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Jacob Katz Cogan

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# The Regulatory Turn in International Law

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Jacob Katz Cogan

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## The Regulatory Turn in International Law

Jacob Katz Cogan\*

*In the post-War era, international law became a talisman for the protection of individuals from governmental abuse. Such was the success of this "humanization of international law" that by the 1990s human rights had become "part of . . . international political and legal culture." This Article argues that there has been an unnoticed contemporary countertrend—the "regulatory turn in international law." Within the past two decades, states and international organizations have at an unprecedented rate entered into agreements, passed resolutions, enacted laws, and created institutions and networks, formal and informal, that impose and enforce direct and indirect international duties upon individuals or that buttress and facilitate a state's authorities respecting those under and even beyond its territorial jurisdiction. Whereas the human rights turn protected the individual against excessive governmental control, these parallel processes do just the opposite—they facilitate and enhance the regulatory authorities of government (both national and international) in relation to the individual.*

*The regulatory turn represents a fundamental challenge to the assumptions and dynamics of traditional international law. While once the international system shied away from acting directly on individuals, it now asserts such authority with regularity through the articulation of rules and the adoption of decisions. And while once international law deferred to states in the implementation of common rules pertaining to individual duties and their enforcement, it now often eschews state discretion and instead dictates with increasing specificity the provisions to be adopted at the national and sub-national levels. This constitutive realignment in the international system's position vis-à-vis the individual complicates our inherited vision of international law and the expectations that flow therefrom. The system effects include the restructuring of the distributions of power to and among states and international institutions; the reframing of the ways in which international problems and solutions are imagined; the reallocation of resources to support law enforcement organizations and programs; the recalibration of the substantive and procedural demands made upon international decision-making processes; and even the reconfiguring of the ways in which we, as individuals, imagine each other.*

*This Article draws connections between diverse subject matters and practices, past and present, so that we can better discern the otherwise hidden trend that is the regulatory turn, situate it within the emerging system of international governance, and appraise its effects.*

### INTRODUCTION

We now take for granted international law's role in the protection of individuals from governmental abuse. Of course, it was not always so. While

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strands of such international human rights law date back hundreds of years in the protection of certain foreign nationals, such as diplomats, from state action or inaction deemed unlawful,<sup>1</sup> its flowering would only begin to occur in the mid-twentieth century when, in the wake of World War II, international law's shelter extended fundamentally beyond that limited population to encompass a state's control of its own people.<sup>2</sup> No longer would states escape regulation for the improper treatment of their own citizens; their deeds would now come under international scrutiny. In a process that would take decades to mature, through numerous human rights declarations, multilateral agreements, and decisions of international organizations, as well as acts of nongovernmental organizations and popular movements, international law, in a fundamental break with its past, became a talisman for the protection of "individuals *vis-à-vis* their governments."<sup>3</sup> Such was the relative success of this process—rhetorically, and at times even in practice—that by the 1990s human rights had become "part of . . . international political and legal culture."<sup>4</sup>

The triumph of human rights as an idea—if not a fully effective tool—has only grown since. Whether the focus is war,<sup>5</sup> trade,<sup>6</sup> intellectual property,<sup>7</sup> investment,<sup>8</sup> the environment,<sup>9</sup> or any number of other topics,<sup>10</sup>

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1. These rules were "designed to protect friendly relations between states"; they were not based on a conceptualization of individuals themselves as rights-holders. Louis Henkin, *International Human Rights as "Rights,"* in HUMAN RIGHTS 257, 276 n.3 (J. Roland Pennock & John W. Chapman eds., 1981); cf. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6) ("the State . . . assumes the defense of its citizens by means of protection as against other States"). See generally DAVID WEISSBRODT, *THE RIGHTS OF NON-CITIZENS* 23–30 (2008).

2. See generally A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001) (providing a historical survey of the protection of individual rights).

3. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 105 (1994); see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466 (2001) (noting that "the unstated understanding during the growth of the human rights movement was that the duties [imposed by international law] were still those of states" and describing this idea as the "originalist position"); William N. Nelson, *Human Rights and Human Obligations*, in HUMAN RIGHTS 281, 281–82 (noting that a "tacit assumption underlying much discussion of human rights seems to be that . . . the obligations corresponding to a person's rights lie only on his or her own government" and referring to this as the "standard assumption").

4. Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917, 935 (1991) (reviewing LOUIS HENKIN, *THE AGE OF RIGHTS* (1990)). See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010) (arguing that the triumph of "human rights" as a set of beliefs occurred only in the 1970s).

5. See, e.g., *Theme: Human Rights*, 871 INT'L REV. RED CROSS (2008).

6. See, e.g., *HUMAN RIGHTS AND INTERNATIONAL TRADE* (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi Bonanomi eds., 2005).

7. See, e.g., LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011).

8. See, e.g., *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., 2009).

9. See, e.g., John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163 (2009).

10. See, e.g., *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* (Menno T. Kamminga & Martin Scheinin eds., 2009); Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1 (2010).

human rights norms now influence, in varying degrees, international law and politics more than ever before.<sup>11</sup> “This is a good time for human rights,” Raz noted recently.<sup>12</sup> Though hardly definitive or comprehensive in its application, the effects have been both substantive and structural, with a deepening of the law and its enforcement.<sup>13</sup> In these developments, however imperfect, we see what Meron labels the “humanization of international law,”<sup>14</sup> or, alternatively, what we might term the “human rights turn” in international law.

Less well appreciated or understood, however, is a contemporary counter-trend—the regulatory turn in international law. “Regulation,” as used here, entails the creation of public authoritative obligations on private parties to act or to refrain from acting in certain ways or the establishment or facilitation of authoritative measures to enforce such duties.<sup>15</sup> The idea is to control or influence individual behavior (and by extension societal behavior) through the creation and application of rules. Because international law is a multilevel system, with decisions taken at the international, national, and sub-national levels,<sup>16</sup> the imposition of duties upon private actors and the provision for the public enforcement of such duties can be effectuated di-

11. See CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 1 (2009) (“[H]uman rights have become ‘a fact of the world’ with a reach and influence that would astonish the framers of the international human rights project.”).

12. Joseph Raz, *Human Rights Without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 321, 321 (Samantha Besson & John Tasioulas eds., 2010); see also JHHW, *Individuals and Rights – The Sour Grapes*, 21 *EUR. J. INT’L L.* 277, 277 (2010) (“[T]here can be little argument that *The Individual* and his or her *Rights* are the most common, oft cited, self-celebratory clichés in the vocabulary of European legal discourse.”).

13. See generally SONIA CARDENAS, *CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE* (2007); *NON-STATE ACTORS AND HUMAN RIGHTS* (Philip Alston ed., 2005); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

14. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 1 (2006).

15. Consequently, “regulation” is not being employed here in connection with, as in global administrative law scholarship, a particular form of international lawmaking. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, *LAW & CONTEMP. PROBS.*, Summer/Autumn 2005, at 15, 17 (“[G]lobal administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties.”); see also Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 1, 3 (2006) (describing global administrative law as “the setting and application of rules by bodies that are not legislative or primarily adjudicative in character”). The general idea of regulation used here may be quite similar to the one applied in the domestic context (if we think of that term, broadly speaking, as governmental control of or influence on individual behavior). Yet, because of the particular structure in which international law operates, many of the institutional implications, manifestations, and dynamics of regulation in the national setting are not perfectly translatable into the transnational sphere. That is not to say, certainly, that the lessons of domestic experience or the methodologies and approaches of domestic law scholars do not apply or are not helpful—they do and they are. Rather, it is that the distinctive international architecture must always be taken into account when doing so. For one helpful attempt, among many, on analyzing the distinctive nature of international architecture, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490 (2006).

16. On international law as a multilevel system, see, e.g., Ramses A. Wessel & Jan Wouters, *The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres*, 4 *INT’L*

rectly (without requiring state assistance for their imposition) and indirectly (depending on state and possibly sub-state action for their activation).<sup>17</sup> Within the past two decades,<sup>18</sup> states and international organizations have at an unprecedented rate entered into agreements, passed resolutions, enacted laws, and created institutions and networks, formal and informal, that impose and enforce direct and indirect international duties upon individuals or that buttress a state's authorities respecting those under and even beyond its territorial jurisdiction.<sup>19</sup> Like the human rights turn, the regulatory turn includes both doctrinal and structural elements, instituting duties and establishing enforcement mechanisms.<sup>20</sup> The effects, though, are the converse. Whereas the humanization of international law protected the individual against excessive governmental control, these parallel processes do just the opposite—they facilitate and enhance the regulatory authorities of government (both national and international) in relation to the individual.<sup>21</sup>

As with the human rights turn that preceded it, the regulatory turn represents a fundamental challenge to the assumptions and dynamics of traditional international law. While once the international system shied away from acting *directly* on individuals, it now asserts such authority with regularity through the articulation of rules and adoption of decisions. And while once international law deferred to states in the elaboration and implementation of common regulations pertaining to individual duties and their enforcement, it now often eschews state discretion and instead dictates with increasing specificity the provisions to be adopted at the national and sub-national levels. Though the international system has certainly not replaced the state as the primary regulator—indeed, another critical component of

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ORG. L. REV. 259 (2007). To simplify matters, I will usually refer only to two levels: the international and the national.

17. See, e.g., HANS Kelsen, *PURE THEORY OF LAW* 325–27 (Max Knight trans., University of California Press 2d ed. 1967) (1934) (discussing the indirect and direct obligation and authorization of individuals by international law); M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 *CASE W. RES. J. INT'L L.* 27, 29 (1983) (distinguishing between “direct” and “indirect” enforcement systems in international criminal law); J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 547, 550 (2004) (noting that “[r]egulatory regimes have a far greater ‘direct’ and ‘indirect’ effect on individuals”); cf. Jeffrey L. Dunoff, *Levels of Environmental Governance*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 85 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007) (discussing the various levels at which environmental governance might be implemented).

18. It is impossible to date any paradigm shift, such as the regulatory turn, to a single moment. Throughout, this Article will refer to the past twenty years or to the post-Cold War era, even though, as will be evident, some elements of the turn were manifested in prior years.

19. Much of the turn applies to all sorts of non-state actors, not just individuals. To simplify matters, however, this Article focuses on individuals, although on occasion it will reference other private actors.

20. There are a variety of ways in which the duties might be constructed and numerous options for structuring enforcement. On the latter, see, e.g., Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 *J.L. & ECON.* 255, 270–75 (1993).

21. Of course, the motivation for the regulatory turn may be to protect individuals. That irony will be discussed *infra* Part II.D.

current trends is the endorsement and facilitation of state authorities through legal and institutional processes—its role has changed markedly.

This constitutive realignment in the international system's position vis-à-vis the individual, which is the hallmark of the regulatory turn, complicates our inherited vision of international law and the expectations that flow therefrom. The system effects include the restructuring of the distributions of power to and among states and international institutions; the reframing of the ways in which international problems and solutions are imagined; the reallocation of resources to support law enforcement organizations and programs; the recalibration of the substantive and procedural demands made upon international decisionmaking processes; and even the reconfiguring of the ways in which we, as individuals, imagine each other.<sup>22</sup> Though relatively new, the regulatory turn's reach is far from modest.

This Article describes the regulatory turn, delineates its antecedents, explains its causes, and considers its implications. Though others, working primarily (and typically separately) in fields such as international relations, international environmental law, international human rights law, and international criminal law, have elucidated the content of the obligations imposed on individuals under or pursuant to current international law,<sup>23</sup> evaluated proposed new private duties,<sup>24</sup> and chronicled the creation and implementation of contemporary enforcement techniques (especially international criminal tribunals and transnational crime control networks),<sup>25</sup> the intent here is to set out, analyze, and appraise the trajectory over time in the relations between governmental authority<sup>26</sup> and the individual, as regulated by international law and international institutions.<sup>27</sup> By going beyond the

22. Cf. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3–12 (2007).

23. See, e.g., ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (2006) (discussing how changes in international criminal law and international responsibility have modified legal obligations of non-state actors regarding human rights); ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 89–134 (1993); Byung-Sun Cho, *Emergence of an International Environmental Criminal Law?*, 19 *UCLA J. ENVTL. L. & POL'Y* 11, 45–47 (2000/2001); René Provost, *International Criminal Environmental Law*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 439, 453 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

24. See, e.g., John H. Knox, *Horizontal Human Rights*, 102 *AM. J. INT'L L.* 1, 47 (2008); Ratner, *supra* note 3.

25. See, e.g., BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 248–57 (2008); PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 223–50 (2006); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 *MICH. L. REV.* 985, 1031 (2007).

26. Here, “government” and “governmental” refer both to national governments and international bodies that are tasked with governance functions. Thus, international criminal tribunals exert judicial authorities and the Security Council, through its many committees that apply sanctions regimes, employs executive powers. These and other international institutions and groups come within the definition of governmental power used here. “Government,” in other words, is not limited to national institutions.

27. Consequently, I do not discuss private (or public-private) ordering, even though such mechanisms are of obvious importance to contemporary global governance. On these regimes, see, e.g., MYRIAM SENN, *NON-STATE REGULATORY REGIMES: UNDERSTANDING INSTITUTIONAL TRANSFORMATION* (2011); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); Errol Mei-



standard focus on international criminal courts and international criminal law and by drawing connections between diverse subject matters and practices, past and present, we can better discern, consider, and appraise otherwise hidden trends in the techniques of governance that are common to the broad range of contemporary international law.

Moreover, by focusing more on the structure and techniques of regulation and less on its content, we can also better understand and evaluate the novel character and consequences of the recent shifts in policymaking from national fora to international venues, including international organizations and global networks.<sup>28</sup> Scholars have primarily focused on the *amount* of decisions being taken at the international level and, to some extent, the *expansion* of the topics covered by those decisions. The image often employed is one of growth or increase. As one recent article begins, “[g]lobalization is on the

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dingier, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006); Aseem Prakash & Matthew Potoski, *Racing to the Bottom? Trade, Environmental Governance, and ISO 14001*, 50 AM. J. POL. SCI. 350 (2006); Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMP. PROBS. Summer/Autumn 2005, at 225; Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007). My interest here also differs from that of the extensive literature on the international legal personality of the individual. See, e.g., WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 232–49 (1964); CARL A. NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* (1962); GEORGES SCELLE, *PRÉCIS DE DROIT DES GENS* 42–44 (1934); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241 (2001); Marek St. Korowicz, *The Problem of International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956); J.L. Briery, *Règles générales du droit de la paix*, 58 RECUEIL DES COURS 5, 47–48 (1936). Though overlapping in part, this project departs from Knox, *supra* note 24, by, among other things, paying close attention to changes over time and looking beyond human rights law. A few scholars have noted some of the dynamics explored herein or have appreciated some of the resulting tensions. See, e.g., Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT'L L. 231, 288 (2010) (arguing against an “over-assertive approach to international criminal justice” insofar as it impedes the processes of “negotiation and accommodation” that typically lead to peace); Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331 (2009) (reflecting on the effect of the rise of international criminal law on international legal doctrine and institutions); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 925 (2008) (describing how “the assumptions of human rights liberalism subtly undermine the criminal law liberalism to which the system [of international criminal law] aspires”); Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1998) (noting the increase in individual criminal responsibility under international law).

28. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 3–5 (2004); Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 HARV. L. REV. 1255 (2005) (reviewing Anne-Marie Slaughter’s book); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1559 (2003) (“Although these delegation concerns are not entirely new, they have become much more pronounced in recent years.”); see also Jacob Katz Cogan, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti & George Downs*, 20 EUR. J. INT'L L. 1013, 1013–14 (2009) (noting the concerns raised by the trend toward greater international decision-making and the proposed responses); Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9 (criticizing those who see in these developments threats to state sovereignty). For a discussion of issues pertaining to international delegation, see, e.g., Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1.

rise.”<sup>29</sup> But analyses that focus on increases or expansions, in and of themselves, while helpful, do not fully explain what is new about a phenomenon. Things are always increasing or expanding (or decreasing and contracting). As historians joke, poking fun at such explanations, “the middle class is always rising.”<sup>30</sup> While a change in the rate of change or a change in direction (say, from increase to decrease) can certainly be illuminating, more impressive is a change in the nature of a phenomenon.

As we will see, much of the distinctiveness of the current cycle of international policymaking relates to the *direct* (or all but direct) ways in which the international interacts with the individual, leaving out, in important respects, the traditional intermediary, the state. This innovative shift to the direct assertion of public international authority over private actors can be observed by differentiating international lawmaking into three descriptive categories<sup>31</sup>—“unmediated law” (law that has a direct effect on individuals and other non-state entities), “mediated law” (law that depends upon the implementation of international policy through national lawmaking),<sup>32</sup> and “facilitative law” (law that assists states in the imposition of their domestic

29. Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 796 (2009).

