolution. *See* H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 92, 103-10 (1972). Other Third World nations abrogated or successfully renegotiated treaties after independence as well. *See* Summary Records of the 703rd Meeting, [1963] 1 Y. B. INT'L L. COMM'N, *supra* note 507, at 201 (statement of Bartoš of Yugoslavia); *id.* at 90 (statement of Elias of Nigeria). During the debates of the International Law Commission on Article 62 (concerning the doctrine of *clausula rebus sic stantibus*), representatives of Third World nations wanted the doctrine to be interpreted as expansively as possible for that reason. *See* Summary Records of the 695th Meeting, [1963] 1 Y. B. INT'L L. COMM'N 147, U.N. Doc. A/CN.4/SER.A/156/1963 (statement of Elias of Nigeria); *id.* at 256 (statement of Tabibi of Afghanistan); 18 U.N. GAOR C.4 (791st mtg.) para. 41, U.N. Doc. A/C.6/SR.778.836 (1963) (comments of N'N'ang of Cameroon).

580. Hans Kelsen, a leading exponent of monism, *see supra* note 543, is also a leading opponent of the doctrine of *rebus sic stantibus*. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 358-60 (1952).

581. In 1940, President Roosevelt suspended the application of the International Load Line Convention. Acting Attorney General Francis Biddle justified this action on the ground that the convention presumed peacetime conditions. This opinion was severely criticized by Herbert Briggs, the distinguished international lawyer who eventually became the United States Representative to the International Law Commission. *See* Briggs, *supra* note 492, at 89-96. Briggs has consistently opposed the view that this doctrine, or any related theory, could justify unilateral termination or suspension of a treaty. Briggs, Rebus Sic Stantibus *Before the Security Council: the Anglo Egyptian Question*, 43 AM. J. INT'L L. 762-69 (1949); Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974). Other American commentators have acknowledged the widespread acceptance of the doctrine, but have argued that suspension, modification, or termination of a treaty due to change of circumstance can only be based on the mutual intention of the parties, rather than on some objective standard of fairness. *See, e.g.*, C. HILL, THE DOCTRINE OF REBUS SIC STANTIBUS IN INTERNATIONAL LAW 10 (1934); Lissitzyn, *Treaties and Changed Circumstances* (Rebus Sic Stantibus), 61 AM. J. INT'L L. 896, 912 (1967). Such an interpretation of the doctrine, of course, would destroy its utility for

Yet American officials have never really embraced monism. Despite the Constitution's injunction that treaties be considered "the law of the land," American courts have effectively gutted the doctrine of automatic incorporation, partly in response to legislative pressure.[582] On the issue of treaty conflict, moreover, American diplomats and policymakers have clearly opted for the dualistic posture. During the deliberations of the International Law Commission, the United States representatives consistently supported the approach developed by the Special Reporters.[583] As we noted in the previous Chapter, support for this position implied a willingness to countenance treaty conflict. On at least three occasions the United States appears to have undertaken conflicting obligations: (1) in 1794, when it agreed with Britain to exclude foreign privateers from its ports, contrary to an earlier treaty with France;[584] (2) in 1903, when it agreed to exempt Panamanian vessels from canal tolls in violation of an earlier agreement with Britain;[585] and (3) after World War II, when it agreed to the creation of West Germany as a NATO member without Soviet consent.[586]

national liberation movements.

582. *See* V. LEARY, INTERNATIONAL LABOR CONVENTIONS AND NATIONAL LAW 55-65 (1982); McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 748-50 (1958). The most notable case in this regard is Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952) (denied the validity of the human rights provisions of the United Nations Charter as American law). During the course of the *Sei Fujii* litigation, the Senate came within one vote of approving a Constitutional amendment nullifying the Constitution's automatic incorporation clause. This amendment was apparently motivated by concern that courts would invoke international human rights agreements against segregation and other forms of race discrimination. V. LEARY, *supra*, at 62.

583. Summary Records of the 685th Meeting, [1963] 1 Y.B. INT'L L. COMM'N 79, U.N. Doc. A/CN.4/SER.A/1963; Summary Records of the 742nd Meeting, *supra* note 508, at 123-24; Summary Records of the 857th Meeting, [1966] 1 Y.B. INT'L L. COMM'N 98-99, U.N. Doc. A/CN.4/SER.A/1966; Law of Treaties, [1966] 2 Y.B. INT'L L. COMM'N 75, U.N. Doc. A/CN.4/SER.A/1966/Add.1; Reports of the International Law Commission to the General Assembly, [1966] 2 Y.B. INT'L L. COMM'N 357, U.N. Doc. A/CN.4/SER.A/1966/Add.1; Proceedings of the United Nations Conference on the Law of Treaties 165-66, U.N. Doc. A/Conf.39/11 (1st Sess. 1968).

584. *See supra* note 123.

585. *Id.*

586. J. TRISKA & R. SLUSSER, *supra* note 579, at 120. The American decision to create an economically and militarily strong West Germany as a bulwark against communism was first signalled in 1947 by the unification of the British and American occupation zones and the creation of a West German currency. These maneuvers coincided with the development of plans, that Soviet intelligence was probably privy to, to rearm Germany. Thus, to the Soviets, America's unilateral decision to reorganize the administration of West Germany was not merely a technical violation of its Yalta and Potsdam commitments. *See* F.

Moreover, the United States has often encouraged its allies to create conflicting treaties: in inducing Haiti to agree to harbor American privateers during the Civil War, the United States caused Haiti to violate an international convention;[587] in signing the Bryan-Chamorro treaty, the United States participated in Nicaragua's anticipatory breach of its treaty obligations to Costa Rica;[588] in mediating the Camp David negotiations, of course, the United States encouraged Egypt's apparent violation of its Arab League commitments;[589] finally, and most recently, in invading Grenada at the request of the Organization of Eastern Carribean States, the American government condoned an application of that organization's charter in apparent violation of the member states' obligations under the charter of the Organization of American States (of which the United States is a member).[590]

It is tempting to explain the apparent ambivalence of American leaders toward international law as simple cynicism: the prevalence of the view that international relations constitute a Hobbesian state of nature[591] conditions us to expect that great powers will obey international law only when it is in their interest to do so. Yet if we imagine a unified leadership ruthlessly pursuing a deter-

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SCHURMANN, *supra* note 572, at 216-17.

587. *See supra* note 123.

588. *See supra* text accompanying notes 130, 140.

589. *See supra* text accompanying notes 29, 108.

590. The United States justified the invasion of Grenada on the grounds that the Organization of Eastern Carribean States (O.E.C.S.) had requested their intervention. By virtue of a 1981 agreement, this organization is empowered to request foreign military assistance in the event of a unanimous vote of the member states. Since Grenada was not consulted by other member states, it appears that these states themselves violated the O.E.C.S. charter in requesting U.S. assistance. Presumably, the other member states took the position that the legitimate government of Grenada could not be consulted because it had been overthrown. Nevertheless, in requesting U.S. intervention, these states appear to have violated their obligations under the Organization of American States charter. This charter forbids intervention in the affairs of a member state without that state's request. The charter further requires that any such intervention be carried out by the O.A.S. and done so with the actual or putative consent of the Grenadian government. They might have been able to arrange an intervention consistent with the charter of the O.A.S. In this sense, the O.E.C.S. charter was not necessarily inconsistent with the O.A.S. charter, but by requesting aid directly from the U.S., the O.E.C.S. member states interpreted their charter in a manner inconsistent with the O.A.S. charter. By acceding to this request, the U.S. condoned this interpretation. *See* Chayes, *Grenada was Illegally Invaded*, N.Y. Times, Nov. 15, 1983, § 1, at 35, col. 1. *Cf.* Rostow, *Law 'Is Not a Suicide Pact,'* N.Y. Times, Nov. 15, 1983, § 1, at 35, col. 1.

591. C. BEITZ, *supra* note 135, at 13, 50.

minate national interest we confront an anomaly: the reluctance of the United States to use international law as an instrument of national policy. Given the power and popularity of the United States in the postwar era, American leaders could have fashioned an international order to their own liking. Yet the attempts of some leaders to do so were resisted by others. American ambivalence toward international law is not dictated by the vagaries of a single national interest over time, but by persistent conflict between distinct interests.

Observers have distinguished two durable competing traditions of thought in American foreign policy, one internationalist in orientation, the other nationalist in orientation.[592]

H. *Internationalism in American Politics*

The centerpiece of the internationalist view in American foreign policy has always been free trade. Though they are proponents of laissez-faire economics, internationalists are partisans of intervention in foreign affairs. Because they identify American interests with the unrestricted mobility of American capital, they are advocates of a homogeneous world market.[593] As a result, they are opponents of protectionism and regulation abroad, as well as at home. Nevertheless, they have generally rejected gunboat diplomacy as a means of enforcing their preferences; for a second persistent feature of the internationalist viewpoint has been an emphasis on stability. Internationalists have feared that war would encourage protectionism, disrupt commerce, and render overseas investments insecure. Accordingly, they have functioned as a peace lobby within the foreign policy establishment.[594]

The apparent tension within the internationalist viewpoint between the urge to prescribe policy for other governments and the antipathy toward military intervention has been mediated by a monistic vision of international society. Under conditions of peace and stability, internationalists argue, all countries will eventually develop relatively unrestricted market economies compatible with international capitalism. War is therefore unnecessary, as well as

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592. F. SCHURMANN, *supra* note 572, at 48-60; Klare, *The Assault on the Vietnam Syndrome*, in FIRST HARVEST: THE INSTITUTE FOR POLICY STUDIES, *supra* note 578, at 143.

