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## Critique, Culture and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse

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# CRITIQUE, CULTURE AND COMMITMENT: THE DANGEROUS AND COUNTERPRODUCTIVE PATHS OF INTERNATIONAL LEGAL DISCOURSE

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*Theory is always for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space. The world is seen from a standpoint definable in terms of nation or social class, of dominance or subordination, of rising or declining power, of a sense of immobility or of present crisis, of past experience, and of hopes and expectations for the future . . . . There is, accordingly, no such thing as theory in itself, divorced from a*

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*standpoint in time and space. When any theory so represents itself, it is the more important to examine it as ideology, and to lay bare its concealed perspective.*<sup>1</sup>

*[H]ave we a right to assume the survival of something that was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere. In the animal kingdom we hold to the view that the most highly developed species we have proceeded from the lowest; and yet we find all the simple forms still in existence today.*<sup>2</sup>

*Nothing we do can be defended absolutely and finally. But only by reference to something else that is not questioned.*<sup>3</sup>

## I. INTRODUCTION

International law has undergone profound and radical transformations. The history of international law is replete with paradigm shifts as momentous as those in the history of science, philosophy, or the arts. The first great paradigm was forged out of the Treaty of Westphalia in 1648, that point in history commonly given for the genesis of modern international law. Out of the Treaty, certain metaphors for the state and inter-state relations became well-entrenched and pervasive. They concerned the equality of sovereign and independent nations and rules of action designed to prevent conflicts and wars. The next great shift involved the move away from natural law to positivism, which gained strength in the late eighteenth century, and culminated in the efforts of the great codifiers of the late nineteenth and early twentieth centuries, those who were determined to set down the rules of international law in a coherent and systematic manner. However, this quasi-scientific approach was deemed a failure. Alejandro Alvarez, in the 1920s, recognized that a new international law was needed to deal with the issues of globalization, to better describe the intertwined nature of law and politics. This realization resulted in a move away from positivism toward postmodernity, from

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1. Richard K. Ashley & R.B.J. Walker, *Reading Dissidence/Writing the Discipline: Crises and the Question of Sovereignty in International Studies*, 34 INT'L STUD. Q. 367, 369 (1990) (quoting Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, in NEOREALISM AND ITS CRITICS 207 (Robert O. Keohane ed., 1986)).

2. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 77 (1999) (quoting SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 15 (James Strachey ed. & trans. 1961) (1930)).

3. LUDWIG WITTGENSTEIN, CULTURE AND VALUE 16e (Peter Winch trans., G.H. Von Wright ed., 1980) [hereinafter WITTGENSTEIN I].

the strict notions of a rules-based system, to a new conception of international law, as an ideology, a social system, a great conversation in which all nations, and ultimately all individuals, groups, corporate entities, and NGOs, potentially can participate and realize a new international society.<sup>4</sup>

The important point for purposes of this paper is that at each of these historical “moments,” at each major paradigm shift, the prior understandings and conceptual assumptions were not eradicated or wholly replaced. While modified and transmuted by the new innovations, each prior understanding remained intact as part of the structure upon which the succeeding layer was constructed. Contemporary international law, as this paper seeks to show, is an amalgam of its history. International law exists in a very special and interesting conceptual space. It is simultaneously postmodern and antiquated, aspirational and antiquarian, forward-looking and backward-referencing. International legal arguments routinely rely on old precedents encapsulating bright-line legal rules, such as in *The Lotus Case*,<sup>5</sup> where territoriality trumped nationality. At the same time, they also look forward to customary and so-called “soft” law, relying on emerging trends in support of a so-called “graduated normativity,” where there can be various degrees of more binding and less binding norms. As exemplified in *The Nuclear Weapons Case*,<sup>6</sup> the court recognized that a trend existed, that the international community is moving toward a prohibition of nuclear weapons, but that a bright-line rule representing an all-out ban under any conditions had not yet been realized.<sup>7</sup> These considerations, the simultaneous referencing of past legal principles, and the importance of emerging trends as having a degree of normative force complicates matters, makes the discerning of bias more difficult as historical distance arguably can never really be achieved.