30. PETER EARLE, *THE MAKING OF THE ENGLISH MIDDLE CLASS: BUSINESS, SOCIETY AND FAMILY LIFE IN LONDON, 1660–1730*, at 333 (1989).

31. This approach is novel for the English-language international law literature. French and German international law scholarship, though, do contain similar concepts to those employed here: *règle médiate* and *Mediatisierung*. See Ph. Francescakis, *Lois d'application immédiate et droit du travail*, 63 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 273 (1974) (Fr.); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 13, at 74 n.189. And, of course, European Union law explicitly distinguishes between “regulations” (which have direct effect in national legal systems) and “directives” (which are to be implemented by EU Member States). In the context of U.S. administrative law, the conceptual distinction elucidated by Edward Rubin between “transitive” and “intransitive” law is similar to that made in this Article between “unmediated” and “mediated” law. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380–85 (1989) (my thanks to Kevin Stack for pointing this out).

32. These techniques of mediated and unmediated law and mediated and unmediated enforcement can be applied and manipulated in various ways. They might, for instance, be modulated. Thus, tasking states with the imposition of certain duties upon individuals can be done in strong or weak ways: (1) by varying the ambiguity of the duty’s content (for example, by making a provision definite and quite specific or broad and capable of multiple interpretations); (2) by declaring a state’s obligation to impose the duty optional or mandatory (for example, by indicating that states “should” or “shall” make certain crimes punishable); (3) by establishing state duties that imply, but do not make explicit, the need to regulate individual acts (for example, by obligating states to protect certain individuals, such as diplomats, without explicitly noting the corresponding need to take action against private persons who might impinge upon that obligation); (4) by expanding or contracting the scope of persons potentially liable (for example, by imposing various forms of vicarious culpability, such as complicity and command responsibility); (5) by incorporating the purported duty in various types of formal and informal and binding and nonbinding texts (for example, political declarations or treaties); and (6) by establishing or failing to establish an enforcement mechanism for a duty (the latter of which has been called *lex imperfecta*). Alternatively, direct and indirect duties or enforcement might be imposed in concert, or, as with the complementarity regime of the International Criminal Court, priority may be given to one set of decisionmakers, such that the articulation of duties or their enforcement at one level may be made conditional on the absence or deficiency of action at another level.

authorities over individuals)<sup>33</sup>—and tracking the use of these legislative techniques over time. Doing so, it becomes evident that what is new in contemporary international organization is not the increase in international decisionmaking, *per se*, though that exists, but an overall change in its character—from indirect to direct effect. The regulatory turn is a particular, and particularly significant, example of this phenomenon.<sup>34</sup>

To appreciate the uniqueness and importance of the regulatory turn, we first need to understand how international law formerly regulated the individual. Part I reviews the post-World War II conceptualization of the individual as a subject of international law. This human rights position, as it evolved during those decades, viewed the individual as a holder of select international law-based claims against governmental authority; international law, to the extent it pertained to individuals directly, primarily protected them from their national governments. Though international law, in a variety of ways, required states to regulate and even prohibit certain acts of individuals such as narcotics trafficking (through mediated law) and facilitated inter-state cooperation pertaining to the control of individuals such as international extradition (facilitative law), it generally refused to apply the force of international law upon individuals in an unmediated way, to articulate with much specificity the law that states, by international obligation, were to impose on individuals, or to set out the duties that individuals owed to their governments. Doing so would have supplanted what was thought to be the proper role of states and, by reinforcing state authority over individuals, would have undermined state human rights obligations. As a result, when international law acted upon individuals, it did so almost entirely *indirectly*, in a mediated or facilitative fashion, and even then relatively weakly.

Part II describes the recent counter-development—the use of international law and institutions to assert *direct* regulatory control over individuals (unmediated law) and to extend and deepen the regulatory obligations of states in relation to their subjects (mediated law)—and explains its causes. Far from being inevitable, the shift stems from the changing perceptions over time of the sources of harm to individuals in a free society and the uncertain capacities of states, the traditional default regulator, to meet many of the contemporary challenges to world order. In the immediate post-War

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33. Facilitating domestic authorities can be accomplished through a number of methods: by providing mechanisms for international cooperation (for example, by establishing or expanding relations pertaining to international extradition or mutual legal assistance in criminal matters); by seeking to unify national laws (for example, by coordinating domestic civil liability regimes for trans-boundary environmental and other harms); or by reducing the legal barriers to extraterritorial action (for example, by extending national jurisdictions over crimes committed abroad). Facilitative law, like mediated law, is a technique whereby international law acts upon the individual indirectly.

34. This Article provides greater content to a development that global administrative law scholars and others have noted in passing and at a general level but upon which they have not focused. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 15, at 23–24; Reinisch, *supra* note 31, at 74; Weiler, *supra* note 17, at 559.

period and for decades thereafter, unrestrained governments were deemed to be the primary danger—both to individuals and to international peace and security. That notion was what fed and sustained the original human rights movement. Today, though governmental abuses obviously continue, the fear of the state (at least the centrality of that fear) has subsided relatively; individuals and private groups, including corporations and terrorist bands, are now thought to pose an equal or greater threat to public order, one that individual states have been unable or unwilling to control unilaterally. Consequently, the state-centric limits that had previously worked to constrain international law have begun to be unwound. Promoted and supported in different ways and for different reasons by states and state elites (which have sought increased authorities to protect their populations, as well as their own interests) and nongovernmental organizations (which have sought to sublimate the powers of the state for the promotion of human rights),<sup>35</sup> a new international legal framework has begun to emerge in which government's regulatory authority, once conceptualized mostly as a hazard to individual freedom that had to be tamed, instead is primarily viewed as a means for the protection of individuals that should be harnessed. International law and international organizations are not replacing the state; rather, the idea behind the regulatory turn is to use those techniques to shore up and back up states that are thought to be failing in their regulatory responsibilities in critical sectors and to enhance, as well, the capacities of other, more capable states in this regard. The substantive content and the legislative form of the turn reflect and balance both this felt-desire to maintain order and the continued default deference to the state. It is for these reasons that the duties imposed by the turn have tended to be prohibitions, that the penalties required, to a significant extent, have typically been criminal, and that the most common method of regulation employed has continued to be mediated. This regulatory turn is a process that began long before the terrorist attacks of September 11, and it is a move that goes beyond the discrete interests and preferences of certain states or component parts of their governments.<sup>36</sup>

Though the new paradigm that is the regulatory turn is still evolving, and its content, parameters, and assumptions are continually contested and,

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35. As the discussion below will elucidate, this dichotomy is, certainly, not perfect; the motivations of these groups are not uniform, nor are they exclusive of one another.

36. Many, of course, have lamented the strengthening of national executives in the wake of the events of September 2001. Kim Lane Scheppelle, for example, in an unpublished manuscript, writes about "the development of international security law" in which "national executives are empowered relative to local parliaments and courts; security services and police are linked across countries more tightly than they are linked to bodies that might supervise them within their own states." Kim Lane Scheppelle, *The International State of Emergency: Challenges to Constitutionalism after September 11*, at 2 (Sept. 21, 2006) (unpublished paper delivered at the Yale Legal Theory Workshop, Sept. 21, 2006), available at [http://digitalcommons.law.umaryland.edu/schmooze\\_papers/49/](http://digitalcommons.law.umaryland.edu/schmooze_papers/49/). As we will see, this "international security law" is part of a much broader shift in international law that, while certainly facilitated in some respects by the attacks of 9/11, was, nevertheless, antecedent to and independent of those events.

to some extent, resisted, its outlines and character going forward are evident. Part III considers the consequences for the international system of governing through regulation—the ways in which this new model has shifted and re-framed international decision-making and governance and the apprehensions and challenges that these changes have produced. Part IV concludes briefly by placing the regulatory turn within a wider framework of contemporary constitutive change in international organization. Not only is the regulatory turn—in its structures and processes—a part of the much-commented upon move toward multilevel governance, this emerging international system is, in practice, intertwined with and dependent upon the legitimacy and success of the turn itself.

### I. REGULATION BEFORE THE TURN

Pre-World War II international regulation of the individual was straightforward, at least as a matter of formal doctrine. States were the exclusive controllers of their populations—international law did not touch the individual directly, either to protect or to control. While foreign nationals did receive various forms of international legal protection from the acts of their host state, these were designed to benefit the interests not of the individual involved but those of the sending state, which alone held the option to seek redress for any breaches by the host state of the obligations owed.<sup>37</sup> A state's own nationals, however, could not expect to receive even such minimal levels of international oversight, except by special agreement, such as those provided for by the post-World War I minority rights regime.<sup>38</sup> And while international law did establish some individual duties (limiting or prohibiting certain actions such as piracy, slavery, trafficking in persons, and the opium trade) through conventional and customary law<sup>39</sup> when “the common national interest in international regulation [was] strong enough to overcome objections to restrictions on national sovereignty,”<sup>40</sup> it did so entirely

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37. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 363–64 (2d ed. 1912).

38. On these treaties, see, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 38–52 (1991).

39. Most individual duties and related state obligations to punish were conventional. Blackstone, though, noted a few customary duties. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*68 (referring to “violation of safe conducts,” “infringement of the rights of ambassadors,” and piracy). Vattel suggested another. See *United States v. Arjona*, 120 U.S. 479, 484 (1887) (citing Vattel) (counterfeiting foreign currency). Quincy Wright characterized these conventional and customary crimes, as well as others such as breaches of neutrality, as “offenses against the law of peace” (those acts that threaten other states, such as injuries to foreign ambassadors) and “offenses against universal law” (those acts that threaten the international community, such as piracy). Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 280 (1945); see also QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 179–91 (1922). States may also decide to enact still other laws as a result of international comity, not out of international obligation. See Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 268 (1950).

40. J.G. Starke, *The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs*, 31 AM. J. INT'L L. 31, 31 (1937).

in the “background,” to use Oppenheim’s term—that is, in a mediated or facilitative fashion.<sup>41</sup> Even then, though, the law acted quite weakly: the extent of the individual obligations to be imposed by states was not always clear,<sup>42</sup> and the mandates placed upon states to impose sanctions on individuals were not always detailed<sup>43</sup>—and sometimes not required at all.<sup>44</sup> State

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41. OPPENHEIM, *supra* note 37, at 363; *see also* HERBERT W. BRIGGS, *THE LAW OF NATIONS* 96 (2d ed. 1952) (“[I]nternational law does not operate *ex proprio vigore* upon individuals but obliges States to exercise jurisdiction over their own nationals and authorize them to punish certain enemy nationals for violations of the laws of war [referring to the Hague Convention IV of 1907].”). Piracy is an example of facilitative law, as it involved the permissive extension of domestic jurisdiction. *See* Paola Gaeta, *International Criminalization of Prohibited Conduct*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 63, 63 (Antonio Cassese ed., 2009) [hereinafter *OXFORD COMPANION*].

42. They could range from administrative obligations to outright prohibitions.

43. The common language of “appropriate” or “necessary” measures provided great discretion, allowing states to establish quite weak sanctions, such as fines, or strong punishments, such as incarceration. *See, e.g.*, Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere arts. 5, 7, 9, Oct. 12, 1940, 161 U.N.T.S. 193; Convention for the Prevention and Punishment of Terrorism art. 2, Nov. 16, 1937, 19 L.N.O.J. 233 (1938); International Agreement for the Regulation of Whaling art. 1, June 8, 1937, 190 L.N.T.S. 79 (“The contracting Governments will take appropriate measures to ensure the application of the provisions of the present Agreement and the punishment of infractions against the said provisions.”); Convention for the Suppression of the Illicit Traffic in Dangerous Drugs art. 2, June 26, 1936, 198 L.N.T.S. 299; Convention Relative to the Preservation of Fauna and Flora in Their Natural State art. 9(2), Nov. 8, 1933, 172 L.N.T.S. 241; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; International Opium Convention art. 28, Feb. 19, 1925, 81 L.N.T.S. 317 (“Each of the Contracting Parties agrees that breaches of its laws or regulations by which the provisions of the present Convention are enforced shall be punishable by adequate penalties, including in appropriate cases the confiscation of the substances concerned.”); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs art. 15, July 13, 1931, 139 L.N.T.S. 301 (“The High Contracting Parties shall take all necessary legislative or other measures in order to give effect within their territories to the provisions of this Convention.”); Convention for the Regulation of Whaling art. 1, Sept. 24, 1931, 155 L.N.T.S. 349 (“The High Contracting Parties agree to take, within the limits of their respective jurisdictions, appropriate measures to ensure the application of the provisions of the present Convention and the punishment of infractions of the said provisions.”); Convention concerning Forced or Compulsory Labour art. 25, June 28, 1930, 39 L.N.T.S. 55 (“it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced”); Slavery Convention art. 6, Sept. 25, 1926, 60 L.N.T.S. 253 (“Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.”); International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications art. 1, Sept. 12, 1923, 27 L.N.T.S. 213 (“The High Contracting Parties agree to take all measures to discover, prosecute, punish and person engaged in committing any of the following offences, . . . .”); Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416; Universal Postal Union Convention arts. 18(5), 20, Nov. 30, 1920; Convention for the Preservation of Fur Seals in the North Pacific art. 6, July 7, 1911, 5 Martens Nouveau Recueil 3d 720; International Convention for the Suppression of the White Slave Trade art. 3, May 4, 1910, 7 Martens Nouveau Recueil 3d 252; Convention for the Protection of Submarine Telegraph Cables art. 12, Mar. 14, 1884 (“The High Contracting Parties engage to take or to propose to their respective legislatures the necessary measures for insuring the execution of the present Convention, and especially for punishing, by either fine or imprisonment, or both, those who contravene the provisions of Articles II, V and VI.”).

44. Sometimes, all that was required was that state parties “use their best endeavours to adopt . . . measures” regulating certain activities or “examine the possibility of enacting laws or regulations making [a particular act] a penal offense.” International Opium Convention arts. 10, 20, Jan. 23, 1912, 8 L.N.T.S. 187; *see also* Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium art. 9, Feb. 11, 1925, 51 L.N.T.S. 337 (“The Contracting Powers will

discretion was the rule. International law did not operate on or for the individual directly; though the law may, ultimately, have been to the benefit of or may have controlled individuals in certain respects, that was accomplished only through the interposition of state action. Thus, while the formal doctrine hesitated to recognize even the attenuated connections between international law and the individual during this period, its outlines quite accurately depicted international law's deference to the state regarding its own people and the law's brief to reinforce that authority.<sup>45</sup>

Turning this world upside down, the post-War recognition of the human rights idea radically "shift[ed] the fulcrum of the [international] system from the protection of sovereigns to the protection of people."<sup>46</sup> But the concept was not only that international law would act as the protector of individuals; it was also that the state—and not some other entity—was conceived of as the primary threat to individuals, that is, the object from which individuals required protection. This combination of assumptions—that international law itself should protect individuals and that such protection was required from the potential predations of the state—comprised the fundamental tenets of the original human rights turn. The corollary to this approach was that international law should not endorse, except in a very limited fashion, the notion that individuals owed duties to the state. In other words, the conception of the role of the individual in post-War international law was as a claimant upon the state and not the reverse.<sup>47</sup>

This position did not mean, however, that international law could not be called upon to facilitate inter-state cooperation and coordination, including regulatory measures, as it had done for years, to meliorate transnational problems caused by individuals and private entities (such as drug trafficking or the trade in endangered species) and required restraining or prohibiting individual acts. In such situations, though, international law would continue to act (as it had before the war) only in a mediated and facilitative fashion—it would not impose duties directly on individuals, except in a few extraordinary cases, and it would effectively have no mechanism for direct enforcement. After all, the state, for all the harm it could potentially wreak, continued to be understood as *the* legitimate source of governmental authority. International law and international organizations were founded on (and

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examine in the most favourable spirit the possibility of taking legislative measures to render punishable illegitimate transactions which are carried out in another country by a person residing with their territories."). Sometimes, criminalization was only recommended. See, e.g., International Convention for the Suppression of Counterfeiting Currency art. 3, Apr. 20, 1929, 112 L.N.T.S. 371 ("The following *should* be punishable as ordinary crimes . . .") (emphasis added).

45. Though a full discussion of the doctrine is beyond the scope of this Article, even this mild regulatory regime of the late nineteenth and early twentieth centuries was a significant departure from previous practice.

46. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990).