593. F. SCHURMANN, *supra* note 572, at 48, 56; Klare, *supra* note 592, at 147.

594. F. SCHURMANN, *supra* note 572, at 50-52.

counterproductive, as a means of coercion. The economic incentives created by the ordinary operation of a self-regulating market, they argue, should be sufficient; if not, judicious use of economic aid could do the trick.[595] This confidence in the persuasive power of capitalism assumes common motivations on the part of the leaders of all nations. Accordingly, internationalists view ideologies hostile to international capitalism—whether protectionist or socialist—as fundamentally inauthentic. Thus they may view socialism as a coercive strategy on the part of a disgruntled group bent on wrongfully seizing capital without feeling seriously threatened by it. Internationalists remain confident that once the new management has established possession of a country's capital, it will invest it in the world market.[596]

Some observers sympathetic to internationalism view nationalist ideologies as themselves creatures of international capitalism. Ernest Gellner has argued that such ideologies generally are imposed from above, rather than percolating spontaneously from below, and that they are imposed for the purpose of facilitating the penetration of market capitalism. They do so, he argues, by legitimizing the erection of a national system of public education which, in turn, proliferates a homogeneous, literate and technocratic culture likely to have more in common with the elite cultures of other countries than with native traditions.[597] The product of a successful nationalist movement, he implies, is a well-socialized work force, unconstrained by loyalty to any particular tradition, community or method of production, and a cosmopolitan elite capable of interacting with its counterparts in other countries. Internationalists within the American foreign policy establishment, such as Max Millikin and W.W. Rostow, have in fact argued that the United States should generate nationalism in "underdeveloped" areas as a means of bringing them into the world market.[598] From the perspective of the internationalists, nationalist ideology need not be taken seriously.

595. *See generally* M. MILLIKIN & W. ROSTOW, A PROPOSAL: KEY TO AN EFFECTIVE FOREIGN POLICY (1957).

596. *Id.*

597. E. GELLNER, NATIONS AND NATIONALISM 57-58 (1983).

598. *See* M. MILLIKIN & W. ROSTOW, *supra* note 595.

I. *Nationalism in American Politics*

Nevertheless, the internationalist position has been persistently and effectively challenged by nationalist ideologues within the American foreign policy establishment. Nationalists have traditionally favored protectionism, an isolationist posture towards Europe, and an interventionist posture towards certain regions in the Third World.[599] Nationalists identify the national interest with insuring markets and resources for American manufacturing, rather than the construction of a world market in which all nations may compete. Accordingly, they have been anxious to establish limited, but uncontested spheres of American influence. In particular, they have advocated American economic domination of the Pacific and Latin America as natural continuations of America's westward expansion.[600] This tradition is very close in spirit to the militant nationalism of Machiavelli. It justifies America's manifest destiny on the basis of a conception of virtue, consisting of entrepreneurial ingenuity, military courage and Protestant Christianity. It views the world beyond American borders with mistrust and has traditionally looked to military intervention and missionary Christianity in order to literally create islands of order in a sea of chaos.[601] Moreover, the millenarian imagery of manifest destiny has always been accompanied by the shadow of apocalypse: isolationists have traditionally warned that participation in European affairs would embroil America in global conflict; latter day nationalists believed the millennium was at hand when America acquired a monopoly on the Bomb, and that armageddon was around the corner when she lost it.[602] The McCarthy witchhunt was a predictable response to this disappointment: American nationalists have typically ascribed the frustration of their ambitions to corruption and betrayal. They have generally viewed the internationalist current in American foreign policy as the product of a conspiracy of Eastern banking interests controlled by English, Jewish or other "foreign" capital. Their phobic

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599. F. SCHURMANN, *supra* note 572, at 56-60.

600. *Id.* at 56-58.

601. *Id.* at 57 (Nationalist image of American virtue based on role of three institutions in penetrating the Pacific and Latin America: Missionary Protestantism, the Navy and free enterprise; discussion of the cultural and material links between the three).

602. *Id.* at 56-58 (isolationist attitude towards Europe); *Id.* at 83-91 (nationalist possessiveness toward nuclear weapons).

view of communism as a clandestine contagion was merely an elaboration of this tradition.[603]

J. *Nationalism, Internationalism and Capitalism*

The conflict between nationalism and internationalism within American foreign policy is not simply a difference of opinion about how best to achieve a common end, but a conflict between opposed interests. Nor is this conflict peculiar to American ruling elites: Franz Schurmann has argued that it is an example of conflicts inevitably engendered by the development of a world market system.[604] The distinctive feature of such a system, according to Karl Polanyi, is the absorption of local patterns of resource distribution into the broader currents of international trade, with the result that the availability of even locally produced goods becomes dependent upon worldwide supply and demand. A world market permits rapid industrialization and resource exploitation, as well as the constant movement of capital to ever more profitable investments. This rapid development and mobility, however, produces the massive social and economic dislocations anticipated by Hegel and described by Polanyi.[605] Waves of investment can uproot populations, destroy communal institutions and natural resources, and disintegrate traditional systems of production and distribution, leaving nothing in their path when they recede as suddenly as they have come. For all the wealth that industrialization may generate on an international scale, it may wreak devastation within the scope of a single region. The destructive consequences of free trade, moreover, are not confined to workers: capitalists who invest heavily in static assets such as land, buildings, heavy machinery or natural resources, may find themselves ruined when the tradewinds shift.[606]

As a result of these dislocations, Polanyi argues, the movement of capital meets with localized resistance, both from disgruntled workers and peasants, and from the managers of the less suc-

603. *Id.* at 58-59 (conspiracy theories linking Northeastern, British, Jewish and Bolshevik interests are a traditional feature of American nationalism). For a classic expression of the phobic attitude toward communism characterizing American leadership in the cold war era, see Dennis v. U.S., 241 U.S. 494, 561-79 (1951) (Jackson, J., concurring).

604. F. SCHURMANN, *supra* note 572, at 62-65.

605. K. POLANYI, *supra* note 117, at 68, 129.

606. *Id.* at 130-35. *See also* F. SCHURMANN, *supra* note 572, at 63-64.

cessful sectors of the economy. Such resistance, particularly in the form of worker violence, disrupts trade, eventually cutting into the profits of even the more successful sectors. Thus an ever increasing segment of the elite looks to the state to mollify the discontented. The result is the legislation of a safety net for the unsuccessful sectors of the economy—protectionism for business, and social welfare programs for workers. This in turn interferes with the mobility of capital and slows the pace of industrial development, at the same time that it requires ever greater expenditures of government revenue. Thus, pressure increases on the state to attempt to speed the pace of economic development by managing the national economy. When this sort of state capitalism becomes sufficiently widespread, trade is seriously hampered and the world market is in danger of collapse, as occurred in the wake of World War I.[607]

Naturally, the world market has a defense against this eventuality. When states institute nationalistic economic policies, foreign investment tends to flee. This will encourage local elites to reinstitute free trade policies, resuscitating the cycle of development, devastation and discontent. Fred Block has recently noted:

> Polanyi's arguments were of obvious relevance to the international economic situation of the 1970's. . . . Citizens in country after country were told during the 1970's that they could not afford various types of social policy measures because of their potential damage to the country's international competitive position in a context of increas[ing] conflicts over markets. And in those periods of economic contraction, 1974-75 and 1980-83, existing redistributive policies came under attack on the grounds that they prevented the readjustments that were necessary for improved performance in world markets. . . .
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> . . . The French Socialist government pursued redistributive and expansionary policies while the rest of the major economies were contracting. The result[s] were higher rates of inflation and mounting balance of payments difficulties. The currency markets forced a series of devaluations of the Franc and ultimately the Mitterand government was forced to reverse many of its policies and pursue a program of austerity.
>
> . . . In the context of widespread plant closing, [American] management insisted that unless workers made substantial wage concessions, it would be impossible for the firms to compete effectively against foreign producers. They argued that the discipline of the international marketplace dictated some downward adjustment of overly high American wages.[608]

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607. *Id.* at 163-219.

608. F. Block, Social Policy and Accumulation: Beyond the New Consensus 12-13 (un-

The effort to construct a world market is a Sisyphean task, for such a market undermines the conditions for its own success: a world market can only be established under conditions of stability, yet its effects are inherently destabilizing. As a result, even a power wholly committed to capitalism must remain ambivalent toward internationalism.