The present study has as its goal to identify, catalogue, and explore the biases and blind spots, prejudices, and unintended consequences which reside in and around present-day international law, in this its most recent phase of its history. Philip Allott has described the new international law as a so-

4. This historical process of change has been well-documented and extensively analyzed. See ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION AND INTERNATIONAL AFFAIRS* (1986); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT’L L. 20 (1948); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99 (1997); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986); see also LORI FISLER DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS xxvii-xxxvi* (4th ed. 2001).

5. S.S. *Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 20, reprinted in 2 WORLD COURT REPORTS 20 (Manley O. Hudson ed., 1935).

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

7. *Id.*

cial phenomenon, as a “self-constituting” phenomenon, a process whereby the international society is coming to know itself and is actualized.<sup>8</sup> For Allott, international law is a social-psychological phenomenon, and law and society exist out of (as well as in) the minds of its constituents.<sup>9</sup> My basic thesis is that because of the inherent subjectivity of any system designed to regulate and mediate relations between people—and peoples—it is of the utmost importance to subject the new international law to a searching scrutiny, to ask hard questions about its tendencies to emphasize certain interests, exalt particular groups, and order society in predetermined or preconceived ways. The outcomes and distributional consequences of the various decisions, models, and discourses—ways of framing, conceptualizing, and talking about international law—must be examined.

The biases of the past are easier to perceive than the biases of the present and the future. One example, the use of the term “civilized nations” (which is still in existence in Article 38)<sup>10</sup> and the language employed by the jurists of the nineteenth century reveal their prejudices, prejudgments, and biased attitudes.<sup>11</sup> But the prejudices of the contemporary discourses are not so easy to discern. Under normal conditions, we are too close in time and perspective during our everyday legal activities to be able to perceive the new international law’s biases and unintended consequences. It takes a lot of thought and consideration—a lot of patient self-criticism and self-appraisal—to be able to take a step (or more) back, to reevaluate the process and enterprise of international law making in this new era.

The problem is further complicated by the fact that bias is not a monolithic entity. It does not merely exist—as stereotypically conceived—in law’s views of cultures, ethnicities, and political structures. Although culture does play a part in the discussion which follows, this is only one lens through which to view bias in international law. There are many metaphors which international law has employed, many built-in, structural biases which exist so deeply entrenched in the system of international law as to be part and parcel of its function, exhibited in so-called background rules and their assumptions. Bias is also found in the major procedural doctrines of international law, in the conceptions of sovereignty, jurisdiction, state responsibility, nationality, statehood, self-determination, and standing. These structural, sys-

8. See Philip Allott, *The Concept of International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* ¶¶ 3.1, 3.4, at 69 (Michael Byers ed., 2000).

9. *Id.* ¶ 4, at 70.

10. See 1947 I.C.J. Acts & Docs. 38, reprinted in 2 *THE FUTURE OF THE INTERNATIONAL COURT JUSTICE* app. 1, at 789 (Leo Gross ed., 1976).

11. See *infra* Part II.

temic modes, dictating the procedural apparatus of international law, constitute the main subject of this study. Outside the direct scope of this paper, but equally important, are the more well-recognized and well-documented biases in the context of international law's substantive regimes: for example, human rights, the environment, or in rules surrounding a particular nation's labor practices, trade, or immigration policies.<sup>12</sup>

Before moving to the specific examples of bias, there must be an exploration of what we mean by the term itself and whether bias itself can be employed in an effective, meaningful, and cogent way. To put it succinctly, is there a bias in talking about bias? The genesis of my thinking about these issues derives from my reading of Roland Barthes' essay, *The Eiffel Tower*.<sup>13</sup> Perhaps, in some trivial sense, all discourse (all thinking for that matter) is biased in favor of one group, party, person, or identity, usually but not necessarily in favor of the speaker, the client, or the special interest being represented. Like Barthes' inhabitant of Paris ascending the Eiffel Tower, we as international lawyers and academics exist within the structural constraints and presuppositions of the international legal regime. Once the sightseer attains the summit and looks down from the tower's apex, there is a transformation of the city landscape. The city of Paris is seen in a particular way, an idiosyncratic viewing, mediated by the viewer's position within the tower, its height, location, and most importantly, by the experience of the viewer as a person "inside" the tower's structure.