47. By "claimant," I do not mean to suggest that there was necessarily an available legal claim that could be asserted by individuals for a state's breach of its international obligations relating to individuals.

often designed to maintain) that assumption. The idea of human rights was to check (and hence burnish) state authority, not eliminate it; the post-War human rights movement was not founded in anarchism, nor did it stem from a spirit of revolution.<sup>48</sup>

We set out international law's post-War position with regard to the regulation of individuals here so that in the following Part we can more fully appreciate the turn the law has taken since.

### A. *The Human Rights Turn*

The menace of governmental evil—quite palpable in the wake of the Second World War—precipitated the movement we now call international human rights.<sup>49</sup> “Depredations, while sometimes the result of private conduct, are most frequently committed by persons acting in a public or quasi-public capacity,” Bassiouni wrote in 1982, summarizing the prevailing view of the period.<sup>50</sup> “Governmental policies,” he continued, “are . . . the primary cause of human rights violations today.”<sup>51</sup> Consequently, acts “committed under the aegis of state policy” were of the greatest concern.<sup>52</sup> Such was the strength of this basic assumption that the Universal Declaration of Human Rights did not bother to specify the perpetrators of the “barbarous acts” referred to in its preamble<sup>53</sup>— everyone knew.

But why did governmental repression demand *international* concern? Belief in the inherent value of human dignity, of course, was central to the international impetus to regulate human rights infringements. For this reason, the Universal Declaration began with the “recognition [that] the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>54</sup> And for some that would have sufficed as a basis for international control. But for others there needed to be something more to justify international standard-setting. That additional component was the idea that human rights abuses implicated threats to international peace and security. It was, after all, “Hitler the warmonger, not Hitler the architect of European extermination, who preoccupied the drafters” of the U.N. Charter.<sup>55</sup> The connection between domestic human rights abuses and international security, then, was central to the argument. And, indeed, as has been noted, the “view of

48. See Samuel Moyn, *On the Genealogy of Morals*, NATION, Apr. 16, 2007, at 25.

49. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 175 (2d ed. 2003).

50. M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 194 (1982).

51. *Id.*

52. *Id.*

53. Universal Declaration of Human Rights pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (1948).

54. *Id.*

55. Michael Ignatieff, *Human Rights, Sovereignty and Intervention*, in HUMAN RIGHTS, HUMAN WRONGS 52, 53 (Nicholas Owen ed., 2002).



the drafters [of the Universal Declaration] seems to have been that regimes that engage in gross violations of human rights are also likely to be threats to international peace and security."<sup>56</sup> Such threats might come about, as in the case of Nazi Germany, through international aggression from the repressive regime itself. The idea was that governments that are internally oppressive will typically be externally belligerent as well.<sup>57</sup> But threats to international peace might also result, as they would in the cases of Rhodesia and South Africa beginning in the 1960s, from the interdependence of peoples who live in different states. This was because "[t]he peoples in one . . . community may realistically regard themselves as being affected by activities in another territorial community, though no goods or people cross any boundaries."<sup>58</sup> For these two reasons, then, a government's repression of its own population had to be controlled at the international level.

Yet, government was not altogether evil; rather, governmental power was simultaneously necessary and dangerous. Consequently, the human rights project was not designed to liberate the individual entirely from the confines of the state. After all, the state, which, it has been said, "reached [its] full flood" after World War II with decolonization, was thought to be indispensable to the promotion and maintenance of the general welfare and the achievement of national self-determination.<sup>59</sup> But in order to preserve these positive aspects of government, government itself had to be controlled.<sup>60</sup> Human rights worked at this intersection, to protect both the dignity of individuals and the promise of government.

The international human rights documents drafted in the early years reflected this desire to protect individuals from the predatory state and to ensure that the state's actions promoted human welfare. The Universal Declaration of Human Rights of 1948 set out the rights of individuals—rights that protected against improper governmental action (such as arbitrary arrest and partial tribunals) and rights that allowed individuals to participate freely in society without governmental interference (through, for example, freedom of expression, association, political participation, and employment).<sup>61</sup> This approach to individual protection was seen most clearly, though, in the more elaborately detailed international covenants of 1966—

56. BEITZ, *supra* note 11, at 19.

57. See Paul Gordon Lauren, *A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad*, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 7, 32 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., abr. ed. 2009).

58. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 12 (1968).

59. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 113 (rev. ed. 2006).

60. Cf. DAVID CIEPLEY, *LIBERALISM IN THE SHADOW OF TOTALITARIANISM* 231–38 (2006) (describing the U.S. Supreme Court's increasing emphasis on civil liberties to curtail state power in the wake of World War II).

61. See Universal Declaration of Human Rights, *supra* note 53, arts. 19–21, 23.

the International Covenant on Civil and Political Rights (ICCPR)<sup>62</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>63</sup> The ICCPR operated to control state coercion of its citizenry; the ICESCR worked to encourage positive state action for its peoples. As Higgins has commented, the Covenants were the “legal yardstick against which the behaviour of states may be judged and a point of reference for the individual in the assertion of his claims.”<sup>64</sup>

The wariness, during this period, of using international law to sanction governmental power in relation to individuals also meant that the original drafters of these human rights instruments typically eschewed the endorsement of any but the most general private duties to the state or any obligation of governments to take action against private individuals for the violation of human rights.<sup>65</sup> Charles Malik, one of the drafters of the Universal Declaration, explained that “[t]he world was faced with a tendency to ‘statism,’ or the determination by the state of all relations and ideas, thus supplanting all other sources of convictions. The state insisted on the individual’s obligations and duties to it.” To Malik, “this too was a grave danger, for man was not the slave of the state, and did not exist to serve the state only.”<sup>66</sup> Thus, the ICCPR contained no explicit duty for states to punish individuals for violations of the rights of others.<sup>67</sup> And the same was true of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>68</sup> and the American Convention on Human Rights.<sup>69</sup> These treaties, likewise, did not establish any individual duties to the state, except in the most general and benign of terms.<sup>70</sup> Nearly all subse-

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62. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

63. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

64. Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11, 24 (1978).

65. Among the major human rights charters, the one exception is the African Charter on Human and Peoples’ Rights, which was drafted decades later and has been interpreted in such a way as to narrow the text’s incorporation of individual duties. For a discussion, see KNOX, *supra* note 24, at 14–18.

66. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 242 (1999) (quoting Charles Malik).

67. *See* ICCPR, *supra* note 62, art. 2(1) (requiring States Parties generally “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized”).

68. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (requiring High Contracting Parties to “secure to everyone within their jurisdiction the rights and freedoms” defined by the convention).

69. American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 (requiring States Parties to “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”).

70. *See id.* art. 32(1) (“Every person has responsibilities to his family, his community, and mankind”); ICCPR, *supra* note 62, pmb. (“Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”); ICESCR, *supra* note 63, pmb. (same); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 68.

quent human rights treaties,<sup>71</sup> such as the Convention on the Elimination of All Forms of Discrimination Against Women, that effectively, if indirectly, established private obligations (such as non-discrimination) also declined to explicitly endorse state punishment of human rights violators.<sup>72</sup> Human rights were to be protected, but, for human rights advocates, the state's positive role in the enforcement of those rights was problematic. Such was the Catch-22 of the original human rights turn: the state—the default enforcer of human rights—was also its putative violator.

### B. *International Law Enforcement*

The idea of the human rights turn was for international law to take the side of individuals in relation to the state precisely because an active but well-controlled state was so vital to the welfare of individuals and international security. This approach, however, did not undercut the usefulness of international law to states as a technique to regulate individuals, at least at a certain level. There were numerous transnational problems (drugs, pollution, and the conduct of warfare, to name just a few) that required, in the view of some international actors, the coordinated control of individual acts; international law provided a framework for the primary actors—states—to work together more effectively. Eventually, human rights concerns would be raised in connection with international law enforcement processes, as those processes grew stronger,<sup>73</sup> but the limited structure of international author-

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71. The one exception is article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (requiring States Parties to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”).

72. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), adopted Dec. 18, 1979, 1249 U.N.T.S. 13 (states agree “[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”); *id.* art. 6 (“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”); *see also, e.g.*, Convention on the Rights of the Child art. 19(1), adopted Nov. 20, 1989, 1577 U.N.T.S. 3 (“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 71, art. 2(d) (“Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”). International labor law worked similarly. *See* Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively art. 1, adopted July 1, 1949, 96 U.N.T.S. 257 (“Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”).

73. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”); *see also* Neil Boister, *Human Rights Protections in the Suppression Conventions*, 2 HUMAN RTS. L. REV. 199 (2002); *infra* Part III.D.

ity over individuals during this period had more to do with the tension between efforts by certain states or groups of states to promote transnational regulation of particular cross-border problems of significant concern and the reluctance of other states to cede control of their internal authorities to integrative regimes.<sup>74</sup>

The existing model—that of mediated law and facilitative law—provided the means and the framework with which to debate and resolve this tension. Unlike the pre-War balance, which deferred substantially (if not entirely) to states in the elaboration and application of rules, the mediated law of the post-War period tentatively began to assert somewhat greater control over the acts of states that were endorsed by international law. While some treaties remained general in their requirements (allowing considerable state discretion as to the contents of the duty and the appropriate means for its enforcement),<sup>75</sup> a number also set out in some detail the obligations that had

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74. Law enforcement treaties, or “suppression conventions,” promote certain policy preferences and goals, not only of states but of domestic and transnational interest groups. On the move to criminalize certain acts at the international level, see generally ANDREAS & NADELMANN, *supra* note 25; WAYNE SANDHOLTZ & KENDALL STILES, *INTERNATIONAL NORMS AND CYCLES OF CHANGE* (2009) (discussing international law enforcement alongside global movements against imperialism and for humanitarian intervention and democratization); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479 (1990); Michael Woodiwiss, *Transnational Organised Crime: The Global Reach of an American Concept*, in *TRANSNATIONAL ORGANISED CRIME: PERSPECTIVES ON GLOBAL SECURITY* 13 (Adam Edwards & Peter Gill eds., 2003).

75. See, e.g., International Convention Against the Taking of Hostages art. 2, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Conservation of European Wildlife and Natural Habitats arts. 5–7, Sept. 19, 1979, E.T.S. No. 104 (“Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of [specified protected species]”); Convention for the Prevention of Marine Pollution from Land-Based Sources art. 12(1), June 4, 1974, U.K.T.S. 64 (1978), 13 I.L.M. 352; Agreement on the Conservation of Polar Bears art. 6(1), Nov. 15, 1973, 27 U.S.T. 3918 (“Each Contracting Party shall enact and enforce such legislation and other measures as may be necessary for the purpose of giving effect to this Agreement.”); International Convention for the Prevention of Pollution from Ships art. 4, Nov. 2, 1973, 1340 U.N.T.S. 184 (as modified by the Protocol of 1978); Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter arts. 4, 7(2), *opened for signature* Dec. 29, 1972, 1046 U.N.T.S. 120; Convention for the Conservation of Antarctic Seals art. 2(2), June 1, 1972, 1080 U.N.T.S. 175 (“Each Contracting Party shall adopt for its nationals and for vessels under its flag such laws, regulations and other measures . . . as may be necessary to implement this Convention.”); Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft art. 15(3), Feb. 15, 1972, 932 U.N.T.S. 3 (“Each Contracting Party shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention.”); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 8, Nov. 14, 1970, 823 U.N.T.S. 231 (“The States Parties to this Convention undertake to impose penalties or administrative sanctions upon those persons responsible for infringing the prohibitions referred to under articles 6(b) and 7(b) above.”); Interim Convention on the Conservation of North Pacific Fur Seals art. 6(3), Feb. 9, 1957, 314 U.N.T.S. 105 (“The authorities of the Party to which such person or vessel belongs alone shall have jurisdiction to try any case arising under Article III [prohibiting pelagic sealing] and this Article and to impose penalties in connection therewith.”); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 28, May 14, 1954, 249 U.N.T.S. 240 (“The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those person, of whatever nationality, who commit or order to be committed a breach of the present Convention.”); International Convention for the Prevention of Pollution of the Sea by Oil art. 3, May 12, 1954, 327 U.N.T.S. 3 (listing prohibitions and providing jurisdiction to punish to state of ship’s registry); Convention for the Suppression of the Traffic in Persons

to be implemented.<sup>76</sup> At the same time, there was also a proliferation of facilitative law that coordinated state regimes (such as those pertaining to extradition,<sup>77</sup> individual liability for transnational harms,<sup>78</sup> and statutes of limitations for war crimes and crimes against humanity<sup>79</sup>) and that extended the adjudicative jurisdiction of states over treaty crimes committed abroad in which there was no connection to the prosecuting state aside from the presence there of the fugitive.<sup>80</sup>

Thus, though there was interest in the international regulation of individuals (at least in regard to certain transnational concerns), states were still quite reluctant to have international law or international organizations act

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and of the Exploitation of the Prostitution of Others arts. 1–2, *approved* Dec. 2, 1949, 96 U.N.T.S. 271; International Convention for the Regulation of Whaling art. 9(1), Dec. 2, 1946, 161 U.N.T.S. 72 (“Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions . . . .”); Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish art. 11, Apr. 5, 1946, 231 U.N.T.S. 199 (“The Contracting Governments agree to take . . . appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions of the said provisions.”).

76. *See, e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents art. 2, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention on International Trade in Endangered Species of Wild Fauna and Flora, with Appendices, Mar. 3, 1973, art. 8, 993 U.N.T.S. 243; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation arts. 5–13, *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; Convention on Psychotropic Substances art. 22, Feb. 21, 1971, 1019 U.N.T.S. 175; Hague Convention for the Suppression of Unlawful Seizure of Aircraft arts. 1–11, Dec. 16, 1970, 860 U.N.T.S. 105 [hereinafter Hague Convention]; Convention on the Physical Protection of Nuclear Material art. 7, Oct. 26, 1979, T.I.A.S. 11080; Single Convention on Narcotic Drugs art. 36, Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter Single Convention] (“Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that [any action that is contrary to the provisions of the Convention] shall be punishable offences when committed intentionally, and that serious offenses shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”); Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery art. 6(1), Sept. 7, 1956, 266 U.N.T.S. 3.

77. *See, e.g.*, European Convention on Extradition, Dec. 13, 1957, E.T.S. No. 24 and its additional protocols of Oct. 15, 1975, E.T.S. No. 86, and Mar. 17, 1978, E.T.S. No. 98; Inter-American Convention on Extradition, Feb. 25, 1981, 1752 U.N.T.S. 190; Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth, 1966, Cmnd. 3008 Nordic Co-Operation Treaty art. 5, Mar. 23, 1962, 434 U.N.T.S. 145 (entered into force July 1, 1962); Convention on Judicial Cooperation of the Organization Communale Africaine et Malgache, Sept. 12, 1961, Journal Officiel de la République Malgache, Dec. 23, 1961, at 2242.

78. *See, e.g.*, Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, Dec. 17, 1976, 974 U.N.T.S. 255; Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; Brussels Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, *reprinted in* 57 AM. J. INT’L L. 268 (1963); Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265; Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 263.

79. *See* U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Dec. 16, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970).

80. *See* Survey of Multilateral Conventions Which May Be of Relevance for the Work of the International Law Commission on the Topic “The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)”: Study of the Secretariat ¶¶ 113, 144, U.N. Doc. A/CN.4/630 (June 18, 2010) (dating this phenomenon to the early 1970s).

directly on individuals—to declare that individuals must act or not act in particular ways by virtue of international law alone. Doing so would circumvent state authority, which retained pride of place. Consequently, though individual acts had to be controlled, international law would continue to do this only through the mediation of state action or through the facilitation of inter-state relations.<sup>81</sup> Such was the commitment to this design that even the most heinous of individual acts outlawed during this period, such as those prohibited by the 1949 Geneva Conventions (including their grave breaches provisions),<sup>82</sup> did not constitute international crimes, as such, in these years.<sup>83</sup> Instead, the prohibition of such acts required the enactment of

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81. Sometimes treaty drafters would make this assumption explicit. Thus, Article 36(4) of the 1961 Single Convention on Narcotic Drugs provides that the treaty's criminalization obligation "shall [not] affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party." See Single Convention, *supra* note 76, art. 36(4).

82. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49–50, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 50–51, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War arts. 129–130, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–147, Aug. 12, 1949, 75 U.N.T.S. 287. This approach was not altered by the 1977 Additional Protocols. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6, June 8, 1977, 1125 U.N.T.S. 609.