K. *Monism and Dualism in Soviet Diplomacy*

A similar ambivalence toward internationalism seems to characterize socialist powers. Soviet positions on doctrinal issues in international law have been as eclectic as American ones. In fact, even though the American doctrinal positions that we have discussed seem contradictory, the Soviet government seems systematically to disagree with them. Where American diplomats have opposed recognizing a right to national self-determination, Soviet diplomats have been among the most ardent advocates of such a right. Where Americans have feared that recognition of such a right would encourage militant "national liberation movements,"[609] Russians have supported recognition of such a right for precisely this reason.[610] Apparently, Soviet diplomats view national sovereignty as a creature of popular will rather than international institutions. They have encouraged application of the doctrine of *rebus sic stantibus* because it could be invoked by national liberation movements to justify altering treaty arrangements with Western powers.[611] They have found this doctrine particularly appealing because it resonates with the historicist strain in marxist thought. From the Soviet viewpoint, successful national

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published manuscript) (prepared for M. REIN, L. RAINWATER & G. ESPRING ANDERSON, STAGNATION & RENEWAL).

609. *See infra* text accompanying note 618 (discussion of national liberation movements).

610. The Soviet commitment to the liberation of colonized peoples was first enunciated by Lenin. *See generally* V. LENIN, IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM (1917). Early Soviet treaties and official statements enunciated a commitment to the self determination of peoples, and early theoretical writings, particularly of the influential Korovin, explained this commitment in terms of the goal of national liberation in Asia. *See* J. TRISKA & R. SLUSSER, *supra* note 579, at 198-202. Soviet international lawyers since that time have viewed national sovereignty as the foundation of international law, and have characterized monistic theories as a reflection of "hegemonic imperialism." Margolis, *Soviet Views on National and International Law*, 4 INT'L & COMP. L.Q. 116, 120-22 (1955). *See generally* G. HARASZTI, *supra* note 28, at 327-416; *supra* text accompanying notes 543-52.

611. *See supra* notes 489-509.

liberation movements represent the triumph of the proletariat in the dialectic of class struggle. They view such an event as a fundamental change of circumstance, because marxism views the identity of a society's ruling class as its most fundamental characteristic. From this perspective, the interests of the dictatorship of the proletariat are necessarily in conflict with those of the bourgeois regime it replaces.[612] Soviet commitment to dualism in international law reflects the dualism of a marxist social vision.

This makes it all the more startling that the Soviet Union has consistently favored the monistic position on the question of treaty conflict. In the International Law Commission debates, the Soviet representative continued to support a property rule, long after it was clear that the Commission had rejected it. Despite his country's approval of the doctrine of *rebus sic stantibus*, he was insistent that the Commission express its commitment to the sanctity of treaty obligations.[613]

The appeal of this principle to Soviet diplomats stems from the precarious international circumstances that faced the new Soviet regime in the wake of its revolution. As a member of the European Concert, Russia had expected consultation on all questions affecting the European balance of power. That expectation was recognized in a network of treaties. Of course, the Concert was an exclusive club, and Russia's membership had depended not only on its might, but on its acquiescence in the development of a world market as well. When, after World War I, a defeated Russia began to detach its economy from the market, it was excluded from European diplomacy and attacked militarily. Soviet support for the sanctity of treaties reflects a fear that Russia cannot afford to be excluded from international institutions, even if it opposes their aims.[614] The dilemma of capitalist powers has concerned the extent to which they should create a world market system. For marxist states, the dilemma has been to what extent they should

612. G. HARASZTI, *supra* note 28, at 382-92 (historicist interpretation of *rebus sic stantibus* doctrine consistent with marxism; Korovin approved clause but restricted its application to social revolutions). J. TRISKA & R. SLUSSER, *supra* note 579, at 131-41 (Soviet theorists subsequent to Korovin, most notably Pashukanis, view clause as generally applicable to revolutionary societies because of their continuous development); Margolis, *supra* note 543, at 120 (law is a superstructural incident of class interests; class interests of bourgeois-liberal and socialist nations are inalterably opposed).

613. *See supra* note 542.

614. *See* J. TRISKA & R. SLUSSER, *supra* note 579, at 118-20.

participate in a world market system not of their own making. Nevertheless, their ambivalence toward international law is a product of the same contradiction that shapes capitalist attitudes toward international law.

L. *Revolutionary Internationalism*

Because a self-regulating market system distributes the burdens of development unevenly, marxism's political opportunities always arise in the localized struggles of communities, particularly those victimized in capitalism's advance. Yet the mobility of capital in a world market system makes some marxists feel that capitalism cannot be combatted effectively on a local or even national level. Immanuel Wallerstein has argued that nationalism provides a devastatingly effective obstacle to successful class struggle. Political boundaries, he has argued, permit multinational capital to shop for favorable conditions and escape political accountability while disguising class differences as national differences.[615] Capitalism, he claims, recruits its managers from the Western industrialized, or "core," nations, while exploiting inhabitants of underdeveloped, or "peripheral" nations. Wallerstein is an internationalist: he believes that capitalism has succeeded in establishing a world market system and that all people derive their identities from their positions in that global system. In this context, national self-determination is at best a Quixotic goal for Third World peoples, and may actually reenforce their exploitation.[616] Third World nations cannot afford the protectionist policies sometimes adopted by Western powers, because they cause them to become less self-sufficient; on the other hand, nationalist rhetoric may legitimize the efforts of Western powers to protect

615. Wallerstein, *A World System Perspective on the Social Sciences*, 27 BRIT. J. SOC. 343, 351-52 (1976); Wallerstein, *Class Formation in the Capitalist World-Economy*, 5 POL. & SOC'Y 367, 373 (1975) [hereinafter cited as Wallerstein, *Class Formation*].

616. Wallerstein, *The 'Crisis of the Seventeenth Century,'* 110 NEW LEFT REV. 65 (July-Aug. 1978) (brief description of the world system); Wallerstein's view that capitalism is an integrated worldwide market system seems influenced by the work of the path breaking economic historian, N.D. Kondratieff. *See* Kondratieff, *The Long Waves in Economic Life*, 17 REV. ECON. STAT. 105-15 (1935). For Wallerstein's conception of social identity in such a world system, see *Wallerstein, Class Formation, supra* note 615. On the distinction between "core" and "peripheral" nations and the prospects of the peripheral nations for self-determination, see Wallerstein, *Dependence in an Interdependent World: The Limited Possibilities of Transformation Within the Capitalist World Economy*, 17 AFR. STUD. REV. 1-26 (1974).

profits harvested in the Third World. On the basis of such reasoning, Soviet leaders have traditionally argued that the revolutionary struggle should center on the industrialized nations. Workers could seize the means of production, they reasoned, only where those means were located.[617]

M. *Revolutionary Nationalism*

This conclusion has been contested by a competing marxist tradition. National liberation movements, patterned on the Chinese Revolution, fuse marxism with romantic nationalism. Stressing the historicist elements in each of these traditions, partisans of national liberation argue that marxism must take on a new meaning when applied in a non-western cultural setting.[618] In their view, the Soviet insistence on the centrality of industry is ethnocentric. Marxist and capitalist internationalism share not only a specific preference for industrial over agrarian society, but a more general materialism: both view societies as fundamentally economic rather than political or cultural orders. Yet much of the rhetoric of national liberation implies that non-western cultures have deliberately subordinated economic development to other values. The revolutionary strategy of national liberation is premised on the belief that these cultural commitments can enable non-western societies to resist the corrupting power of the world market.[619]

The social vision of the national liberation movements then is ultimately dualistic: it identifies virtue with the realization of culturally specific values. The revolutionary internationalism of tradi-

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617. *See* 2 A. ABDEL MALEK, SOCIAL DIALECTIC 81-84, 87-90 (1981).

618. *Id.* at 78-114. Abdel Malek both exemplifies this form of marxism, and describes its development. The Chinese Revolution serves as a model for national liberation movements because (a) it was a struggle for national independence as well as economic reorganization; (b) because the dominant revolutionary class was agrarian rather than urban; (c) because the primary locus of struggle was therefore rural rather than urban; (d) because the primary method of struggle was therefore guerilla warfare, rather than industrial confrontation; (e) because the focus of organization was therefore the mobilization of existing organic communities rather than the organization of industries; and (f) because the revolutionary ideology incorporated indigenous cultural traditions. *See* 2 SELECTED WORKS OF MAO TSE-TUNG 305-34, 339-84 (1965).