83. See Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 310–11 (1999) ("One cannot but deplore the high level of confusion about the meaning of the 'grave breaches' provisions . . . [They are not] crimes of a truly international character."); Gaeta, *supra* note 41, at 64 (noting that, in drafting the grave breaches provisions, "the international community reacted by resorting to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states a duty to criminalize the prohibited conducts, and organizing judicial cooperation for their repression"). For the purpose of this Article, I am agnostic as to what constitutes or should constitute an "international crime" in any normative sense. There is large and contentious literature on the proper definition of such crimes in which the label "international" is highly charged. Some argue that only "rules establishing individual criminal responsibility directly at the *international level*" create "responsibility of a truly international character." Simma & Paulus, *supra*, at 308. In this account, international obligations "to try individuals and punish them for certain conduct on the basis of domestic criminal law" (what I call mediated law) do not create duties of an international character. *Id.* Others do not believe this distinction important; both unmediated and mediated law "create duties on the individual under international law not to commit the act." Steven R. Ratner, *Is International Law Impartial?*, 11 LEGAL THEORY 39, 52 (2005) (explicitly disagreeing with Simma and Paulus); see also STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 12 (3d ed. 2009) ("[A] violation of international law becomes an international crime if the global community intends through any of those strategies [direct criminalization; the obligation to prosecute and punish; and the authorization to prosecute and punish] . . . to hold individuals directly responsible for it."). As the discussion in the text suggests, the distinction noted by Simma and Paulus is analytically useful, for, as Knox points out, "[a] legal obligation that international law directly places on an individual differs from one that it imposes indirectly, through a duty on governments." Knox, *supra* note 24, at 29. That said, as Ratner implies, both unmediated and mediated law reflect values imposed through the international lawmaking process, and that fact has considerable meaning too. Others define international crimes by focusing on different criteria, such as violation of fundamental international values. See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 11–12 (2d ed. 2008) (establishing four criteria, including the values embodied in the violated rules, universal jurisdiction, and the absence of functional

state legislation for individual duties to arise, and their enforcement depended upon state investigations and prosecutions.

In accordance with this approach, the 1945 and 1946 Charters of the International Military Tribunals (IMT)<sup>84</sup> were a product of national—not international—authorities. As the Nuremberg Tribunal itself recognized, “The making of the [1945 IMT] Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered.”<sup>85</sup> Both the law and the tribunal were understood as the implementation (“the expression”) of international law by states (the occupying powers)—that is, not the establishment of direct international duties or their enforcement, but rather a particularly strong example of mediated law by the allied states that had won the war.<sup>86</sup> That precedent of mediated law was confirmed by the subsequent drafting of the Geneva Conventions, which, as already noted, depended entirely on state implementation, as well as by the failure in the decade following the war of the U.N. General Assembly-initiated projects to codify an international Code of Offences Against the Peace and Security of Mankind and to establish a permanent international criminal court.

To be clear, recognizing the “mediatedness” of the International Military Tribunals, the Geneva Conventions, and the many other regulatory regimes of this period does not discount their importance or their international character (in the sense that they were statements made by the international community). It does, though, serve the purpose of properly situating these measures within a framework of the possible regulatory techniques available to states as they formulated international law and the choices they made in this regard. As a result, we can better appreciate the contemporary significance of the steps taken and more precisely compare them with subsequent developments.

Until the 1980s, there were only two exceptions to this rule against unmediated law: the 1948 Genocide Convention, which established an international individual duty but relied on state action for its application;<sup>87</sup> and the

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immunity of state officials); Win-chiat Lee, *International Crimes and Universal Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY* 15, 16 (Larry May & Zachary Hoskins eds., 2010) (defining international crimes as those acts for which there is universal jurisdiction). For a discussion distinguishing “transnational criminal law” from “international criminal law,” see Neil Boister, “*Transnational Criminal Law*”, 14 *EUR. J. INT’L L.* 953 (2003).

84. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *as amended* Apr. 25, 1946, TIAS No. 1589, 4 *Bevans* 20; Charter of the International Military Tribunal, Aug. 8, 1945, 82 *U.N.T.S.* 279.

85. International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 *AM. J. INT’L L.* 172, 216 (1947) [hereinafter *Nuremberg Judgment*].

86. *Id.*

87. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 *U.N.T.S.* 227 (“The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish.”); *id.* art. 5 (“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty

1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which also established an international duty that, in practice, depended on state enforcement.<sup>88</sup> While these agreements were atypical insofar as they established international duties in an unmediated fashion, they were in line with the post-War human rights turn that had as its aim the control of states. Certainly, individuals were the direct subjects of these rules. After all, “[c]rimes against international law,” as the Nuremberg Tribunal observed, “are committed by men, not by abstract entities.”<sup>89</sup> But, as with the human rights conventions of the period, the true targets of these treaties were really states (sometimes very specific states, such as South Africa), and the intended beneficiaries were those states’ populations. In other words, they were, at the time of their adoption, much more about regulating the state than regulating the individual.

### C. *The Post-War Position’s Dual Limits*

It was the contemporary idea of the state—as an entity to be feared and as the indispensable locus of government—that structured the goals and mechanisms of both international human rights and international law enforcement during the post-War period, that is, the ways in which international law regulated the relationship between governmental authority and the individual.

The idea was both generative and limiting, as we have seen. The emergence of human rights law at the international level resulted from the profound failure during the Second World War of the state’s responsibilities to its own (and others) and the consequential desire to establish a means to prevent a reoccurrence of such a calamity through the establishment of substantive rules governing a state’s control of its inhabitants. But the suspicious, even oppositional, stance of the human rights project vis-à-vis the state, particularly a government’s regulatory powers over its own people, meant that that movement could not easily call upon international law to require the state to exercise those very powers in favor of human rights, especially when the alleged violators were not public but private persons. The perceived risk that the state might abuse its authorities, albeit in the

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of genocide or any of the other acts enumerated in article 3.”). In its Article 6, the Convention contemplated the possibility of a future international tribunal, but one was never established. See generally Ben Saul, *The Implementation of the Genocide Convention at the National Level*, in THE UN GENOCIDE CONVENTION: A COMMENTARY 58 (Paola Gaeta ed., 2009).

88. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 1, July 18, 1976, 1015 U.N.T.S. 243 (declaring that “apartheid is a crime against humanity” and that acts stemming from apartheid are “crimes violating the principles of international law”); *id.* art. 4 (obligating the States Parties to take both ex ante and ex post measures, including prosecution, to suppress apartheid). At the request of the Human Rights Commission, M. Cherif Bassiouni drafted a statute for an international court to try persons under the Apartheid Convention, but it was never adopted. See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 10–11 (1987).

89. Nuremberg Judgment, *supra* note 85, at 221.



name of human rights, was too great. And the default position of the state as the purveyor of justice and its fundamental, even visceral, reluctance to accede to outside interference meant that international institutions themselves could not be called upon to take retributive acts against individual violations of human rights in the state's stead. Though some sought to set out a duty for states to prosecute public officials for human rights violations (or advocated for the establishment of a permanent international criminal court or other forms of direct international regulation),<sup>90</sup> theirs was a position that continually butted up against these conceptual and practical limitations.

International law enforcement also emerged during the post-War period, as select states increasingly sought to extend international law's domain to the regulation of matters they thought were of transnational concern and significance. Here, too, though, the role and vision of the state acted as a brake on the potential of international law to be used as a regulatory technique. The refusal of states to relinquish their sovereignty diminished the possibilities for the establishment of international control over individual activity, at least in any significant fashion. While some international regimes were enhanced, their overall strength was quite weak and their implementation depended entirely on the will and cooperation of states, which efforts were, in practice, uneven at best.<sup>91</sup>

Dual limits—the mistrust of government and the jealousy of states over their own authorities—constrained the possibility that international law might assume a truly regulatory role over individuals, either directly or indirectly. The result, to use Bassiouni's phrase, was that international law, at most, constituted an "indirect control scheme."<sup>92</sup> Indeed, because of its incorporation of human rights and because of the weakness of the law enforcement system, international law, if anything, became conceptualized as a protective, not coercive, influence when it came to the relationship between governmental authority and the individual.<sup>93</sup> That trend would only gain strength over the years. A fundamental shift in underlying assumptions would need to transpire for this dynamic to change.

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90. See, e.g., M.C. Bassiouni, *The International Narcotics Control System: A Proposal*, 46 ST. JOHN'S L. REV. 713, 758 (1972).

91. See Boister, *supra* note 83, at 958, 960 (noting the weakness of transnational criminal law because it "relies on domestic law to flesh out the skeletal provisions of the suppression conventions," "assumes the existence of fully developed penal systems," depends on states that "have shown themselves to be unwilling to harmonize their penal systems to a greater degree than absolutely necessary due to domestic resistance," and incorporates "treaty provisions for enforcement [that] are weak and hardly ever used").

92. M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405, 429 (1974).

93. See MOYN, *supra* note 4, at 178–79.

## II. THE REGULATORY TURN

The post-War regime rested on the twin notions that both the primary threat to and primary protector of individuals was the state. This state-centered perspective made a good deal of sense in the wake of World War II, and it continued to have meaning going forward, particularly in the West. After all, states provided social safety nets, satisfied dreams of national liberation, and defended their peoples from the perceived dangers that lurked beyond (and within) national boundaries. And yet states also abused their powers—the Soviet bloc and dictatorships worldwide provided powerful reminders of the persistent danger to individual rights posed by the uncontrolled state, and the liberal welfare states of the First World, though beneficent in their purposes, threatened just the same, if perhaps less menacingly. But what if these foundational ideas were no longer true, or as true, as they once were? What if the state could no longer fulfill its responsibilities? And what if, instead, the greatest threat to individuals shifted from the state to non-state entities, including other individuals? Just as the role of international law in relation to the individual depended on a certain set of historically contingent conditions for its establishment and continued resonance, so too could its function alter with changed circumstances.

And so it did. The fall of the Soviet Union and the Eastern Bloc, the toppling of many authoritarian regimes, the Reaganite/Thatcherite undermining of the centrality of government in the West, the move to privatize governmental functions, not to mention the failure of many states, such as Somalia, Yugoslavia, and Afghanistan,<sup>94</sup> and the fact that the “state, acting alone, seem[ed] increasingly less able to accomplish what [was] expected of it”<sup>95</sup>—all these developments of the 1980s and 1990s undercut the value of governments and defanged in important ways the post-War conceptualization of governmental evil. At the same time, as barriers to the transnational movement of currency, persons, and goods and services receded and communications technologies became more sophisticated, non-state entities—terrorist groups in particular, but others as well (such as corporations and organized crime syndicates) rose up in the public’s mind as threats to liberty, order, and rights.<sup>96</sup> Though they had been there all the while, and some had even been subject to international regulation,<sup>97</sup> private entities,

94. See Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1160 (2005).

95. W. Michael Reisman, *Designing and Managing the Future of the State*, 3 EUR. J. INT’L L. 409, 409 (1997); see also, e.g., Karen A. Mingst, *Global Governance: The American Perspective*, in GLOBALIZATION AND GLOBAL GOVERNANCE 87, 89 (Raimo Väyrynen ed., 1999) (“During the 1980s and 1990s, theorists recognized that something deeper was happening . . . Spurred by technological change and the globalization of economic life, the state is challenged, its sovereignty undermined and constrained, its structures unable to provide the necessary public goods.”).

96. See, e.g., Richard A. Martin, *Problems in International Law Enforcement*, 14 FORDHAM INT’L L.J. 519, 519 (1990/1991).

97. See, e.g., Hague Convention, *supra* note 76; Montreal Convention, *supra* note 76.

particularly transnational ones—“post-modern brigand[s]” to use Macklem’s term<sup>98</sup>—now loomed where the shadow of the state once hovered.<sup>99</sup> Though in absolute terms there may or may not have been an increase in their perniciousness,<sup>100</sup> individuals and non-state entities now were defined as the problem.<sup>101</sup> Organized crime, for instance, was denominated in 1994 as the “New Empire of Evil,” “a greater international security challenge than anything Western democracies had to cope with during the cold war.”<sup>102</sup> To some, the nation-state itself was threatened.<sup>103</sup> As a result of this framing,<sup>104</sup> as well as the quite real inabilities of states, acting alone, to deal with collective problems such as risks to the environment, the idea of the state as the primary threat to and as the primary protector of individuals no longer made as much sense as it had previously. The facts had changed.

International actors responded accordingly.<sup>105</sup> They did so, of course, not by dropping the human rights protections put in place in the second half of the twentieth century to guard against state excesses and not by eliminating the primacy of the state as the default governmental authority, but by diminishing the limitations that had previously worked to restrict the operation of international law and institutions over individuals and private entities. These developments served the interests of and were promoted by two important constituencies that hitherto had resisted or at least felt conflicted about the expansion of these very international authorities—states (which reflexively and jealously had guarded their sovereignty from international encroachments) and human rights activists (who had previously feared

98. Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT’L L.F. D. INT’L 281, 281 (2005) (referring to the image of the global corporation).

99. Cf. ALISON BRYSK, HUMAN RIGHTS AND PRIVATE WRONGS: CONSTRUCTING GLOBAL CIVIL SOCIETY 1 (2005) (“The human rights tradition, a necessary and continuing struggle to limit state repression, grapples with a world in which some violators cannot be picketed at the presidential palace or sanctioned by the UN.”).

100. It depended on the circumstances. Some threats were new and very real. See, e.g., W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 86 (2003) (noting the increased dangerousness of non-state actors in a world in which atomic, biological, and chemical weapons are proliferating).

101. See Adam Edwards & Peter Gill, *After Transnational Organised Crime? The Politics of Public Safety*, in TRANSNATIONAL ORGANISED CRIME; PERSPECTIVES ON GLOBAL SECURITY 264, 265 (Adam Edwards & Peter Gill eds., 2003).

102. Michael Woodiwiss, *Transnational Organized Crime: The Strange Career of an American Concept*, in CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION 3, 26 (Margaret E. Beare ed., 2003). See generally TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? (Mats Berdal & Mónica Serrano eds., 2002).

103. See, e.g., Louise I. Shelley, *Transnational Organized Crime: An Imminent Threat to the Nation-State?*, 48 J. INT’L AFF. 463, 463 (1995).

104. On this concept, see, e.g., Beth Simmons & Paulette Lloyd, *Inter-subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking* 4 (Dec. 3, 2010) (unpublished manuscript) (on file with author), available at <http://www.iilj.org/courses/documents/HCC2010Dec03.Simmons.pdf>.

105. The precise coalition of actors depended on the particular issue and the particular moment. In some areas, like counter-terrorism, certain states took the lead. In other areas, like environmental law, a different set of actors pushed the agenda.

the enhancement of governmental power as a threat to individuals). Their efforts, separately and together, established the new paradigm that is the regulatory turn.

The regulatory turn of turn-of-the-century international law manifested itself in three ways: the establishment of direct international duties and their direct enforcement; the expansion of mediated law's coverage and the increasing specificity in which that law was outlined; and the extension and the particularizing of facilitative law and processes. These developments and the forces behind them are elaborated here; their effects are described subsequently.

#### A. *Unmediated Law and Its Enforcement*

Nothing distinguishes the regulatory turn more than the establishment of direct international duties on individuals and their direct enforcement by international institutions. Until the early 1990s, with the quite limited exceptions of genocide and apartheid, international law did not directly regulate individuals. That was left to states through the rubric of mediated and facilitative law. No more. Now, in key areas, international agreements set out individual obligations, and international organizations or their proxies apply the law directly upon individuals. This has occurred in several different ways.

The hallmark of this new unmediated law was the creation (and re-creation) of international criminal law and institutions. The formation of the two ad hoc U.N. tribunals—the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)—in 1993 and 1994, the permanent International Criminal Court (ICC) in 1998, and the several mixed tribunals (the tribunals for East Timor, Sierra Leone, Cambodia, and Lebanon) established direct international enforcement of individual duties for the first time. Particularly notable was the establishment of the ICC—the first permanent international organization devoted to the enforcement of direct international obligations upon individuals. While these institutions, including the ICC, are not entirely self-reliant—they depend in a variety of important ways upon states for their success, having limited capabilities to act on their own<sup>106</sup>—their independent existence and operation—in investigating, prosecuting, and convicting individuals without the consent or mediating actions of states—fundamentally distinguish the contemporary era from its predecessor.

But the recent innovations in international criminal law went beyond the establishment of these institutions themselves. The statutes of these tribunals internationalized (or “un-mediated”) duties—such as those in the 1949 Geneva Conventions—that had previously been mediated, elaborated on

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106. See, e.g., Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 *YALE J. INT'L L.* 111, 111–16 (2002).

these older duties, and articulated new ones.<sup>107</sup> Again, the Rome Statute of the International Criminal Court is instructive. The Statute, for the “first time in history,” “comprehensively codified” crimes against humanity, and the purview of these crimes was innovatively extended beyond the traditional realm of armed conflict.<sup>108</sup> The law of war crimes, too, was carefully articulated.<sup>109</sup> In so doing, the Statute’s drafters incorporated novel judicial decisions of the two ad hoc tribunals, such as that of the ICTY in *Tadić*, in which that tribunal extended war crimes to armed conflicts not of an international character.<sup>110</sup> Further, the Statute’s already relatively detailed provisions were subsequently elaborated even more in the Elements of Crimes adopted by the Statute’s Assembly of States Parties in 2002.<sup>111</sup> And these are just a few examples. To put it differently, these courts did not prosecute acts criminalized by states; by virtue of their statutes, they prosecuted acts criminalized by international law itself, and those crimes were more extensive and more detailed than ever before.

Though the most well-known, international criminal tribunals and international criminal law were not the only mechanisms set up at the international level that regulated individuals directly during this period; two other sets of developments also established direct international control. One of these was the proliferation of territorial administration by international organizations or their designees. While the governing of territories by international authorities has a long history, the number of such actions has increased significantly during the past two decades. From East Timor to Iraq to Kosovo and elsewhere, international authorities or their designees—the United Nations, NATO, the European Union, and the Coalition Provisional Authority, among others—have directly regulated individuals “independently of any other territorial sovereign.”<sup>112</sup>

107. This was true of most of the tribunals, but some mixed tribunals (for example, that for Sierra Leone) included domestic law crimes among those within the court’s jurisdiction and others (that for Lebanon) entirely limited jurisdiction to domestic crimes.

108. Claus Krc̄, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, in OXFORD COMPANION, *supra* note 41, at 143, 147.

109. See Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 (amended Jan. 16, 2002) [hereinafter Rome Statute].

110. See *id.* art. 8(2)(c); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). On the ways in which international tribunals revise the law of war, including in *Tadić*, see, e.g., Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

111. International Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3(part II-B) (Sept. 9, 2002). The Elements of Crimes was an innovation, as previously such elements were elaborated in judicial decisions, not negotiated texts.

112. CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND* 11 (2008). On the administration of territory under international law, see generally SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* (2004); RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* (2008); Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT’L L. 695, 695–97 (2005).

The Security Council employed another technique of direct effect—individual targeted sanctions. To enforce its efforts to maintain or restore international peace and security,<sup>113</sup> the Council has leveled sanctions against numerous terrorist groups and individuals, violators of embargoes, armed groups and militias and their members, and coup plotters, requiring states to take certain actions against those persons or non-state entities designated (such as asset freezes, travel bans, and arms embargos).<sup>114</sup> Like the international criminal tribunals, the Council acts as fact-finder and decision-maker regarding the liability of specific individuals for the violation of U.N.-established rules. Undoubtedly, the Council, which has no independent intelligence gathering capacity and lacks direct control over bank accounts, travel documents, and ports of trade, must still rely (also like the criminal tribunals) on states for the success of its measures. Nonetheless, the Council's use of these sanctions brings it into direct contact with individuals, evaluating and controlling their behavior and effectively levying penalties for wrongdoing.

These innovative mechanisms and rules have established direct (unmediated) individual regulation at the international level for the first time, so much so that it is now commonplace to call for the creation of international tribunals or for the imposition of individual targeted sanctions.<sup>115</sup> Certainly, even in the matters covered, the field of regulation is not complete and its substantive content is circumscribed. Certainly, too, international institutions still depend upon states, in a number of ways, for the successful accomplishment and implementation of their rules and decisions, even in these contexts. Yet, the areas covered are significant in their high-profile status, and the ramifications of the law and the decisions of these institutions are considerable and of great practical and symbolic effect.

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113. See U.N. Charter ch. VII.

114. See, e.g., S.C. Res. 1907, U.N. Doc. S/RES/1907 (Dec. 23, 2009) (Eritrea); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006) (as amended) (same for Iran); S.C. Res. 751, ¶¶ 1, 3, 7, 8, U.N. Doc. S/RES/751 (Apr. 24, 1992) (as amended by S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008)) (Somalia); S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (same for the Democratic People's Republic of Korea); S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005) (same for those suspected of involvement in the February 14, 2005 terrorist bombing in Beirut); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (same for Sudan); S.C. Res. 1572, ¶¶ 6–14, U.N. Doc. S/RES/1572 (Nov. 15, 2004) (same for Côte d'Ivoire); S.C. Res. 1533, U.N. Doc. S/RES/1533 (Mar. 12, 2004) (same for the Democratic Republic of the Congo); S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003) (replacing the committee established by S.C. Res. 1343, ¶¶ 2–11, U.N. Doc. S/RES/1343 (Mar. 7, 2001)) (committee overseeing sanctions measures concerning Liberia, including designating individuals and entities subject to an asset freeze and travel ban); S.C. Res. 1518, U.N. Doc. S/RES/1518 (Nov. 24, 2003) (committee established to update lists of individuals and entities subject to the asset freeze imposed by Resolution 1483, S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003)); S.C. Res. 1267, ¶¶ 1–4, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (Al-Qaida and Taliban Sanctions Committee); S.C. Res. 1132, ¶¶ 1, 2, 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (as amended by S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 5, 1998)) (Sierra Leone).

115. The most recent example is the Security Council's request of the U.N. Secretary-General to present a report "on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy . . . including . . . a regional tribunal or an international tribunal . . ." S.C. Res. 1918, ¶ 4, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

### B. *Mediated Law*

The establishment of direct duties and their direct enforcement is a key transformation in contemporary international law—but the regulatory turn is more than that. It is also characterized by expansions in the scope of mediated law and changes in the ways in which that law is specified. The quintessential mechanism for deferring to national governments in the articulation and application of international law, mediated law has become, in short, less mediated and less deferential. Because it respects the importance (and retains the semblance) of state autonomy, mediated law remains the preferred mechanism, but its dissimilarity from unmediated law has diminished. During the past two decades, this evolution in the content and work of mediated law has been manifested across a wide substantive spectrum of law (from human rights to banking) and has been codified through a range of formal and informal lawmaking techniques (from treaty-making to innovative interpretations of existing law to nonbinding resolutions and agreements). Not surprisingly, then, mediated law is marked by considerable variation; still, the overall trend is evident.

Treaty law constitutes a significant component of these developments. New or updated conventional regimes have been instituted in the areas of arms control,<sup>116</sup> children's rights,<sup>117</sup> corruption,<sup>118</sup> cybercrime,<sup>119</sup> drugs,<sup>120</sup> enforced disappearances,<sup>121</sup> environmental law,<sup>122</sup> intellectual property,<sup>123</sup>

116. See Convention on Cluster Munitions art. 9, May 30, 2008, CCM/77, 48 I.L.M. 357; Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction art. 9, Sept. 18, 1997, 2056 U.N.T.S. 211; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effect art. 14, May 3, 1996, Doc. CCW/CONF.I/16/Annex; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 7(1)(a), Jan. 13, 1993, 1974 U.N.T.S. 45. On the Chemical Weapons Convention, see TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS WITH SPECIAL REFERENCE TO THE CHEMICAL WEAPONS CONVENTION (Rodrigo Yepes-Enríquez & Lisa Tabassi eds., 2002).

117. See Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Oct. 25, 2007, C.E.T.S. No. 201; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 4(2), May 25, 2000, 39 I.L.M. 1286; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art.3, May 25, 2000, 39 I.L.M. 1290.

118. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1; U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC]; Inter-American Convention Against Corruption art. VIII, Mar. 29, 1996, OEA/Ser.K/XXXIV.1, 35 I.L.M. 724; Criminal Law Convention on Corruption art. 18, Jan. 27, 1999, 38 I.L.M. 505.

119. See Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, E.T.S. No. 189; Convention on Cybercrime, Nov. 23, 2001, 2296 U.N.T.S. 167.

120. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, 1582 U.N.T.S. 164 [hereinafter 1988 Convention].

121. See International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, A/RES/61/177, U.N. Doc. A/RES/61/177; Inter-American Convention on the Forced Disappearance of Persons art. 2, June 9, 1994, 33 I.L.M. 1529.

the law of the sea,<sup>124</sup> organized crime,<sup>125</sup> terrorism,<sup>126</sup> trafficking in persons,<sup>127</sup> and violence against women,<sup>128</sup> among others.<sup>129</sup> Unlike previous practice, seemingly now the default position in international negotiations—such as those pending in the areas of anti-counterfeiting<sup>130</sup> and the illicit

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122. *See, e.g.*, Convention on the Protection of the Environment Through Criminal Law arts. 2–3, Nov. 4, 1998, C.E.T.S. No. 172 (not in force); Convention on Biological Diversity arts. 8, 11, June 5, 1992, 31 I.L.M. 818; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste within Africa art. 9(2), Jan. 29, 1991, 2101 U.N.T.S. 177; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal arts. 4(3), 9(5), Mar. 22, 1989, 1673 U.N.T.S. 57; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

123. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 300.

124. *See* International Maritime Organization, Protocol for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Oct. 14, 2005 [hereinafter SUA Protocol I]; International Maritime Organization, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Oct. 14, 2005; International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; International Maritime Organization, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 201.

125. *See* Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components, and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208; United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter Transnational Organized Crime Convention]; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 480 [hereinafter Smuggling Protocol]; Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 14, 1997, 2029 U.N.T.S. 55.

126. *See, e.g.*, International Convention for the Suppression of Acts of Nuclear Terrorism art. 2, Apr. 13, 2005, 2445 U.N.T.S. 89; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 [hereinafter Terrorist Financing Convention]; OAU Convention on the Prevention and Combating of Terrorism, June 14, 1999; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256 [hereinafter Terrorist Bombings Convention].

127. *See* Council of Europe Convention on Action Against Trafficking in Human Beings art. 19, May 16, 2005, C.E.T.S. No. 197; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

128. *See* Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 7(c), June 9, 1994.

129. *See* Convention on the Safety of United Nations and Associated Personnel art. 9, Dec. 9, 1994, 2051 U.N.T.S. 363.

130. The latest consolidated text of the Anti-Counterfeiting Trade Agreement includes a section on “criminal enforcement” that would require parties to “provide for criminal procedures and penalties” for a variety of offenses, including “willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.” Anti-Counterfeiting Trade Agreement, Consolidated Text art. 2.14, Oct. 2, 2010. For a discussion of minimum standards of criminal enforcement in international intellectual property law, see Henning Grosse Ruse-Khan, *From TRIPs to ACTA: Towards a New “Gold Standard” in Criminal IP Enforcement?*, in CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY: A BLESSING OR A CURSE? (Christophe Geiger ed., forthcoming 2011).



tobacco products trade<sup>131</sup> and those just concluded in international civil aviation<sup>132</sup>—is the regulation of individual behavior.

But these developments do not simply reflect a growth in the subject matter of mediated law or the shifting of assumptions, though these would be significant. The formulation of the law itself is often different from that of the previous era. While still mediated, the obligations of states established by many of these treaties are much more detailed—the individual duties are more elaborately stated, their elements are more specific, the forms of liability (aiding and abetting, attempt, conspiracy, and so on) are broader,<sup>133</sup> the sanctions to be imposed by states are more precise and harsher, and the obligation of states to elaborate and apply the law clearer. To be sure, the state still acts as an intermediary, so that some action must be taken at the national (and, depending on the system, the sub-national) level before the duties contemplated by these treaties and their enforcement are activated, yet the discretion traditionally allowed to states by international law in the elaboration and application of international directives has narrowed substantially in many respects from what had been the norm. International law, as one commentator has noted, is “reaching ever further into the domestic . . . process to control how it operates.”<sup>134</sup>

The 2003 U.N. Convention Against Corruption demonstrates these trends. The Convention’s criminalization provisions read like domestic statutes,<sup>135</sup> and its stipulations on prosecution, adjudication, and sanctions get into the weeds, specifying appropriate punishments and articulating intricate rules on freezing, seizure, and confiscation.<sup>136</sup> The Convention also goes beyond criminal enforcement, concerning itself both with preventive measures and asset recovery.<sup>137</sup>

While treaty law has developed in these innovative ways, the phenomenon of unmediated law has also forced the creation of new or updated do-

131. The current text of the Draft Protocol to Eliminate Illicit Trade in Tobacco Products details numerous acts that parties are to declare “unlawful” conduct and/or criminal offenses, which are to be subject to “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.” WHO Framework Convention on Tobacco Control, Conference of the Parties, Draft Protocol to Eliminate Illicit Trade in Tobacco Products arts. 12, 14, Mar. 21, 2010, FCTC/COP/INB-IT/4/7, available at [http://apps.who.int/gb/fctc/PDF/it4/FCTC\\_COP\\_INB-IT4\\_7-en.pdf](http://apps.who.int/gb/fctc/PDF/it4/FCTC_COP_INB-IT4_7-en.pdf). For a discussion of the Protocol on the Illicit Trade in Tobacco Products currently under negotiation, see Neil Boister, *Recent Progress in the Development of a Protocol on the Illicit Trade in Tobacco Products*, 5 *ASIAN J. WTO & INT’L HEALTH L. & POLY* 53 (2010).

132. See *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, Sept. 10, 2010; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, Sept. 10, 2010.

133. Compare, e.g., *Terrorist Bombings Convention*, *supra* note 126, art. 2(3), and *SUA Protocol I*, *supra* note 124, art. 3, with *Hague Convention*, *supra* note 76, art. 1, and *Montreal Convention*, *supra* note 76, art. 2(2).

134. Boister, *supra* note 73, at 213.

135. See, e.g., *UNCAC*, *supra* note 118, art. 15 (defining bribery of national public officials). This is no coincidence, as oftentimes domestic statutes were used as models.

136. See *id.* arts. 29–31.

137. See *id.* chs. II, V.

mestic law by states. Hence, some unmediated law takes on a secondary function as mediated law. This has occurred through two processes. First, states have enacted domestic laws when they are obligated to enforce the decisions of international institutions. Thus, many member states of the United Nations have enacted (or revised) laws to enforce the Security Council's individual targeted sanctions regime.<sup>138</sup> Second, in situations in which international jurisdiction depends upon the non-exercise of domestic jurisdiction, states have adopted laws in an attempt to preclude international action. For example, one consequence of the ICC's complementarity regime—which deems a case before the Court inadmissible unless a “State is unwilling or unable genuinely”<sup>139</sup> to, for example, carry out an investigation or prosecution of a crime within the Court's jurisdiction—has been the establishment of pressure on states to incorporate those crimes into their domestic legal codes.<sup>140</sup> States, wishing to retain their jurisdiction and exclude cases from the Court's purview, have enacted legislation to ensure that their own authorities have the capabilities and capacities to prosecute individuals for Rome Statute crimes, in all their considerable detail.<sup>141</sup> This, indeed, was the intention of the States Parties to the Statute, which stated that it is the “primary responsibility of states to investigate and prosecute the most serious crimes of international concern.”<sup>142</sup> One of the externalities of the innovations in unmediated law, therefore, has been the creation and greater enforcement of national law.<sup>143</sup>

Mediated law has also expanded through the interpretation of human rights treaties. Human rights bodies—such as the Human Rights Committee, the Inter-American Court of Human Rights, and the European Court of Human Rights—have encouraged and endorsed the regulatory authorities of states through the promotion of a state's duty to protect individuals in their

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138. See, e.g., *Migration (United Nations Security Council Resolutions) Regulations 2007* (Cth) (Austl.).

139. Rome Statute, *supra* note 109, art. 17.

140. See JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 309-41 (2008); see also The Board of Editors, *The Rome Statute: A Tentative Assessment*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1901, 1906 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (noting that the “principle of complementarity also has a role to play in ensuring that national jurisdictions implement the necessary legislation to enable them to play a more active role in the prosecution of international crimes” and may “provide[ ] an impetus to national prosecutions”).

141. See *Full Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)*, Coalition for the International Criminal Court, (April 2009), available at [http://www.iccnw.org/documents/Global\\_RatificationImplementation\\_chartApr2010\\_\(3\).pdf](http://www.iccnw.org/documents/Global_RatificationImplementation_chartApr2010_(3).pdf).

142. Assembly of States Parties to the Rome Statute Res. RC/Res.1 (June 8, 2010); cf. Prosecutor v. Katanga, ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case 33 (2009) (“The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes.” (citing Rome Statute, *supra* note 109, pmbl. ¶ 6.)).