619. A. ABDEL MALEK, *supra* note 617, at 71-77, 157-72 (primacy of the political over the economic as determining factor in revolutionary struggle); *id.* at 191-201 (national liberation movements turn revolutionary struggle into the construction of new civilizations which transcend the materialism of western civilization).

tional marxism, by contrast, is monistic: it identifies virtue with the realization of species being, and views conflict as ultimately ephemeral. Nevertheless, Soviet leaders have been forced to heed the call of revolutionary nationalism. Because international capital wreaks its worst devastation at a distance, the peripheral nations are the sites of the greatest instability and discontent. The struggle for liberation can catalyze those feelings of discontent into a sense of community, but one that will be characterized by a specific historical identity. Western marxists may think Third World nationalism naive and parochial, but they cannot ignore it because it constitutes the greatest potential reservoir of support for revolutionary change.[620]

N. *National Liberation and International Law*

On the other hand, Third World nationalists cannot afford to spurn internationalism, no matter how much they may suspect that it is a cover for Western imperialism. Because of the Third World's economic dependence upon, and military vulnerability to, the West, its peoples cannot achieve any significant measure of self-determination without Western acquiescence. As a consequence, national liberation movements have appealed to international institutions to guarantee a legal right to national self-determination.[621]

Partisans of international institutions have responded to this appeal for strategic reasons. Since, for the reasons we have just discussed, none of the major powers have offered the institutions of international law unqualified support, partisans of such institutions have courted the favor of the Third World. The role that the United Nations has been able to play in legitimating post-colonial governments has in turn enhanced its own prestige.[622] Accordingly, academic supporters of strong international institutions have sought to reconcile the principle of national self-determination with internationalism by grounding it in the international law of human rights. They interpret self-determination as consisting of representation in a democratic government, and justify such representation on the grounds that it is a necessary means to guar-

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620. F. SCHURMANN, *supra* note 572, at 72.
621. *See* Stearns, *supra* note 538.
622. F. SCHURMANN, *supra* note 572, at 69.

antee the protection of any particular group's civil liberties and material needs. The criterion of adequate representation, therefore, becomes the extent to which a particular group's human rights are protected: the right of national self-determination collapses into the human rights of individuals.[623]

Charles Beitz has argued, however, that the principle of self-determination is incompatible with an international law of human rights. The ideal of self-determination as advanced by the national liberation movements is romantic and historicist; it is premised on the belief that value is determined by cultural context. Self-determination therefore entails not simply the liberation of a nation's people, but of its culture as well. Therefore, it requires not that each member of a people be treated in accordance with a universal standard of justice, but that the people as a whole be free to develop their own vision of justice. The principle of self-determination, in short, embodies a dualistic social vision. The ideal of an international law of human rights, by contrast, entails a monistic view of international society. Beitz—himself a proponent of human rights—criticizes the principle of self-determination be-

623. Internationalist interpretations of the principles of self-determination rid it of nationalist content by reducing it to some combination of the following three universal principles: anticolonialism, representative democracy and antiracism. For the classic articulation of the reduction of self-determination to independence from colonial rule, see R. EMERSON, SELF DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION (1964). *See also* H. Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/405/Rev. 1 (1980). De Aréchaga, *Growth of the International Community and the Principles of Self Determination of Peoples*, 7 REV. INT'L AFF. 767 (1982). The difficulty with this view is that it does not necessarily permit peoples to define themselves or even to choose their own systems of government. "The Declaration of Friendly Relations" adds that groups subjected to racial discrimination within an independent state should also be accorded self-determination. *See* C.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8028 (1970). Thus the test of whether a government is adequately representative for any particular group is a universal one: it turns on the extent to which their civil rights are respected. Support for this general approach to the problem is expressed by a number of commentators. U. UMOZURIKE, SELF DETERMINATION IN INTERNATIONAL LAW (1972); Carey, *Self-Determination in the Post-Colonial Era: The Case of Quebec*, 1977 A.S.I.L.S. INT'L L.J. 47; Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS 92 (L. Henkin ed. 1981); Cassese, *Political Self-Determination—Old Concepts and New Developments*, in UN LAW/FUNDAMENTAL RIGHTS (A. Cassese ed. 1979); *Eritrea's Claim to Self-Determination*, 26 INT'L COMM'N JURISTS REV., June 1981, at 8; Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981); Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978). Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45 (1981).

cause of its implicit cultural relativism.

One of his arguments is premised, like Wallerstein's, on the assumption that the economies of all nations are linked in a single world system: economic activity in one country affects inhabitants of other countries. Economic interdependence, he argues, entails that national self-determination is not only impossible, but immoral as well. A community cannot prescribe rules valid only for its own members if those rules will affect people beyond the community's borders.[624]

A second argument is based on skepticism that communities actually will be characterized by cultural unity. A government that views its function as the advancement of a particular culture may become a vehicle for the persecution of minorities.[625]

A third argument is based on skepticism about the possibility of popular sovereignty. Since few governments in fact represent their peoples, argues Beitz, we cannot adopt popular sovereignty as a criterion of legitimacy. Instead, we should judge the legitimacy of a government by the justice of its institutions.[626] However laudable, support for an international law of human rights is antidemocratic.

In practice, Beitz's internationalist criterion of legitimacy may be a mandate for imposing Western values by force. Schurmann has argued that President Kennedy's decision to introduce American ground troops into Vietnam was motivated by political rather than military considerations. Kennedy was concerned that the flagrant corruption and violence that characterized the Diem regime would cause it to lose popular support to the Viet Cong. American advisers were sent to force Diem to reform; when Diem failed to do so, he was assassinated.[627] The United States may or may not have intervened in Vietnam in order to protect South Vietnam from North Vietnamese aggression—but they occupied the country in order to protect South Vietnam from the South Vietnamese government. The notion of international human rights is a de-

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624. C. BEITZ, *supra*, note 135, at 35-50 (view of international relations as consisting of distinct, autonomous states is empirically false).

625. *Id.* at 109-10. Beitz's belief in the likelihood of such persecutions is based on his commitment to the third argument.

626. *Id.* at 78-79, 96.

627. F. SCHURMANN, *supra* note 572, at 436-49 (Kennedy administration saw introduction of ground troops as means of controlling Diem regime); *id.* at 448 (helped plot Diem's overthrow).

scendant of the idea of universal natural rights invoked by the imperial tradition in political theory; the dark side of that tradition is its legitimization of paternalistic domination. Noble as the desire to insure human rights abroad may be, it has been the heart and soul of American imperialism.[628] National liberation movements probably cannot avoid seeking support from revolutionary and reformist internationalism, but such support is often offered as a Trojan horse.

Any time a national liberation movement appeals to international law for help it places itself in an awkward position, because it is essentially inviting foreign intervention. When, therefore, Egypt abandoned its treaty obligations to the Palestine Liberation Organization in order to make a separate peace with Israel, the P.L.O. found itself in a dilemma: the P.L.O. could only argue that the Egyptian action was void if it was willing to adopt a property conception of treaty entitlements; but to adopt this position was to endorse a monistic view of international society which would preclude the validity of claims to self-determination. The P.L.O. could not invoke the protection of international law without seeming to abandon its own revolutionary nationalism.

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628. *Id.* at 16-17 (imperialism typically characterized by revolutionary ideology); *id.* at 105-07 (containment policy inspired by such an ideology); *id.* at 72-76 (Roosevelt succeeded in promoting U.S. to world leadership in part because of progressive ideology); *id.* at 419-22 (Kennedy containment policies resurrected Roosevelt's idealized sense of natural mission); *id.* at 436-39 (intervention in Vietnam motivated by desire to influence oppressive regime).

Eric Foner suggests a relationship between antislavery liberalism and nineteenth century imperialism. *See* E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 72 (1970) (quoting 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1848-1858, at 255 (R. Basler ed. 1953) and Letter from Charles Sumner to Francis Bird (Sept. 11, 1857) (available in Houghton Library, Harvard University)):

> The Republicans . . . accepted the characteristic American vision of the United States as an example to the world of the social and political benefits of democracy, yet believed that so long as slavery existed, the national purpose of promoting liberty in other lands could not be fulfilled. Lincoln declared in 1854 that slavery "deprives our republican example of its just influence in the world—enables the enemies of free institutions to taunt us as hypocrites," and Charles Sumner agreed that the institution "degrades our country, and prevents the example from being all-conquering." William Seward believed that the spread of American economic influence would be accompanied by the export of America's egalitarian political institutions. The nation, he wrote, had a mission and responsibility "to renovate the condition of mankind" by proving at home that the "experiment in self-government" could succeed, and by aiding abroad "the universal restoration of power to the governed."

Id. at 72.

Yet international law, like the world market system and revolutionary internationalism, cannot claim legitimacy without accommodating nationalist sentiment. Legitimation requires consensus, but such consensus does not arise spontaneously merely as a result of our common occupation of the same planet; consensus arises, if at all, from the common struggles and shared experiences of particular communities. In the world we live in, such communities are the only possible sources of legitimacy. Any serious effort to increase the acceptance of international law must therefore appeal to such communities for support; yet this requires that international law root its legitimacy in the myth of international consensus. The difficulty with this myth is not so much that it's false, as that it's unappealing. If, as Hegel suggested, national identity is dependent upon international conflict, the myth of international consensus threatens the very identities of the communities to whom international law appeals for support.

This Article has revealed a discourse divided against itself. The discourse of international law contains contradictory propositions because it is carried on in the context of a culture profoundly ambivalent about the legitimacy of international institutions. The source of this ambivalence is a contradiction endemic to the marketplace economy which that culture haunts. The perpetuation of this world market requires a culture systematically ambivalent toward legal institutions generally.

While the market is generally thought of as a system of distribution by private means, the maintenance of that system requires a supplementary system of distribution to insure that some goods be distributed to all players. This supplementary function is performed by the "public sphere," that is, legal institutions. Yet such institutions are a mixed blessing for the world market. The maintenance of legal institutions requires their acceptance as legitimate; this in turn requires the presence of some community capable of so accepting them. Markets, however, destroy communities. Thus the market at once requires legal institutions and destroys their requisite conditions.

So much is true of both national and international legal institutions; yet there is one important difference between them which renders national legal institutions more viable. While the market destroys communities, it also engenders new ones. These new communities, coalescing in localized resistance to the international

market, may become sources of legitimacy for states erected on a national level. From the standpoint of a world market, it is the very function of such states to represent the interests of relatively deprived communities, lest these communities vanish from the market system altogether. Yet precisely to the extent that they effectively represent these interests, nation states threaten to disrupt the world market system. In this sense, the world market system could more easily maintain itself if local institutions could be replaced by an international "public sphere"; yet local communities would see in such a development the defeat of their interests. If we have rightly estimated the significance of legal institutions in the setting of a world market, one of their crucial functions is *cooptation*, and legal institutions cannot successfully fulfill that function unless they are identified with particular communities.

Because the nation-state serves to represent the interests of dissident communities *within* the world market system, it is a mixed blessing from the standpoint of those communities as well as from the standpoint of the world market system. The nation-state can blunt some of the most devastating effects of the world market system, but it cannot detach its people from that system. Because the market is a worldwide equilibrium system, localized resistance is more likely in the short run to further burden the resisting community than to destabilize the market as a whole.[629] Localized struggle, in other words, is *economically* risky; the difficulty is that no other form of struggle seems *culturally* possible. Nationalism has been a nursery for anticapitalist sentiment, but it has been a prison as well. Hence the path to social change appears to lead beyond the borders of the nation-state. When we peer down that path, however, we glimpse at a psychic wilderness devoid of community and identity. Law cannot lead us there until

629. The idea is that the world market can adjust to the withdrawal of any particular community so long as many communities do not all withdraw at once. Shortages created by the withdrawal of one supplier will be expressed in terms of higher prices which in turn will induce new suppliers into the market. The particular firms that had developed trade in such a community may suffer, but other firms will take their place. Only if the disruptive effects of a single community's withdrawal are localized to the extent that the affected community is also induced to withdraw from the market, does the first withdrawal actually erode the market system. Otherwise, it simply provides opportunities for suppliers and markets that might not otherwise have arisen. Thus the market survives while the withdrawn community suffers. Eventually, argue internationalists, economic interest will drive the withdrawn community back into the world market.

politics paves the way. Our final Chapter will assess the difficulty of developing political identities that transcend the nation-state.

IX. THE RETURN

> The question arises how far a nomadic people, for instance, or any people on a low level of civilization, can be regarded as a state. As once was the case with the Jews and the Mohammedan peoples, religious views may entail an opposition at a higher level between one people and its neighbors and so preclude the general identity which is requisite for recognition.[630]

A. *The Dialectic Recollected*

Our journey began in the disputed territory of the Promised Land. In attempting to make a separate peace with Israel, Egypt violated its agreements with other Arab nations. The source of the conflict lay in the incompatibility of simultaneous commitments to Israel and the Palestine Liberation Organization, in the face of their conflicting claims to sovereignty. The legal consequences of the conflict were less easily determined.

It seemed fairly clear that Egypt's separate peace was illegal; whether it was legally invalid, however, remained an open question. The answer to this question depended upon whether the formation of the treaty violated objective right or merely infringed a subjective right. The former view entailed that a treaty would confer a property right to performance and alienate the capacity to create a conflicting treaty. The latter view entailed that a treaty would confer only a liability right to compensation in the event of nonperformance, and would be perfectly compatible with the conferral on another of a liability right to the performance of a conflicting obligation. Each of these two conceptions of treaty entitlements has received scholarly and diplomatic support.

Treaty expectations have generally been viewed as property entitlements by monistic jurists. Monists view actual sovereignty as the creature of an international order, and view any act violating international law as invalid for municipal law as well. They reject the possibility of a conflict between valid legal obligations because they insist that law is a coherent unity. This assumption rests in turn on a faith in the fundamental homogeneity of all human society, often reinforced by a view of human identity as individually, rather than culturally, determined.

The view of treaty expectations as property entitlements has

630. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 447, § 331.

been rejected by dualist jurists. Dualists view international obligations as creatures of national sovereignty. They are inclined to disparage the notion that international law could place limits on the treatymaking powers of states, since they see the validity of international law as dependent on the consent of states. Dualists see treaties as potential sources of state responsibility, but they tend to see such responsibility as "subjective"—dictated by the will of the parties rather than an international order. Accordingly, dualists seem to vacillate between a view of treaty expectations as liability entitlements and a view of treaty expectations as wishful thoughts. Their dichotomy between national society and international society is reflected in a further dichotomy between international relations based on good faith, and international relations characterized by conflict and exploitation. Dualists view international relations as a forum for conflict because of a belief that human society is composed of discrete communities; this belief is reinforced by a view of human identity as culturally rather than individually determined.

The social vision of monism is lent plausibility by the ubiquitous penetration of a market system of resource distribution. In replacing traditional systems of resource distribution, the market eliminates an important support for the integrity of communities. The mobility of capital, technology and labor generated by such a system has a homogenizing effect on culture, and a disintegrative effect on social groups. Because it discounts the importance of the communities destroyed by the world market, monism plays an ideological role in justifying the entrenchment of a world market.

The social vision of dualism is lent plausibility by the struggle of particular communities to maintain or reconstitute themselves in the face of this market threat. In protecting their peoples against the destructive effects of a world market, governments adopt protectionist, social welfare, and expansionist policies which bring them into conflict with other states. The social vision of dualism plays an ideological role in justifying resistance to a world market because it presents the resulting conflict as inevitable.

The two postures coexist in international jurisprudence because the interests supporting them coexist in world politics. Neither interest can afford to defeat the other. A world market cannot survive if it systematically destroys temporarily marginal communities that may yet again produce and consume. On the

other hand, those communities most injured by a world market can least afford to detach themselves from it because they are least capable of surviving in isolation.

That communities cannot survive in isolation entails that they must engage in relations with one another; it does not require that those relations be mediated by a market that constantly threatens to destroy communities. The romantic tradition in political theory generated powerful images of community which could be deployed in a variety of contexts, including transnational ones. The imagery of community has nevertheless been appropriated by nationalist movements that attempt to define themselves as autonomous. As a result, it has been exceedingly difficult to build political communities across state lines. While nationalism has facilitated the expression of localized resistance to the market, it has impeded the development of forms of international relations that might challenge the market. This means that nationalist movements express a romantic desire for community, but in a form which precludes the realization of that desire. The reason that nationalism precludes the realization of community is that it requires that incipient communities efface one another.

Consider the Camp David negotiations discussed in Chapter II. Dualist jurisprudence theoretically permits one state to keep faith with several nations even if the goals of those nations conflict; yet Egypt was forced to choose between Israel and Palestine because each claimed a right to preclude performance of the other's treaty. Each saw recognition of the other as a denial of its own sovereignty because the identity of each required the nonexistence of the other. Such self-deception demands to be met with duplicity. If international relations are to be transformed, our political identities must be conceived in recognition of other communities.

What induces communities to define themselves in terms which efface one another? In this Chapter, I will suggest that this type of collective identity is partly the product of a nationalist tradition in historiography. By this I do not mean that oppressed peoples fight wars against one another because they read the wrong books; I mean that people's collective identities are shaped by their historical experience, and that a nationalist movement within one community impacts on other communities in ways that engender new nationalist movements. When one community iden-

tifies itself as a nation-state, it forces other communities to do likewise. Because national identity proliferates in this way, nationalism can be characterized as a tradition, not only in the writing of history, but in the way history is experienced. To illustrate this point, I invite you to return with me to the Promised Land. Let us attempt to reconstruct how its Jewish and Arab claimants each came to identify themselves in terms which effaced one another.

B. *A Dialectical History*

Zionism cannot be understood apart from its social origins in nineteenth century Europe. It was at once an example of European nationalism and a reaction against it. Such a response to nationalism, though paradoxical, is not unusual: Dov Ronen has suggested that available national identities are "activated" when a group or institution that presents itself as "alien" is perceived as a barrier to a group's material aspirations.[631] Thus one nationalism begets another. Various nineteenth century European nationalist movements, most notably the German, arose in simultaneous imitation of, and resistance to, French nationalism. Zionism was a similarly imitative reaction against these nationalist movements.