143. Some have argued that the complementarity regime does not put enough pressure on states to enforce the substantive provisions of the Rome Statute. See Payam Akhavan, *Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes*, 8 J. INT'L CRIM. JUST. 1245 (2010).

enjoyment of their human rights and to remedy wrongs.<sup>144</sup> The trend began in the early 1980s. Though the “possibility of requiring States Parties to punish violations was never seriously considered by the drafters of the [International Covenant on Civil and Political Rights],”<sup>145</sup> the Human Rights Committee in a 1982 General Comment interpreted the Covenant to require that complaints about ill-treatment “be investigated effectively by competent authorities” and “[t]hose found guilty . . . be held responsible.”<sup>146</sup> While the Committee did not explicitly indicate that the responsibility entailed criminal penalties,<sup>147</sup> subsequent decisions in cases concerning torture, extra-legal executions, and disappearances incorporated this requirement.<sup>148</sup> The Inter-American Court of Human Rights, in the *Velásquez Rodríguez* and *Godínez Cruz* line of cases, also placed upon governments the “duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”<sup>149</sup>

Following the traditional pattern, the cases of the 1980s typically focused on governmental abuses; those in subsequent decades, though, adapted the doctrine to private wrongdoing.<sup>150</sup> In the European Court of Human Rights (ECHR), for example, a series of cases, beginning with *Osman v. United Kingdom*, have placed burdens on states to take action to protect individuals from

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144. On how to think about the responsibilities of the state in this regard, see Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341 (2010).

145. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2569 (1991); cf. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 77 (Louis Henkin ed., 1981) (acknowledging that the “the *travaux préparatoires* are not explicit”).

146. Rep. of the Human Rights Comm., General Comment No. 7, U.N. Doc. A/37/40; GAOR, 37th Sess., ¶ 1, Supp. No. 40 (1982); see also Human Rights Committee, General Comment No. 20, ¶¶ 7, 15, 44th Sess., (1992) (noting the obligation of states not only to punish but to prevent and indicating amnesties are “generally incompatible with the duty of States to investigate” torture).

147. See Orentlicher, *supra* note 145, at 2573.

148. See *id.* at 2573-75; see also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 66-67 (2d rev. ed. 2005).

149. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (1988); see also *Godínez Cruz v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 175 (1989) (holding that “States must prevent, investigate and punish any violation of the rights recognized by the Convention”). On the practice in the Inter-American Court, see, e.g., Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195 (2007).

150. An exception is *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A.) at ¶ 40 (1985) (finding a breach of article 8 of the European Convention for the absence of a criminal law remedy for the rape of a handicapped girl). For a discussion of positive obligations generally and some of the cases and issues discussed in this paragraph, see A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004).

the possible criminal acts of other individuals.<sup>151</sup> In *Opuz v. Turkey*, the Court found, in a domestic violence case, that the respondent had breached its obligations regarding the right to life and against torture and inhuman or degrading treatment by failing “to prevent the recurrence of violent attacks against the applicant’s physical integrity” through criminal investigations and prosecution.<sup>152</sup> And in *Siliadin v. France*, the Court “consider[ed] that, in accordance with contemporary norms and trends in this field, the member States’ positive obligations [pertaining to the right not to be held in slavery or servitude or be required to perform forced or compulsory labour] must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such situation.”<sup>153</sup>

This move to impose duties on the state to control private persons through preventive or remedial means in the name of human rights is particularly evident in the Human Rights Committee’s 2004 interpretation of the ICCPR. In its General Comment 31, the Committee found that: “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities that impair rights protected by the Covenant.”<sup>154</sup>

Another component of the new mediated law has been the adoption by international organizations of resolutions that require or encourage states to regulate individual acts. In 2001, the Security Council decided that States

151. *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124. In cases decided slightly earlier, the ECHR also found a duty to investigate and punish in the context of acts of state officials. *See, e.g., Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2272; *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. 1988.

152. *Opuz v. Turkey*, Eur. Ct. H.R. (§ 3) at ¶162-170 (2009); *see also A. v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692, ¶ 22 (1998) (finding that “[c]hildren and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity”); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, Jan. 20–30 1992, 11th Sess., Supp. No. 38, ¶ 24(r)(i), U.N. Doc. A/47/38 (Jan. 30, 1992) (“Measures that are necessary to overcome family violence should include: (i) Criminal penalties where necessary and civil remedies in cases of domestic violence”); Comm. on the Elimination of Discrimination Against Women Communication No. 6/2005, July 22–Aug. 10, 2007, 39th Sess., ¶ 12.1.5 U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007) (concluding, in a domestic violence case, that the state was under an obligation to protect the victim by arresting the perpetrator); Comm. on the Elimination of Discrimination Against Women, Communication No. 5/2005, July 23–Aug. 10, 2007, 39th Sess., ¶ 12.1.5 U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007). For a review of recent developments, *see* Andrew Byrnes & Eleanor Bath, *Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments*, 8 HUMAN RIGHTS L. REV. 517 (2008).

153. *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333, ¶ 112 (2005).

154. Report of the Human Rights Comm., General Comment No. 31, March 15–Apr. 2, 2004, ¶ 8, U.N. Doc. A/59/40; GAOR, 80th Sess., Supp. No. 40 (Mar. 29, 2004). Other human rights treaty bodies have taken the same approach. For example, the Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child as prohibiting corporal punishment. As a result, according to the Committee, states should criminalize such acts. *See* Comm. on the Rights of the Child, General Comment No. 8, 42d Sess., May 15–June 2, 2006, ¶ 34, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2006).

must criminalize terrorist financing.<sup>155</sup> In 2004, it decided that “all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery,” including the “establish[ment] and enforc[ement] [of] appropriate criminal or civil penalties for violations” of export control laws.<sup>156</sup> And in 2005, the Council called upon “all States to adopt such measures as may be necessary and appropriate . . . [to] prohibit by law incitement to commit a terrorist act or acts,” “prevent such conduct,” and “deny safe haven to any persons” guilty of such conduct.<sup>157</sup> Recently, the Council called on “all States . . . to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment if convicted, pirates apprehended off the coast of Somalia.”<sup>158</sup> The General Assembly has also acted, for example, by indicating that states have a “duty to investigate . . . and to submit to prosecution” persons alleged to have committed “gross violations of international human rights law and serious violations of international humanitarian law.”<sup>159</sup> It has also urged states to investigate, prosecute, and punish other crimes, such as those committed by U.N. officials and experts on missions.<sup>160</sup> Other bodies, such as the Human Rights Commission and its successor, the Human Rights Council, have similarly called on states to criminalize and prosecute individual acts.<sup>161</sup>

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155. S.C. Res. 1373, ¶¶ 1(b), 2(e), U.N. Doc. S/RES/1373 (Sep. 28, 2001). For a discussion, see Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. & POL'Y 437 (2010).

156. S.C. Res. 1540, ¶ 3(d), U.N. Doc. S/RES/1540 (Apr. 24, 2004).

157. S.C. Res. 1624, ¶ 1, U.N. Doc. S/RES/1624 (Sep. 14, 2005).

158. S.C. Res. 1918, ¶ 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

159. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex, Basic Principle 4, U.N. Doc. A/RES/60/147 (Mar. 21, 2005).

160. See Criminal Accountability of United Nations Officials and Experts on Missions, G.A. Res. 64/110, ¶ 2, U.N. Doc. A/RES/64/110 (Jan. 15, 2009) (“*urg(ing)* States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice” and strongly encouraging the establishment of domestic jurisdiction and the cooperation of states with each other and the United Nations in investigations and prosecutions); see also, e.g., Trafficking in Women and Children, G.A. Res. 61/144, ¶ 2, U.N. Doc. A/RES/61/144 (Feb. 1, 2007) (“*call(ing)* upon Governments to take appropriate measures . . . to eliminate . . . trafficking, including by strengthening existing legislation . . . through both criminal and civil measures”); Intensification of Efforts to Eliminate All Forms of Violence Against Women, G.A. Res. 61/143, ¶ 8(i), U.N. Doc. A/RES/61/143 (Jan. 30, 2007) (“*Urg(ing)* States to . . . to end impunity for violence against women, by prosecuting and punishing all perpetrators . . .”).

161. See, e.g., Rights of the Child: The Fight against Sexual Violence against Children, Human Rights Council Res. 13/20, ¶ 2, U.N. Doc. A/HRC/RES/13/20 (Apr. 15, 2010) (urging states to criminalize, investigate, and prosecute sexual violence and abuse against children); Accelerating Efforts to Eliminate All Forms of Violence against Women: Ensuring Due Diligence in Prevention, Human Rights Council Res. 14/12, ¶¶ 2, 15, U.N. Doc. A/HRC/RES/14/12 (June 23, 2010) (calling on states to prosecute “any form of violence” against women and girls and “all forms of rape”); Abduction of Children in Africa, Commission on Human Rights Res. 2004/47, 56th meeting, ¶ 5(c) (Apr. 20, 2004) (calling upon African states to criminalize the abduction and recruitment of children by armed forces and armed groups); Trafficking in Women and Girls, Commission on Human Rights Res. 2004/45, ¶ 10 (Apr. 19, 2004) (calling upon governments to “criminalize trafficking in persons, especially women and children, in all its forms and to condemn and penalize traffickers and intermediaries”).

Informal or nonbinding agreements constitute the final component of contemporary mediated law. For example, the Basel Committee on Banking Supervision, which is composed of senior representatives of bank supervisory authorities and central banks from twenty-seven countries, has issued a series of documents, most recently in December 2010, that set standards and disseminate principles for, among other things, minimum capital requirements and liquidity for internationally active banks.<sup>162</sup> The standards, which are quite detailed in many respects, are “expected” to be implemented by states, even though they are, and were intended to be, nonbinding. Though the mediated law here, at least on the surface, is quite soft, it is nonetheless substantially effective despite its intrusion into traditionally domestic authorities.

Unlike the mediated law of the Cold War period, these recent developments are more directive. They not only require states to take certain acts in relation to their subjects—they characterize and specify those acts more than before, and, in some circumstances, establish consequences (for example, loss of jurisdictional primacy in the case of not investigating or prosecuting the Rome Statute crimes and financial penalties for breaches of the European Convention on Human Rights) for states that fail to implement the law as directed. The law is still mediated, but in many (though not all) areas the traditional discretion afforded to states has diminished. What’s more, the extent of the law’s domain has expanded. Areas, such as banking, which have traditionally been off-limits, are now within international law’s purview.

### C. *Facilitative Law and Processes*

With these innovations in mediated law, there has also been an extension and specification of facilitative law and processes—the means by which the regulatory authorities of states and international institutions are supported through cooperation and coordination regimes.<sup>163</sup> This has transpired in a number of different ways: through more detailed and comprehensive legal frameworks concerning international extradition and mutual legal assistance in criminal matters, particularly in the areas of corruption, organized crime, and terrorism;<sup>164</sup> through the curtailment of individual immunities in crim-

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162. See, e.g., Basel Comm. on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (Dec. 2010), available at <http://www.bis.org/publ/bcbs189.pdf>; see also Brooke Masters, *Global Accords Target Credit Bubbles*, FIN. TIMES, Jan. 10, 2011.

163. See generally SLAUGHTER, *supra* note 28, 51-61.

164. This has occurred in at least two ways. The expansion in the substantive coverage of the conventions over earlier texts has broadened the scope of cooperation. So too do the more detailed requirements for extradition and mutual legal assistance. For these points in the context of the Terrorist Bombings Convention, see Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT’L L. 774, 777 (1998).

inal cases;<sup>165</sup> through the facilitation of law enforcement cooperation (including information sharing) by international institutions and intergovernmental networks;<sup>166</sup> and through the provision of assistance, both technical and financial, by international and national institutions to states in order to improve domestic enforcement capabilities in a range of areas.<sup>167</sup>

But the most famous example of the extension of facilitative law pertains to universal jurisdiction. With the support of non-governmental organizations,<sup>168</sup> during the past two decades a number of states extended their national criminal jurisdiction over crimes committed abroad that had no connection to the prosecuting state.<sup>169</sup> Unlike the earlier extensions of jurisdiction that were required by treaty “extradite or prosecute” provisions,<sup>170</sup>

165. On immunities, see Statute of the Int’l Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, annex art. 7(2), U.N. Doc. S/RES/827 (May 25, 1993); Statute of the Int’l Trib. for Rwanda, S.C. Res. 955, annex art. 6(2), U.N. Doc. S/RES/955 (Nov. 6, 1994); Rome Statute, *supra* note 109, art. 27(2); R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte Pinochet Ugarte*, 2 W.L.R. 827 (H.L. 1999); Prosecutor v. Taylor, Case No. SCSL-2002-01-I, Decision on Immunity from Jurisdiction, Appeals Chamber, (Special Court for Sierra Leone May 5, 2004). *But see* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14). *See generally* ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 105 122-38 (4th ed. 2010).

166. These processes have been marked by the creation or revitalization of a number of international organizations, formal and informal (such as Interpol, Europol, the Financial Action Task Force (FATF)) and the establishment of inter-state police and military networks (such as the Proliferation Security Initiative (PSI)). On the PSI, see Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526 (2004). On networks in international law enforcement and international criminal law, see ANDREAS & NADELMANN, *supra* note 25; Turner, *supra* note 25.

167. This is evident in a variety of program offices, governmental and nongovernmental, both at the national and international (particularly, the U.N. Office on Drugs and Crime), that seek to promote national implementation of minimum law enforcement standards through the establishment of model laws, programs, and other means of cooperation. On the U.S. efforts, see, e.g., Allegra M. McLeod, *Exporting U.S. Criminal Justice*, unpublished manuscript, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1546631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546631).

168. *See, e.g.*, Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150; Comm. on Int’l Human Rights Law & Practice, Int’l L. Ass’n, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (July 25–29, 2000); Lawyers Comm. for Human Rights, *Universal Jurisdiction: Meeting the Challenge Through NGO Cooperation* (Apr. 3–5, 2002), available at [http://www.humanrightsfirst.org/international\\_justice/w\\_context/meeting\\_challenge310502.pdf](http://www.humanrightsfirst.org/international_justice/w_context/meeting_challenge310502.pdf); Int’l Fed. Hum. Rts., *Position Paper to the United Nations General Assembly at Its 64th Session*, at 10–12 (Oct. 2009), available at [http://www.fidh.org/IMG/pdf/FIDH\\_Position\\_Paper\\_to\\_the\\_GA\\_-\\_64.pdf](http://www.fidh.org/IMG/pdf/FIDH_Position_Paper_to_the_GA_-_64.pdf).

169. *See generally* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003); Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the “Torture Memos” Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT’L L. 405 (2009); Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927 (2009); Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735 (2004); Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW (William A. Schabas & Nadia Bernaz eds., 2010).

170. *See supra* note 80 and accompanying text; *see also, e.g.*, Convention Against Torture, *supra* note 73, art. 5(2) (requiring a state party to “establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him” to a state party that has jurisdiction based upon the nationality of the alleged offender or the victim or based upon territoriality); Arrest Warrant (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 36–40 (Separate Opinion of President Guillaume); *id.* at 74–75 (Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).

or were designed (as in the case of piracy) to cover cases in which there was an absence of state jurisdiction,<sup>171</sup> these moves were voluntary, they did not require the presence of the accused in the jurisdiction for a case to be brought, they did not defer to other states that had jurisdiction under traditional rules, and they did not require any connection between the crime and the investigating state. This new universal jurisdiction of the 1990s,<sup>172</sup> as the 2001 Princeton Project on Principles of Universal Jurisdiction defined it, constituted “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”<sup>173</sup> Laws and judicial decisions in Belgium (1993), Germany (2002), and Spain (particularly in the late 1990s and 2000s), among others, and investigations and prosecutions of numerous high-profile politicians, including Hissène Habré, Tzipi Livni, Yerodia Ndombasi, and Donald Rumsfeld, pushed and sought to establish as custom the concept of universal jurisdiction as never before.<sup>174</sup>

These efforts, though, have now largely been repulsed, either by judicial decision or legislative act, as a result of considerable pressure brought by other states. In the 2002 *Yerodia* case, for example, the International Court of Justice (ICJ), acting on the application of the Democratic Republic of the Congo, circumscribed the possibilities for universal jurisdiction by upholding the functional immunity of sitting foreign ministers under international law.<sup>175</sup> A year later, hounded by diplomatic pressure, Belgium repealed its

171. See HUGO GROTIUS, THE FREE SEA 128 (Richard Hakluyt trans., David Armitage ed., 2004) (1609) (with William Welwod’s Critique and Grotius’s Reply) (“All peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations. For even supposing a land that has been occupied by no people, there will be the same right against brigands lurking there.”). But see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190 (2004) (disputing the assertion that universal jurisdiction “existed merely because the traditional jurisdictional categories did not cover piracy”).

172. The term is also used by Kontorovich, *supra* note 171, at 184. On the novelty of the new universal jurisdiction, see Arrest Warrant (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 40 (Separate Opinion of President Guillaume).

173. *The Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 21 (Stephen Macedo ed., 2004).