I have described these movements as contradictory forces, simultaneously expressing and diffusing resistance to the advance of the market. Nationalism could fulfill the latter function to the extent that it could reassure interests threatened by the market that, by virtue of their membership in a community bound by affective ties, the state would look after them. Nationalism was not, however, the only ideology serving to diffuse discontent in the nineteenth century market society.

Liberalism—the voice of the imperial tradition in mass politics—defended the market as the scourge of entrenched hierarchy, assuring laborers that "property" in their own labor would make them the jural and social equals of owners of capital. The legitimating force of this feature of liberalism was its implicit promise that current suffering could be redeemed by future prosperity; that vulnerability to the mobility of capital could be transcended through individual social mobility.[632] The success of this legitimat-

631. D. RONEN, THE QUEST FOR SELF-DETERMINATION 53-98 (1979).

632. The identification of progress with the movement from a society based on status relations to ones based on contract was articulated by Sir Henry Sumner Maine. *See* H.

ing function required the emergence of a stratum of relatively privileged, educated laborers; such laborers, by virtue of liberal ideology, could identify with owners of capital, thereby forming a distinct middle class and depriving laborers of their most articulate voices.[633] As ideology, nationalism and liberalism were in tension with one another: nationalism required its adherents to view themselves as members of a collective; liberalism required its adherents to view themselves as individuals. Nevertheless, nationalism reenforced liberalism in important ways. Nationalism justified an interventionist state; this in turn called for an expanded state apparatus, and the development of a civil service. Civil service employees, however, were natural recruits for the new middle class. Moreover, as Ernest Gellner has argued, the formation of a civil service required a greatly expanded educational system which facilitated the expansion of other professions as well.[634] Nationalism helped create the middle class in which liberal ideology took root.

For European Jews, liberal ideology had considerable appeal. The status society that prevailed in preindustrial Europe may or may not have been more exploitative than the market society that replaced it. It was particularly burdensome for Jews, however, not so much because it exploited them as because it excluded them. Such society linked political, economic and religious life in an organic unity. Religious deviance banished Jews from agriculture and most trades, as well as subjecting them to periodic violence and forced migration. As a result, European Jews lacked precisely those characteristics associated by republican theory with virtue: land, artisanal skills, participation in civic life, and identification with a particular polis. Instead they were characterized by those traits associated with corruption: mobility, foreignness, and, if they were "fortunate," participation in commerce. Liberalism could therefore appeal to European Jews for three reasons: First, in encouraging the expansion of the market, liberalism cast mobility and commerce in a new and more favorable light. Second, lib-

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MAINE, ANCIENT LAW 156-65 (10th ed. Boston 1963) (1st ed. London 1860). The origins of this ideology are traced in C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 1-72 (1977). A German variant of this tradition was articulated by Wilhelm von Humboldt. *See* G. IGGERS, *supra* note 498, at 90-123; *see generally* H. LASKI, THE RISE OF EUROPEAN LIBERALISM (1971).

633. *See* Wallerstein, *Class Formation, supra* note 615, at 367-68.

634. E. GELLNER, NATIONS AND NATIONALISM 19-52 (1983).

eralism promised the erosion of the rigid social structure from which Jews had been excluded, substituting a combination of jural equality and a fluid market. Third, liberalism offered to dramatically reduce the social significance of ethnicity and religion.

In viewing citizens as individuals, rather than members of communities, liberalism implied that a religious faith was akin to a personal preference, opinion, or taste. Religious conviction of any sort was an expression of arbitrary subjectivity, and therefore not essentially different from an investment decision. Religion was a private matter; public life was secular. Liberalism accordingly promised to release Jews from the ghetto on the condition that they ghettoize their Jewishness. Orthodox religious leaders spurned this offer as an invitation to apostasy; yet many Jews responded to it, seeing religious orthodoxy as an aspect of the medieval social order that they longed to escape. For them, liberalism promised unprecedented opportunity to participate in civic life—opportunity that was concretely represented by admission to the civil service and the professions.[635]

These ambitions created a difficulty for the newly ascendant market society. Prior to the nineteenth century, antisemitism had been a fact of social life in Europe, but not a problem. In republican political theory, antisemitism took the form of an identification of Jews with corruption, particularly the corruption of the marketplace. When, therefore, republican theory was marshalled against international capital in the nineteenth century, antisemitism was an integral part of its rhetorical arsenal. Recall that the positive function of nationalism in accomodating Europeans to the world market lay in convincing them that the bureaucratic state had an affective base, and could therefore adequately substitute for the organic communities laid waste by industrialization. The emergence of Jews into the civil service and other quasi-public professions, such as journalism, education and law, undermined that claim; it gave rise to the accusation that the state was an instrument of corruption, rather than an exponent of virtue. On the other hand, denying Jews admission to these professions would undermine the claims of liberalism that the deprived could best

635. On the reception of liberalism among European Jews, see generally W. LAQUEUR, A HISTORY OF ZIONISM 3-39 (1976); Hertzberg, *Introduction* to THE ZIONIST IDEA 22-32 (A. Hertzberg ed. 1979).

advance their interests by pursuing them individually rather than collectively, and that poverty was the product of private vice rather than systematic oppression. This then was "the Jewish Question" disputed by Marx and Bruno Bauer: the Jewish presence in market society drove a wedge between nationalism and liberalism, revealing their incompatibility.[636]

In the face of this contradiction, European market society stood to benefit from Jewish emigration. As Herzl persuasively argued to Western leaders, they had three choices: They could protect the civil rights of Jews and thereby provoke antisemitic reaction (as eventually occurred in most of Western Europe); they could collaborate with antisemitism and drive the Jews into the arms of revolutionaries (as occurred in Russia); or they could "Let [His] people go."[637] But why to Palestine? To understand the appeal of this feature of the Zionist program to Western powers, it must be placed in the context of another anxiety plaguing the leaders of these nations throughout the nineteenth century: the so-called Eastern Question.

The Eastern Question, we may recall, concerned the fate of the areas controlled by the Ottoman Empire. Once feared by all of Christendom, by the nineteenth century, the Ottoman Empire had so weakened that it entered the Concert of Europe as a virtual dependency. As a result, it administered a vast area in a manner consistent with the Concert's aim of establishing a stable world market. In so doing, it spared the European powers the risks of direct colonial rule. Because the Ottomans were indigenous to the region, reasoned the Europeans, they would better know how to stabilize it, and their rule would be more easily accepted as legitimate; on the other hand, because they served at the pleasure of the European Concert, their loyalty to European interests was assured. In short, Ottoman power functioned like a sort of stabilizing middle class, representing the Orient within the European Concert while representing European interests in the Orient. The difficulty lay in the steady erosion of Ottoman power. A sudden collapse would certainly disrupt the world market and might so destabilize the European balance of power as to bring

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636. B. Bauer, *The Jewish Problem*, in THE YOUNG HEGELIANS 187-97 (L. Stepelevich ed. 1983); Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 24-51 (R. Tucker ed. 1972).

637. Herzl, *First Congress Address*, in THE ZIONIST IDEA, *supra* note 635, at 229-30.

down the entire system. On the other hand, direct European intervention in anticipation of such a collapse would surely upset the balance of power.[638] Accordingly, European powers throughout the nineteenth and early twentieth centuries were constantly courting "responsible" indigenous elites that could one day be pushed headlong into the breach. To the extent that Jews could represent themselves as civilized Orientals, they became plausible candidates to partially replace the Ottoman elite.[639] To Western European Jews, Zionism offered an opportunity to form a chapter of the European middle class in exile. To the colonial powers, it offered a "native" population for Palestine, already colonized in advance.

As long as Western European Jews felt confident in the triumph of liberalism, they had little reason to present the Zionist case to their governments. But for the strength of liberal ideology in the West, however, Jews might never have gained sufficient voice in public affairs to make such a case. While Zionism developed into a mass movement among Eastern European Jews in the 1880's, it was only when Western European Jews became involved in the late 1890's that the movement gained the ear of the major powers. What prompted the Jews of Western Europe to join a nationalist movement was the ascendency of antisemitism in mass politics as a result of the economic crisis of the early nineties. The Dreyfus affair in France, in particular, convinced many that the bureaucratic state could never be truly neutral and secular in gentile society. They embraced European nationalism as a means of realizing their previously absorbed European liberalism. In a sense, they became separatists rather than revolutionaries because they were so well integrated into European society.[640] They had

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638. E. CRANKSHAW, THE SHADOW OF THE WINTER PALACE: THE DRIFT TO REVOLUTION 1825-1917, 138-56 (1978). K. MARX, THE EASTERN QUESTION (1897).

639. E. SAID, *supra* note 53, at 25-30.

640. Interest in emigration generally, and to Palestine in particular, was present among Russian Jews prior to any expression of interest in their plight by West European Jews. *See* THE ZIONIST IDEA, *supra* note 635, at 142-98 (writings of Smolenskin, Ben-Yehudah, Lilienblum and Pinsker). In the face of the massive pogroms of 1881, large numbers of Jews were politicized. A mild expression of interest in a modest resettlement plan by a French Jewish relief organization galvanized interest in emigration both to America and to Palestine. *See* J. FRANKEL, PROPHECY AND POLITICS: SOCIALISM, NATIONALISM & THE RUSSIAN JEWS, 1862-1917, at 51-132 (1984). Nevertheless, Walter Laqueur described the Zionist movement in this setting as "comatose" because it lacked the economic and political means to achieve its goals. *See* W. LAQUEUR, *supra* note 635, at 75-83. On the origins of

seen some of the bourgeois life, and it suited them; Zionism offered an opportunity to secure it in a setting free of antisemitism. By succeeding in this program, Western European Jews reproduced the same contradiction between liberalism and nationalism in a new setting, begetting a new community of second class citizens—Arabs—within an ostensibly neutral state.

Because Western European Jews were so well integrated into European society, however, they could neither populate a separatist mass movement, nor present a convincing picture of unassimilable Orientals. Western European Jewry constituted the movement's foreign ministry, but the social base of the movement lay in Eastern Europe. For Eastern European Jews, Zionism resolved a somewhat different set of contradictions. Throughout the nineteenth century these Jews—the bulk of the European Jewish population—continued to live a ghettoized life dominated by religious tradition. Here, in the Schtetl, liberalism had much less appeal, for three reasons. First, it had no proven track record of improving conditions for Jews, as it had made almost no headway in Russian public life. Because there was no substantial Jewish middle class in Russia, liberalism had little social base among Jews. Second, Jews had little reason to expect support from the bureaucratic state, which pursued overtly antisemitic policies. This became particularly clear in the 1880's, when the government supported massive pogroms.[641] Third, in challenging religious tradition and communal life, liberalism conflicted with the principle norms of Schtetl society. Assimilators were traitors, in league with the oppressor.[642]

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political Zionism in Western Europe, see *id.* at 84-135. On the relationship between West European Zionism and antisemitic demagoguery in Western Europe, see C. SCHORSKE, *Politics in a New Key: An Austrian Trio*, in FIN DE SIÈCLE VIENNA: POLITICS AND CULTURE 116-80 (1981). While the impetus for Western European Jews to become active in supporting Zionism can be explained as a response to the steady rise of antisemitism in West European mass politics from the seventies to 1895, the early successes of Zionism in gaining a hearing in the corridors of power can be explained in terms of the decline in mass antisemitism after that time. *See* W. LAQUEUR, *supra* note 635, at 29.

641. J. FRANKEL, *supra* note 640, at 1-2, 51-53, 97-107; Hertzberg, *supra* note 635, at 40-45.

642. *See, e.g.*, Smolenskin, *The Haskalah of Berlin*, in THE ZIONIST IDEA, *supra* note 635, at 154-57 (condemning the German Jewish enlightenment as a flight from Jewish identity). For a more modern treatment of the same theme, see J. CUDDIHY, THE ORDEAL OF CIVILITY 189-203 (1976) (analysis of the agonistics of Abbie and Julius Hoffman during the Chicago Seven Trial).

On the other hand, life—and death—in the Schtetl were unendurable. Since the isolation of the Schtetl was externally imposed, tradition too could sometimes seem like a passive collaborator. Like other medieval communities in need of a justification for social change, Jews revived the apocalyptic themes in their theological tradition. One manifestation of this tendency was utopian socialism. Under no illusions as to their class status, Russian Jews leapt eagerly into the arms of revolution.[643] Yet the special trauma of antisemitism, combined with the bonds of community, seemed to argue for a more explicitly Jewish solution; such a solution could not be constructed, however, without redefining Jewish identity.

This was accomplished through the construction of a republican ideology out of Jewish materials. Zionists borrowed their critique of European Jewish life from European antisemitism: orthodoxy and liberal assimilation were equally corrupt because they were diaspora ideologies, reflecting a parasitic existence at the margins of society. Jews had indeed become contemptible because they were without a land or nation; in Europe, they could never be more than scheming servants to their hosts. The only solution was a republic: their own land, their own language and culture, and their own political institutions. They interpreted the Torah as the narrative of a collective escape from bondage, the recovery of a promised land and constitution of a society, rather than as a code of law. Authentically Jewish life should therefore revolve not around observance, but republican virtue—agriculture, physical labor, intellectual creativity, military courage, collective pragmatism and personal sacrifice.[644] After the pogroms of the early 1880's, utopian socialism increasingly expressed itself among Jews in this republican form.[645]

Zionism, though partially conceived on the model of European nationalism, was a movement for independence from European society. Nevertheless, it succeeded in part because it was sold to the European powers as a means of creating a dependent "Ori-

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643. *See* J. FRANKEL, *supra* note 640, at 28-47, 171-287.

644. *See* THE ZIONIST IDEA, *supra* note 635, at 290-328 (writings of Berdichevski, Brenner and Klatzkin).

645. *See* THE ZIONIST IDEA, *supra* note 635, at 330-87 (writings of Syrkin, Borochov, Aaron and Gordon). *See also* J. FRANKEL, *supra* note 640, at 288-364; W. LAQUEUR, *supra* note 635, at 270-337.

ental" state. Jews wanted to leave Europe in part because they were identified as European; they succeeded in part because they were identified as Oriental. To some extent, they may have shared this self-perception. Edward Said has analyzed Zionism as a European imperialist ideology, premised on contempt for the "Orient." I think that he correctly identifies the appeal of Zionism to the Western powers, but misses its meaning to its adherents. For Eastern European Jews, Zionism was the transcendence of the Schtetl: a confining, tradition-bound, unproductive, parasitic, servile and stateless existence. In their eyes, the Arabs of Palestine shared all of these conditions. They could imagine building a vital society in Palestine that marginalized the existing inhabitants because they saw those inhabitants as embracing a medieval life like the one that Jews had been forced to lead in the interstices of European society.[646] European Zionists knew nothing of the Arabs; the contempt that they felt for them could only have been self-contempt.[647] They expected Palestinian Arabs to content themselves with the Schtetl because they saw them as pre-Zionist Jews.

Palestinian Arabs responded by developing their own Zionism.[648] Prior to the Zionist presence in Palestine, the Arab inhabi-

646. What they failed to acknowledge was that the medieval character of life in the Schtetl had only become anomalous with the advent of a bourgeois market society in 18th century Germany, and an industrialized society in late 19th century Russia. Thus, as soon as Zionism established a "developed" economy in Palestine, the persistence of traditional social and economic life among Palestinian Arabs was oppressive; contact with international markets also made that traditional social life less economically viable.

647. For a sophisticated argument that Jewish revolutionary thought has traditionally combined an assault on Western civilization with an embarassed apologia for the vulgarity of Schtetl as perceived by the West, see generally J. CUDDIHY, *supra* note 642. Edward Said's defense of Palestinian nationalism fits this pattern, as does, I suppose, this Article. *See* E. SAID, *supra* note 53.

648. Said is explicit in drawing parallels between Zionism and Arab responses to it. Each manifested the dark side of republicanism, the identification of the foreign with corruption:

> The internal solidity and cohesion of Israel, and of Israelis as a people and a society . . . eluded the understanding of Arabs generally. Thus to the walls constructed by Zionism have been added walls constructed by a dogmatic, almost theological brand of Arabism. Israel has seemed essentially to be a rhetorical tool provided by the West to harass the Arabs. What this perception entailed in the Arab states has been a policy of repression and a kind of thought control. For years it was forbidden ever to refer to Israel in print; this sort of censorship led quite naturally to the consolidation of police states, the absence of freedom of expression, and a whole set of human rights abuses, all suppos-

tants did not identify themselves as "Palestinian" or demand political independence. In the face of Jewish nationalism, however, Arab nationalism in Palestine coalesced around the issue of Jewish immigration. When Palestinian Arabs were displaced as a result of the 1948 partition and war, they developed a specifically Palestinian, diaspora nationalism.[649] Cognizant of the fact that Zionism had succeeded in part by capturing the conscience of the Western powers in the wake of the Holocaust, Palestinian nationalism developed a similar strategy. Accordingly, it has adopted some of the rhetoric and many of the contradictions of Zionism. On the one hand, it attacks Zionism as ethnocentric, likening it to Nazism.[650] At the same time it makes biblical arguments for exclusive Arab title to Palestine, claiming descent from the Philistines who were

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> edly justified in the name of "fighting Zionist aggression," which meant that any form of oppression at home was acceptable because it served the "sacred cause" of "national security."
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> For Israel and Zionists everywhere, the results of Zionist apartheid have been equally disastrous. The Arabs were seen as synonymous with everything degraded, fearsome, irrational and brutal. Institutions whose humanistic and social (even socialist) inspiration were manifest for Jews—the kibbutz, the Law of Return, various facilities for the acculturation of immigrants—were precisely, determinedly inhuman for the Arabs. In his body and being, and in the putative emotions and psychology assigned to him, the Arab expressed whatever by definition stood *outside, beyond* Zionism.