174. Expert groups advocated the extension of national jurisdiction in similar ways. In 2006, the Committee against Torture interpreted the extradite or prosecute provisions of the Convention against Torture so as to require states to prosecute individuals found in their territory regardless of any connection between the state and the crime allegedly committed and independent of any request for extradition. See Communication No. 181/2001: Senegal, para. 9.7, U.N. Doc. CAT/C/36/D/181/2001 (May 19, 2006). A decade earlier, the International Law Commission, in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, also appears to have endorsed such an obligation to prosecute. See Article 9. *Obligation to Extradite or Prosecute*, [1996] 2 Y.B. Int’l L. Comm’n 30–32, U.N. Doc. A/CN.4/SER.A/1996/Add.1.

175. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14). One pending case at the ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), will further test the limits of state extraterritorial assertions of criminal jurisdiction. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Summary of the Order, 2009 I.C.J. 3 (May 28), available at <http://www.icj-cij.org/docket/files/144/15146.pdf>.



universal jurisdiction law,<sup>176</sup> and in 2009 so did Spain.<sup>177</sup> The United Kingdom is considering limitations on the application of its laws as well.<sup>178</sup> As a means of diffusing the issue, the topic has been raised in multilateral fora—in discussions between the African Union and the European Union<sup>179</sup> and in the U.N. General Assembly, where it is currently being considered by the Sixth Committee.<sup>180</sup>

While universal jurisdiction, at least for the moment, appears to have run its course, the movement itself demonstrates the ways in which facilitative law and processes have been pushed ever farther to enhance the regulatory authorities of government.

#### D. *The Regulatory Turn's Dual Tracks*

In the institution of direct individual duties and the direct enforcement of those duties, in the growth and specificity of mediated law and the decrease in state discretion in its implementation, and in the expansion of facilitative law and processes, international law during the past two decades has assumed a different posture vis-à-vis the individual from the one it had held previously. This trend, this regulatory turn, while uniform in its overall trajectory, was (and continues to be) propelled by two very different forces, one from the human rights tradition and one from the law enforcement tradition, each with quite different and, at times, conflicting interests and motivations—forces that previously had acted to constrain, not enhance, international law's purview.

Ironically, the regulatory turn stems, in significant part, from the human rights tradition. With the reduction in the fear of governmental power, the limits on the ability to enforce human rights through state action dissipated significantly. The move to create international criminal tribunals (especially the International Criminal Court); the specification of international crimes (such as war crimes and crimes against humanity); the increasing demands of human rights treaty bodies for states to take positive action, including coercive action, to apply and enforce the law against individuals in their private capacity; the elaboration and criminalization of violations of human rights norms (such as human trafficking); and the attempted innovations in the concept of universal jurisdiction represent, to many, a natural extension of

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176. See Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003); Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT'L CRIM. JUST. 679 (2003).

177. See generally Ignacio de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 INT'L CRIM. L. REV. 777 (2009).

178. See Afua Hirsch, *Ministers Move to Change Universal Jurisdiction Law*, GUARDIAN, May 31, 2010, at 12.

179. AU-EU Technical Ad Hoc Expert Grp. on the Principle of Universal Jurisdiction Rep. 8672/1/09 REV1 (Apr. 16, 2009); Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction of 1 July 2008, Assembly/AU/Dec.199 (XI).

180. See *The Scope and Application of the Principle of Universal Jurisdiction*, G.A. Res. 64/117, U.N. Doc. A/RES/64/117 (2009).

the human rights movement.<sup>181</sup> To its proponents, the merger of human rights and individual regulation has substantially increased the chances of human rights implementation.<sup>182</sup> “[T]he human rights system,” as one advocate has noted, “has now been given new and better tools with which to work.”<sup>183</sup> In important respects, then, the regulatory turn is the flip side of the human rights turn. Or one might say, even more precisely, that the regulatory turn, to a significant extent, represents a second human rights turn. Whereas the first turn focused on governmental wrongdoing, the second turn focuses equally on violations by private individuals and other non-state actors. And whereas the first turn eschewed the endorsement of governmental regulation of individuals, the second turn endorses, “in a liberal garb,” such positive exercises of state power.<sup>184</sup>

Paired with this carceral humanitarianism<sup>185</sup> is a second strain of the regulatory turn that arises out of the law enforcement tradition. Based upon their own interests, and responding to their own constituencies, individual states and groups of states for years have pushed to use international law as a mechanism to reduce and eliminate perceived transnational scourges. Though successful in various ways, their efforts always pushed up against the privileged position of states as controllers of their own populations. The undermining of the idea of the state and the increased dangerousness of non-governmental groups to states and state elites opened up the possibility of asserting more direct control over private actors through the technique of international law. States certainly still jealously guard their sovereignty, but they increasingly appreciate that state sovereignty is insufficient to deal with many current threats. States cannot go it alone—and they cannot let (or trust) other states to go it alone. As a result, they are willing to cede more authority to international law and international bodies and to allow international law to influence how they regulate their own populations. In the numerous new mediated and facilitative law regimes, the specificity with which they are articulated, and the proliferation of international institutions and networks for their application, these state-motivated processes have gone well beyond the standards set by their predecessors.

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181. See, e.g., Bassiouni, *supra* note 50, at 195 (claiming that the promotion of human rights takes place in stages, culminating in criminalization). Some have even called for the creation of a Universal Declaration of Human Responsibilities. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, TAKING DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL HUMAN RIGHTS LAW: A COMMENTARY 54 (1999) (noting the calls for “a new global agreement on individual duties” and arguing that such a document is unnecessary as human rights law already provides for individual responsibilities).

182. See, e.g., Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 792–93 (2009).

183. *Id.* at 847 (referring specifically to the Trafficking Protocol, *supra* note 127, and “related legal developments”).

184. Robinson, *supra* note 27, at 931.

185. This is an adaptation of the phrase “carceral feminism” coined by Elizabeth Bernstein in *The Sexual Politics of the “New Abolitionism”*, 18 DIFFERENCES 128, 143 (2007).

Given the forces behind the turn, its particular substantive character—its strong inclination to prohibitions and criminal punishments—is no mistake. States are still reluctant to cede control to outside authorities, so a high bar must be cleared to overcome such resistance and only matters of considerable seriousness meet that standard. For their part, human rights advocates reflexively wish to enforce those rights, which, among other things, entails punishing individuals for their violation, everything else being equal. The maintenance of minimum public order is the basic purpose of the international legal system; the regulatory turn is the contemporary manifestation of the longstanding effort to realize that goal.

The trend that is the regulatory turn, then, is complex, and its content an amalgamation of manifold decisions on a wide array subjects by diverse parties from multiple traditions and interests in numerous venues over many years. While we have focused on the overall trajectory, it would be a mistake to think that the particular choices that now constitute the regulatory turn—whether at the macro or micro level—were uncontroversial at the time of their adoption. Oftentimes, they were not. The regulatory turn's dual tracks sometimes run in parallel, but they sometimes are in conflict. When it comes to specific issues, there is nothing inevitable about the turn or its contents. While the turn is especially strong in some areas, it is less so in others. Even so, the direction is unmistakable.

### III. GOVERNING THROUGH REGULATION

Hardly a random occurrence, the developments that constitute the regulatory turn reflect the calculated responses of international decision-makers to the changed dynamics and novel problems of the past two decades. States are no longer imagined as they once were; fears of non-state entities have grown; the paradigm has shifted, and so new ways of thinking about international regulation have become not only possible but also, to a good many decision-makers, desirable, and even necessary. As a result of the turn, international law and international organizations now act upon individuals more directly and more coercively than they had previously. And governments and international organizations cooperate and collaborate in international regulation more actively and more aggressively than they had before. Though contested and highly fought over in many cases, in taking all these steps, international law and international organizations, at the behest of states and other participants, were responding to perceived problems, as any system must in order to remain relevant.

But what does the regulatory turn mean beyond the achievement of certain policy outcomes, however important, that previously had been thought unnecessary or were found to be elusive? What is the greater significance of these trends? Here, we separate out the system effects of the regulatory turn—the ways in which the turn represents a reorganization of interna-

tional governance, a reframing of international problems and their attendant solutions, and a reinforcement of government power vis-à-vis the individual at the national and international levels. While the regulatory turn is composed of particular decisions that are important in and of themselves, the turn is also greater and more significant than the sum of its parts.

The constitutive consequences of governing through regulation have not gone entirely unnoticed and have not proceeded without some resistance. Any reorganization of decision-making entails a redistribution of authorities (with winners and losers), and any revolution in policy framework entails a shift in priorities (with real-life repercussions). When such changes involve regulatory measures pertaining to individuals, the stakes and sensitivities are that much greater. Though there has been no backlash, in the strong sense of that word, against the regulatory turn to date, there are certainly strands of dissent in particular contexts that reflect the historical tensions between the regulatory turn's two tracks as well as anxieties about what the regulatory turn has wrought.

Here, we first track the system effects of the regulatory turn, the ways in which the turn reorganizes governance, reframes problems and solutions, and reinforces governmental authority. We then turn to the moves to counter and tailor these effects.

#### A. *Reorganizing Governance*

One of the key characteristics of the regulatory turn is the transfer of considerable decision-making regarding individual duties and their enforcement from states to international fora and transnational networks. This claim of direct authority over the individual enhances international control over social processes, and it does so at the expense of national (and sub-national) governments, which, under the rubric of sovereignty, have historically claimed priority of allegiance and regulation over persons within their jurisdictions.<sup>186</sup> As Sheptycki noted some time ago, the "[m]onopoly of legal discourses and the apparatus of social control has been at the very heart of the institution of the nation-state."<sup>187</sup> Consequently, a shift to the international presumptively threatens national elites and the status and power they maintain through local governance structures.

Necessarily, this shift also attenuates the connection between the rulers and the ruled. Local control is more than simply a means of maintaining the rule of certain social and political groups. Democracy or not, continued close connections between those who govern and the governed increase the likelihood that policies will be enacted and implemented in accordance with current societal needs. The state only obtained and retained its default position

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186. See Reisman, *supra* note 95, at 414.

187. J.W.E. Sheptycki, *Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs*, 24 INT'L J. SOC. L. 61, 62 (1996).

by virtue of its historical ability—relative to its competitors—to provide returns on the expectations of its constituent communities, particularly as they relate to public order.<sup>188</sup> There is much at stake, therefore, in the move, however tentative, to the international. If the international system is to assume similar roles to that of the state, even if part, it will need to satisfy concomitant expectations, both substantive and procedural, in order to retain its power to command.

Yet, the regulatory turn is more complicated than the simple transfer of authority from the national to the international; the reorganization varies state by state and in some cases empowers not only international institutions but also states (or component parts of states) and non-state actors. In many powerful countries, depending on constitutional frameworks, the turn can give greater authority to executives (who are the state's representatives in international organizations and international negotiating fora and, at the same time, are typically international law's primary domestic implementers) while diminishing the roles of legislators and judges, whose capacities (law-making and adjudication) have been transferred, in part, to the international level.<sup>189</sup> In less powerful countries, all domestic authorities are deprived of a certain amount of rulemaking power because they generally have less clout in international negotiations, though executives are given greater clout in the implementation of the law. At the international level, the turn empowers legislative-like bodies, such as diplomatic conferences and assemblies of states parties, as well as the international secretariats and expert bodies, such as tribunals, that are tasked with interpreting, implementing, and promoting international decisions. Control of those institutions, therefore, has become quite important, as their decisions have become more consequential.

The assertion of international control also constitutes a form of social integration among international decision-makers, as the establishment of duties and the means for their implementation reflects an agreement on a set of common values.<sup>190</sup> Depending on the specific duties instituted and the correlative sanctions established for their violation, this can be a powerful signal regarding the nature and commitments of the international community as a community.

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188. Cf. Mariano-Florentino Cuéllar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 982 (2008) ("Concerns about criminal justice seem deeply rooted in what citizens of advanced industrialized states expect from their national governments.")

189. This general dynamic has been noted by others. See, e.g., Eyal Benvenisti & George W. Downs, *Toward Global Checks and Balances*, 20 CONST. POL. ECON. 366 (2009); Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, 41 N.Y.U. J. INT'L L. & POL. 931 (2009); Scheppele, *supra* note 36.

190. See W.M. Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENVER J. INT'L L. & POL'Y 29, 33 (1971).

### B. Reframing Problems and Solutions

In addition to reorganizing governance, thinking through the regulatory lens also reframes international problems and solutions. The turn is more than just one additional quiver in the international decision-making arsenal. It alters the dynamics of decision-making, the options available for solving problems, and the ways we view the world in which we live.

Most fundamentally, the regulatory turn alters and crowds out other forms of decision making. In part this is because of its familiarity from domestic law, where regulation of the individual is taken for granted. But the remarkable ease in which the regulatory turn has been assimilated at the international level goes beyond its commonness in domestic systems. Characterizing problems as susceptible to individual regulation avoids confrontation with systemic causes that are more difficult to solve globally. Consequently, regulation establishes a default hierarchy in which other, less controlling, options are effectively demoted or set aside. With the regulatory turn, the regulation of the individual becomes an easily adopted technique to solve problems that formerly depended upon other mechanisms for resolution. The result is the potential prioritization of some policies (such as retribution and the vindication of victims) over others (such as conflict resolution and amnesty), some rules (those for which there is a penal sanction) over others (for which such penalties do not apply), some forms of liability (individual and criminal) over others (civil, collective, and reciprocal), some forms of norm adherence (formal) over others (internalized), some institutions (courts) over others (political and investigatory bodies), and some doctrines (those supportive of prosecutions and convictions) over others (those protective of defendants).<sup>191</sup>

Governing through regulation also involves the reallocation of resources. The establishment of new institutions and the revitalization of older ones necessarily involve the commitment of capital, time, and wherewithal. As one study has shown, \$1.2 billion was spent on the ICTY alone during its first thirteen years of existence.<sup>192</sup> These are moneys and energies that could be spent on other enterprises. Hence, in this very tangible way, the allotment of finite funds and energies signals a shift in priorities and mindset by endorsing certain institutions, infrastructures, and programs over others.

Finally, the regulatory turn envisions individuals through the perspective of control. Instead of viewing persons and social problems, for example, through a welfarist approach, the regulatory turn sees them more darkly, requiring the "tightening [of] controls and [the] enforc[ement of] discipline."<sup>193</sup> This approach deems "crime as a normal, routine, commonplace

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191. For a discussion of a number of these points, see Anderson, *supra* note 27, at 346–49, 353–56; Robinson, *supra* note 27, at 930–31; Roth, *supra* note 27.

192. See David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 861 (2006).

193. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 15 (2001).

aspect of modern society” and individual wrongdoing as rational and “continuous with normal social interaction.”<sup>194</sup> The consequences for policy are significant—there is less concern for social deprivations as the motivation for wrongdoing and greater inclination toward preventive techniques (such as those outlined in the Corruption Convention), social control, and retribution.<sup>195</sup> Inevitably, then, thinking through regulation has social consequences, coloring the ways in which we view others.

### C. *Reinforcing Governmental Authority*

The regulatory turn is also an endorsement of government power, both national and international. This is a boon to executives—from democratic and authoritarian systems alike—for it provides international law’s imprimatur for acts that might be controversial or dubious under domestic law. But it is more than just the affirmance of the status quos in which governments operate—governing through regulation justifies the expansion of government power.<sup>196</sup> This push for more government comes both from above and from below. The more one defines individual acts as requiring control, the more the public demands a governmental response. And the more one demands a governmental response, the more public officials can employ such calls to justify their own attempts to maintain and expand their own powers.<sup>197</sup> This leads to both real and symbolic consequences.

By endorsing governmental power, international law risks justifying or increasing the likelihood of governmental abuse. The fact that governmental power might be called upon in the name of human rights or the fight against scourges like terrorism, of course, does not change this fundamental dynamic. Even the highest ambitions are susceptible to error by the well-intentioned and to exploitation by the cynical. In the most extreme cases, this can lead to the undermining of constitutionalism itself through the invocation of emergency powers in the name of international law and the national interest.<sup>198</sup> In this way, the regulatory turn can reverse the constraints imposed by the original human rights turn. More than that, though, “the heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector’s rules,” as Wendy Brown has noted.<sup>199</sup> This statism, to recall Malik on the Universal Declaration,<sup>200</sup> is precisely what the early human rights advocates feared and fought against.

The symbolic consequences are as important. The assumption of a regulatory stance, particularly through unmediated law, confers upon international

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194. *Id.* at 15–16.

195. *See id.*

196. Cf. SIMON, *supra* note 22, at 33–74.

197. *See, e.g., id.* at 25, 35–36.

198. *See* Scheppele, *supra* note 36.

199. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 169 (1995).