E. SAID, *supra* note 639, at 88. Said here treats Arab hostility to Israel as derivative from Zionist attitudes toward Arabs. He stops short of saying that Palestinian nationalism is itself derived from Zionism. But Palestinian nationalism is no more easily separated from Israelphobia, than Zionism is from Arab-phobia. We have seen that Zionism is from Arab-phobia and we have seen that Zionism involved an absorption of the republican nationalism that so often inspired Western antisemitism. That antisemitism was first internalized as a critique of Jewish life, then projected onto Palestinian Arabs. In developing a diaspora nationalism of their own, Palestinian Arabs adopted the political theory of Zionism, but endeavored to replace it as the true Palestinian nativist movement. In so doing, it took over from Zionism the Zionist critique of Jewish life which Zionism had applied to the Palestinians; it also adopted the European and American nationalist view of Jews as displaced foreign representatives of international capital.

649. *See* D. RONEN, *supra* note 631, at 86-89; E. SAID, *supra* note 639, at 115-25.

650. "Zionism is . . . racist and fanatic in its nature, aggressive, expansionist and colonial in its aims, and fascist in its methods." PALESTINIAN NATIONAL CHARTER art. 22, *reprinted in* J. MOORE, *supra* note 4, at 1089. "Terrorist Jews massacred more than 350 aged Arab men, women and children with barbarism exceeding that of the Nazis." Nakhleh, *The Liberation of Palestine Is Supported by International Law and Justice*, in J. MOORE, *supra* note 4, at 125. The Palestinian strategy of attacking Zionism as ethnocentric has borne fruit in a number of condemnations of Zionism by nations outside of the region, most notably the United Nations General Assembly resolution declaring that "zionism is a form of racism and racial discrimination." G.A. Res. 3379, 30 U.N. GAOR Supp. (No. 34) at 83, U.N. Doc. A/10034 (1975).

displaced by the first Jewish return.[651] It proposes a tolerant social democratic state in Palestine, but insists upon the expulsion of the Jewish residents of the region.[652] By appointing Zionism as the representative of Palestinian Arabs, the European powers have in fact turned Palestinians into Zionists. In the meantime, Israel is fast becoming the "Oriental" society that the Western powers imagined: the principle beneficiaries of her "right of return" have been Jewish refugees from Arab lands. The result, however, has been an erosion of Western support. As Israeli society becomes increasingly traditional, religious, bellicose and authoritarian, the West is no longer so willing to assume that it is culturally superior to its Arab neighbors.

Israelis and Palestinians have each defined themselves in terms of destinies that deny the existence of the other; yet the meaning of both identities is dependent upon the same historical context, a context in which each of the two parties is a crucial part. Each people, in denying the other, denies an essential feature of itself, thereby inspiring an irredentism that is psychic as well as political. The return claimed as a matter of right by Israelis and Palestinians alike is the return of the repressed.

C. *Towards a Dialectical Identity*

The shared social vision of Zionism and Palestinian nationalism illustrates the historical myopia of nationalism generally. This myopia undermines the strategic value of nationalism as an instrument of social change. Because the market legitimates itself by appeal to individual interests, its success is in part dependent upon the establishment of an individualistic society. Resistance to the market has often been mediated by nationalism because nationalism requires the construction of a collective identity. The creation of such an identity in turn requires the recognition of a common history. Because histories are narratives of change, they entail a dualistic vision of society, a tension between text and context. Yet groups that have attempted to understand their own struggles in nationalistic terms have been driven to view their own histories as

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651. "[T]he Palestinians were the descendants of the Philistines and Canaanites and have lived continuously in Palestine since the dawn of history, even long before the ancient Hebrews set foot in the country." Cattan, *Sovereignty over Palestine*, *in* THE ARAB-ISRAELI CONFLICT, *supra* note 4, at 14.

652. *See supra* note 73.

the autonomous unfolding of national destiny. Accordingly, they have substituted for their real histories mythic futures devoid of context. The vulnerability of such myths lies in their inability to explain how communities come to recognize a common identity in advance of any history. The ancient Hebrews did not, after all, view their return to Zion as the fulfillment of their own promise, but of God's; they did not choose their own destiny, they were chosen for it. So too, every subsequent Millenarian ideology has been dependent upon a *deus ex machina* to explain its ultimate triumph. For a modern nationalism, that *deus ex machina* is provided by the state. The state, for Hegel, was "God's way in the world."[653]

By annointing the state as history's agent, nationalism effaces the role of other communities in the development of national identity. Nationalists inherited a republican perception of all foreigners as corrupt individuals rather than virtuous members of civic communities; Renaissance republicanism was a relativism with only one frame of reference. Yet for all its xenophobia, the Renaissance republic recognized its contingency on events abroad. Nationalists, by contrast, drew from the imperial tradition a vision of the state as invulnerable. The identification of the state with God is simply a natural extension of the paternalistic role accorded it in the imperial tradition. For many historians influenced by Hegel, the state was the "objective" expression of a people's spirit, and a people's true history narrated the constitutional development of its state.[654] Since the state was the repository of the national spirit, actual contact between members of different nations, commercial or intellectual, could not effect their national cultures. Such contact took place in a private sphere which was ephemeral, subjective and unreal.

Nationalists, since Hegel, have failed to take seriously the possibility of transnational communities because of their insistence that political identity can be realized only through the state. The principle of state autonomy proceeds from the assumption that states cannot simultaneously fulfill the dreams of their own people

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653. HEGEL'S PHILOSOPHY OF RIGHT, *supra* note 447, § 258. "Es ist der Gang Gottes in der Welt, das der Staat ist." *See* S. AVINERI, *supra* note 448, at 176-77 for a discussion of various ways of translating this phrase.

654. *See* G. IGGERS, *supra* note 498, at 90-123; L. KRIEGER, THE GERMAN IDEA OF FREEDOM 87-138 (1972).

and their responsibilities to one another.

Yet the basic premises of Hegel's thought suggests that identity is never developed in isolation. No individual can fulfill her own promise autonomously. Hegel argued that the individual becomes conscious of herself as a subject only through struggle against another; that she can only understand her subjectivity by seeing herself in relation to the other; that she can only transcend that subjectivity by gaining recognition from the other; and that she cannot receive such recognition without also conferring it.[655] She cannot, in short, achieve any control over her destiny without recognizing her dependence on others.

Communities, too, lose control of their destinies when they repress awareness of the communities around them. As the Arab-Israeli dispute sadly illustrates, when a collective ideology refuses to acknowledge the context that engendered it, it cannot generate a realistic strategy for transforming that context. Zionism and Palestinian nationalism each identify themselves in terms of the same destiny: undisputed sovereignty in the Promised Land. Each has the power to realize the other's identity, but not its own. Neither can gain any control of its own destiny without offering the other recognition.

Communities may develop in the ordinary course of cooperative social life; but a *sense* of community—a collective self-consciousness—is the product of a collective struggle, not its cause. This means that collective identities are ultimately dependent upon the forces against which they have struggled. Their mythic texts are given meaning by the very contexts they have sought to transcend. This is as true of struggles for dominance as it is of struggles for independence. René Girard has followed Freud in arguing that all cultures originate in acts of violence, a secret which their literatures at once repress and reveal.[656] On the other hand, Edward Said has interpreted Western accounts of Oriental societies as efforts to come to terms with repressed elements of Western culture.[657] Eugene Genovese has argued that white Southern society derived its identity from mastery over slaves,[658]

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655. *See supra* note 444.

656. R. GIRARD, VIOLENCE AND THE SACRED (P. Gregory trans. 1977).

657. E. SAID, ORIENTALISM (1978).

658. E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE (1969); E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY 26-36 (1967).

while Orlando Patterson has revealed that a crucial feature of that mastery was an effort to strip slaves of their histories and social identities.[659] The result, as Genovese has shown, was that slaves constructed a new society, culture and collective identity rooted in their shared history of exploitation.[660]

So too, the other in us will not remain repressed. The categories imposed upon her become her rallying cries: Call her slave, and she will proclaim slavery sovereign; call her untouchable and you shall not touch her; displace her and she shall not "know her place." Every act of sovereignty inscribes a history upon the ruled; every history is a claim to sovereignty. No people chooses to exist, but every people is Chosen. The inherent contradictions of sovereignty will not be resolved until we base our communal identities on the recognition that our histories of domination and oppression are what bind us together, that our promises are not ours to keep. Then every weary, wounded people will come down to the River Jordan to bathe amidst the blood of every other and none shall claim to be clean.

659. O. PATTERSON, SLAVERY AND SOCIAL DEATH 35-101 (1982).
660. E. GENOVESE, ROLL, JORDAN ROLL (1974).