200. *See supra* text accompanying note 66.

law a position of authority vis-à-vis individuals that is novel. And the establishment of that hierarchical relationship inevitably tinges international acts—a consequence of the historical overreaching of governments in the use of their powers and the liberal belief in the core value of the private sphere. In these ways, the decision to regulate the individual will have effects on how the international system is viewed by states, private persons, and other participants.

#### D. Reforming the Turn

Despite the substantial system effects (current and prospective) of the regulatory turn, there has been no coherent movement to counter it to date. In part, this is because the regulatory turn constitutes a change in the techniques of governance, one that is spread out over a wide range of substantive areas and manifested in technical legal texts adopted by diverse decision-makers at multiple levels of governance. And in part it is because the regulatory turn's outputs are in the interests of so many key international players. This is not the way it used to be. Human rights activists, who once worried about the endorsement of state power, now support government authority, so long as it protects individuals. They have become governance humanitarians;<sup>201</sup> they wish, in Halley's evocative formulation, "to wield the sovereign's scepter and especially his sword."<sup>202</sup> For their part, states, which resisted external controls over their internal actions, now accept international regulation, so long as it bolsters the suppression of significant transnational problems that are beyond their individual capacity to eliminate or provided that it strengthens their own internal authorities. The joining of these two heretofore competing forces has given the regulatory turn its particular character, and this confluence of interests has also provided the turn with its overall strength. No longer fully at odds with one another or with the idea of greater international control, the regulatory turn lacks a natural constituency of dissenters. Slowly, though, as the implications of the turn become more evident, several lines of critique have begun to take shape.

One line of criticism has focused on the political legitimacy of the methods through which the regulatory turn has been established.<sup>203</sup> Historically, local institutions—national and sub-national authorities—have been tasked with the regulation of individual duties because it was thought that these sensitive matters—in which a person's liberties were at stake—are best de-

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201. This is an adaptation of the term "governance feminism." Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Feminism*, 29 HARV. J.L. & GENDER 335, 340–42 (2006).

202. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 5 (2008).

203. The push for greater accountability in international law generally is seen in expanding literature on global administrative law. See, e.g., Kingsbury, Krisch & Stewart, *supra* note 15. On the contemporary fights over representation, see Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AM. J. INT'L L. 209 (2009).



cided in accordance with community norms. The transfer, if only partial, of such decision-making to the international level and the concomitant empowering of executive branches raise questions about the appropriateness of the means by which the law is being made and applied. Some have pointed out, for instance, that unaccountable “law enforcement agents have been establishing legal standards rather than applying standards established by elected law-makers.”<sup>204</sup> Others note that prohibition regimes reflect the narrow desires of certain well-positioned interest groups, “transnational moral entrepreneurs,” and powerful states.<sup>205</sup> Still others—like some who take issue with the International Criminal Court—see international institutions as too distant and undemocratic.

Covering a wide range of issues, these questions evidence disquiet about internationalizing the control over the individual, which once was the exclusive preserve of national and sub-national governments. Unlike the human rights turn, which clearly assumed that the locus of citizen participation in lawmaking was the state, and which sought to strengthen that participation by entrenching certain civil and political rights, the regulatory turn reallocates much lawmaking to the international level. This overall reduction in the capacity and choices of domestic political actors and democratic institutions has led to an effort to think about ways to limit powerful states and executives, both of which exercise much control over international decisions, and to increase popular influence in the international system. Some—under the rubric of global administrative law—have suggested more transparency in the work of international organizations, increased public deliberation in their organs, and greater participation of nongovernmental organizations and other non-state actors in their activities.<sup>206</sup> Others have promoted greater popular participation in foreign affairs through the activities of national institutions, including legislatures and courts.<sup>207</sup>

In addition to these questions of political process, there is another—a second strain of criticism—that focuses on whether human rights and rule of law protections have been sufficiently incorporated into the law of the regulatory turn.<sup>208</sup> Many have asked, for example, whether international law en-

204. Boister, *supra* note 83, at 957 (discussing the work of Sheptycki, *supra* note 187).

205. Nadelmann, *supra* note 74, at 480–81, 511.

206. See, e.g., Kingsbury, Krisch & Stewart, *supra* note 15; Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275 (2008).

207. On the role of national legislatures and courts, see Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009); Rüdiger Wolfrum, *Kontrollauswärtiger Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 38 (1997), cited in Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in LEGITIMACY IN INTERNATIONAL LAW 1, 5 n.13 (Rüdiger Wolfrum & Volker Röben eds., 2008); John O. McGinnis, *Medellín and the Future of International Delegation*, 118 YALE L.J. 1712 (2009).

208. See generally JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 185–240 (2007).

forcement treaties sufficiently protect the rights of the individual.<sup>209</sup> Traditionally, such treaties deferred to states. Provisions therein that potentially protected individuals either could be invoked only by a state or they referred, unhelpfully, to limitations on state authority already existing under domestic law.<sup>210</sup> Others have worried about the fairness of international criminal tribunals to defendants.<sup>211</sup> Many have also criticized the Security Council's individual targeted sanctions regime for failing to provide suspected persons with the ability to challenge their designations.<sup>212</sup> Initially, the Council's resolutions only haltingly, and seemingly as an afterthought, mentioned human rights, and then only to remind states (and not the Council itself) of their obligations under international law.<sup>213</sup> In all these cases, as a result of pressures from governments, nongovernmental organizations, international organizations, and tribunals,<sup>214</sup> there have been moves to improve the rights-consciousness of regulatory techniques. The Terrorist Bombings Convention and the Terrorist Financing Convention, for example, innovatively require that persons taken into custody pursuant to those instruments "shall be guaranteed fair treatment."<sup>215</sup> And the Security Council has reformed the processes through which individuals are listed and delisted by its sanctions regimes.<sup>216</sup> Though, in the view of some, the human rights

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209. See, e.g., Boister, *supra* note 73; Robert J. Currie, *Human Rights and International Mutual Legal Assistance: Resolving the Tension*, 11 CRIM. L. FORUM 143 (2000); John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998); GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS 147-73 (1998); Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990).

210. See, e.g., Single Convention, *supra* note 76, art. 36(2) (making the treaty's penalization requirements "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law"); 1988 Convention, *supra* note 120, arts. 3(1)(c), 3(2), 9.

211. See, e.g., Cogan, *supra* note 106; Robinson, *supra* note 27.

212. See, e.g., Joined Cases C-402 & C-415/05 P, *Kadi v. Council of the European Union, and Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. 299; Nabil Sayadi and Patricia Vinck v. Belgium, Communication [Comm.] No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008). For discussion of the legitimacy of the Security Council sanctions regimes, see, for example from a large literature, Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 INT'L ORG. L. REV. 437 (2006); Jochen Abr. Frowein, *The UN Anti-Terrorism Administration and the Rule of Law*, in VÖLKERRECHT ALS WERTORDNUNG. COMMON VALUES IN INTERNATIONAL LAW. Festschrift für/Essays in Honour of Christian Tomuschat 785 (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw & Karl-Peter Sommermann eds., 2006).

213. See, e.g., S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

214. See Boister, *supra* note 73, at 217 (referring to the *Soering* case of the European Court of Human Rights and its progeny); DAVID CORTRIGHT & ERIKA DE WET, SANCTIONS AND SECURITY RESEARCH PROGRAM, HUMAN RIGHTS STANDARDS FOR TARGETED SANCTIONS (2010) (discussing the ongoing process of reforming the Security Council sanctions regimes).

215. Terrorist Bombings Convention, *supra* note 126, art. 14; Terrorist Financing Convention, *supra* note 126, art. 17; see also Transnational Organized Crime Convention, *supra* note 125, art. 16(3).

216. See S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

content of these mechanisms is still lacking,<sup>217</sup> it is nonetheless evident that there has been a continual iterative process of meliorating the system of international regulation to bring it into line with human rights norms.

A third, related approach seeks to ensure the legal responsibility of international actors for their wrongful acts. This is particularly important, as one scholar has noted in the context of the U.N. peacekeepers, when an international organization maintains physical control over individuals and territory.<sup>218</sup> Well-aware of this, many, including the International Law Commission, the International Law Association, and numerous academics, have attempted to think through the complicated legal and institutional issues in order to bring international institutions and the member states acting on their behalf under an appropriate responsibility umbrella.<sup>219</sup>

These three positions take the regulatory turn for granted, if sometimes reluctantly, and seek to moderate its effects. Two other responses to the regulatory turn are, in contrast, less supportive. The first of these questions the strategy of human rights advocates in taking the regulatory route at all. In the context of the Smuggling and Trafficking Protocols,<sup>220</sup> for example, James Hathaway has argued that criminalization can be counterproductive to the promotion of human rights. The “criminalization of smuggling,” he writes, “may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement.”<sup>221</sup> Further, by requiring the enhancement of border controls, he argues, the Protocols allow states “to avoid their duty to ensure that flight to seek asylum is not hampered by the application of immigration rules.”<sup>222</sup> These are some of the problems, he notes, of “mainstreaming” human rights.<sup>223</sup> While he recognizes that it is tempting to incorporate human rights into an infrastructure that “states feel compelled to take seriously,” such as crime control or security, the risk of negative externalities are severely heightened.<sup>224</sup> In contrast to those who see opportunities for the human rights project through the mainstreaming of efforts in this area,<sup>225</sup> Hathaway finds danger in such coalitions.

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217. See, e.g., Boister, *supra* note 73, at 216–27; GEORGE A. LOPEZ ET AL., *OVERDUE PROCESS: PROTECTING HUMAN RIGHTS WHILE SANCTIONING ALLEGED TERRORISTS* (Apr. 2009).

218. Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT’L L.J. 114, 119–20 (2010).

219. International Law Commission, *Draft Articles on Responsibility of International Organizations, Report on the Work of its Sixty-first Session*, ¶ 50, U.N. Doc. A/64/10 (2009); INTERNATIONAL LAW ASSOCIATION, *FINAL REPORT: ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS* (Berlin Conference 2004); Dannenbaum, *supra* note 218. Some have gone so far as to suggest the removal of the immunities of international organizations. See generally Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 INT’L ORG. L. REV. 277 (2010).

220. Smuggling Protocol, *supra* note 125; Trafficking Protocol, *supra* note 127.

221. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 5 (2008).

222. *Id.* at 41.

223. *Id.* at 54.

224. *Id.*

225. See *supra* notes 182–183 and accompanying text.

A final approach questions whether internationalizing individual duties and their implementation satisfies underlying policy goals. In the context of international criminal law, for example, Mark Drumbl advocates separating out “the substantive goals . . . namely the condemnation of great evil and the promotion of accountability . . . from the process regarding *how* these goals are to be operationalized and the institutions *where* this process is to occur.”<sup>226</sup> He argues that a better way to achieve the relevant community objectives is through “qualified deference” to local or national institutions, not wholesale internationalization.<sup>227</sup> Janet Halley has similarly questioned the tendencies of the turn. She asks, for example, whether the “near-universal consensus that making rape in war *more criminal* . . . is a good thing to do.”<sup>228</sup> And, of course, some states have categorically resisted the new universal jurisdiction and the International Criminal Court on the grounds that they undermine more appropriate forms of international dispute settlement.<sup>229</sup>

In these ways, the regulatory turn—in its general trajectory and in its particular manifestations—is being constantly interpreted and reinterpreted, questioned and contested. Mostly, though, it is being reaffirmed. While there may be some dissenters, their criticisms have not undermined the fundamentals of the regime. Indeed, the tendency, instead, has been to attempt to perfect it, not reject it.

#### IV. CONCLUSION: THE REGULATORY TURN AND CONTEMPORARY INTERNATIONAL GOVERNANCE

The regulatory turn represents a profound shift. Whereas once the international system did not act directly upon individuals, it now articulates direct individual duties and provides for their international enforcement. Whereas once international law substantially deferred to states in the enactment and implementation of individual duties, it now specifies those duties more and more, and leaves less and less room for state discretion. And whereas once governmental power and human rights were seen as oppositional forces, the power of government (national and international) is now being called upon to promote rights. Regulatory authority over individuals, a common characteristic of government, is now within the mainstream of international law. The consequences are substantial: the reorganization of governance, the reframing of decisions, and the reinforcement of govern-

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226. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 183 (2007).

227. *See id.* at 187–88.

228. Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. INT'L L. 78, 80 (2008); *see also* Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 816 (2005) (asking “whether increasing the number of convictions for sex crimes should be a central goal of international feminist advocacy”).

229. *See, e.g.*, Roth, *supra* note 27.

mental authority. Contemporary international law is very different from the system that existed twenty years ago.

Perhaps counterintuitively the turn is in many ways designed to shore up, as much as to back up, the state. In this way, the regulatory turn is not much different from the human rights turn that took place after World War II. The idea of the human rights turn was for international law to control the state's regulation of its inhabitants because a well-controlled state was so vital to the welfare of individuals and international security. Indeed, that was the purpose of much of international law at that time—the regulation of states for the establishment of minimum world public order. The idea of the regulatory turn is quite similar. But in contrast to the post-War period, now it is thought that the rights of individuals and international security require international support—not restriction—of the state's regulatory authority over individuals. The regulatory turn is about backing up and shoring up state regulation of the individual precisely because today such regulation is thought to be essential to the maintenance of international public order.

The turn is of a piece with a wider movement in international organization in which international institutions and international lawmakers are asserting greater control, and their decisions are having greater effect, over the local than ever before. In a wide variety of areas, governance is moving vertically. Despite the lack of centralized legislative and executive mechanisms typical of domestic systems, international law and institutions are taking on both functions in ways previously unseen.<sup>230</sup> Though the appearance and rhetoric of state discretion remains—that a state may implement its international obligations, as the International Court of Justice held in *LaGrand*, “by means of its own choosing”—in actuality this is decreasingly the case.<sup>231</sup> The obligations of states are becoming ever more specific. This is hardly the first time that governmental authority has shifted to a higher level,<sup>232</sup> and, of course, the transfer here is only very partial and is still quite dependent upon states for its enactment and implementation. Even so, and however limited in an absolute sense, the establishment of a multilevel form of governance that melds in complicated ways the international with the national is of great significance and necessitates considerable rethinking of our expectations of institutions and networks of governance, national and international.<sup>233</sup>

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230. See, e.g., Dunoff, *supra* note 17; Kingsbury, Krisch & Stewart, *supra* note 15; Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002); Stefan Talmon, *The Security Council as a World Legislature*, 99 AM. J. INT'L L. 175 (2005).

231. *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 516 (June 27).

232. See, e.g., Lars-Erik Cederman & Luc Girardin, *Growing Sovereignty: Modeling the Shift from Indirect to Direct Rule*, 54 INT'L STUD. Q. 27 (2010) (analyzing the historical consolidation of the nation state).

233. See, e.g., SLAUGHTER, *supra* note 28; Anderson, *supra* note 28; Kingsbury, Krisch & Stewart, *supra* note 15; Andreas Paulus, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING*

The regulatory turn is not just a random part or consequence of this larger process; it is an integral element in the maintenance of this new system of hybrid governance. Like the parallel contemporary move to ensure state compliance with international law,<sup>234</sup> the regulatory turn not only functions to enforce a wide variety of policies that are thought to be crucial to the current and future success of the international community, it also works to legitimize the emerging international system itself by attempting to fulfill the fundamental common desire of people for the maintenance of public order.<sup>235</sup> Without successfully addressing popular concerns—those fears of common scourges and lawbreaking that now arise from individual, not state, action—the international system’s ability to govern would be compromised. No system can survive, let alone thrive, if it does not satisfy minimum expectations. In these ways, the regulatory turn is central to the constitutional transformation currently underway.

This is why a normative evaluation of the regulatory turn, as a phenomenon, is far from simple, and indeed why the turn’s staying power is taken for granted. There are very good reasons to use regulatory measures to solve contemporary transnational problems, which is why so many different constituencies have recently sought to do so (and why they have had some considerable success). And there are also substantial risks and downsides inherent in, among other things, the endorsement and use of governmental power and the transfer of decision-making to distant, non-democratic fora. But once one agrees that certain problems that stem from individual acts can be—and must be—tackled at the international level because states cannot or will not solve them acting alone, then much of the debate, as we have seen, tends to—and has to—move from the forest to the trees, from indicting the regulatory turn categorically to attempting to perfect it (or, at least, to meliorate its imperfections). For our time, it seems, if the regulatory turn is a danger, then it’s a necessary one.

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SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 193 (Tomer Broude & Yuval Shany eds., 2008); Weiler, *supra* note 17, at 561.

234. See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT’L L. 189 (2006).

235. Cf. Cuéllar, *supra* note 188, at 982 (“Concerns about criminal justice seem deeply rooted in what citizens of advanced industrialized states expect” from their governments.).