In much the same way, the international lawyer is conditioned to see the "territory" of international law in preconditioned, predetermined, and idiosyncratic ways. As Barthes comments, the viewer upon looking out over the city landscape expects to see certain landmarks, anticipates seeing the historical Paris, populated with various indicators and remembrances of the city's past.<sup>14</sup> When for some reason the landmarks are not present, invisible, obscured, or otherwise not apparent, the mind of the viewer necessarily "fills in" the gaps created by the lacunae of his experience.<sup>15</sup> This is a natural process, an automatic and usually unnoticed and subconscious process, whereby our experience is made whole by the insertion of our fantasies. Our fantasy of the perceived Paris is made to match the reality of the expected

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12. See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?* 3 EUR. HUM. RTS. L. REV. 245 (2001) [hereinafter Kennedy I].

13. Roland Barthes, *The Eiffel Tower*, in A BARTHES READER 236 (Susan Sontag ed., 1982).

14. *Id.* at 237.

15. *Id.* at 238.

Paris, the preexisting Paris residing like a specter of normalcy beneath the curtain of our conscious minds.<sup>16</sup>

Through the thought-experiment of Barthes, we can see the manifestation of non-trivial bias. This bias is (usually) unseen and unappreciated by the speaker and this is where the difficulties arise. More than that, it is at this point that international legal discourse can become dangerous and counter-productive. Actors within the international community, within the matrix of international law, can confront their prejudices, which exist for them outside the tower, but are prevented from confronting such prejudices, which exist instead as *a priori* constructs part and parcel of the tower's structure. The perception of "outside" bias is sometimes achieved, as mentioned above, when there is temporal distance between the usage of the rule and its formation. When enough time has passed and society has changed, it becomes easier to recognize the biases inherent in, for example, the international legal rules supporting colonialism, slavery, or the slave trade. The orthodoxies of preceding generations can become the heresies of their successors.<sup>17</sup> Bias can also be discerned more readily when there is a plurality of voices clamoring for attention. There is perhaps a better chance to uncover biases and blind spots when a variety of alternative narratives are competing to tell the story of international law, as opposed to a narrow range of "official" stories which are received without questioning and perceived as authoritative doctrine. In this sense, the chances for achieving a more unbiased, just, and fair conception of international law has arguably been increased in modern times by the more recent, latest incarnation of international law. As it moves from a monolithic, top-down, rules-based model to a more circular, bottom-up, sociological conception, international law becomes more porous, transparent, and amenable to change, as more voices are raised and more perspectives explored and integrated into the web of inter-connecting relationships.<sup>18</sup>

This modern structural change in the mode in which international law operates raises another point, which must be mentioned at the outset. International law, because of its relative lack of top-down vertical structure, because of the lesser emphasis it places on black and white, on-off, well-settled clear rules, is much more dependent for its legitimizing upon its own rhetoric

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16. *Id.*

17. Of course this process also occurs in the domestic and not just the international realm. Take, for example, all the instances in which the United States Supreme Court has decided to reverse prior cases and suspend the doctrine of *stare decisis*. For example, consider the recent case in the context of state sodomy laws, *Lawrence v. Texas*, 539 U.S. 558 (2003), *rev' d*, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

18. It could also be argued, conversely, that a plurality of voices instead creates cacophony and confusion.

than domestic law or other general fields of law. In other words, what jurists, commentators, academics, and international actors say about the doctrines of international law and how we speak about them is more important, is more constitutive of international law than what we say about, for example, a particular nation's contract law or property law. This brings us to talking "as if"—if we talk *as if* there is an emerging world state, *as if* there is a particular international legal rule, this is much more important to the formation of the reality of the world state and the rule than if we talk about the existence of adverse possession in domestic property law, for instance. The strong vertical hierarchy of most domestic legal systems is able to do the work of legitimating and authorizing reinforcement which international law arguably lacks.

International law makes up for the deficiency of verticality by its heightened reliance on a conversational, circular, or horizontal structure, a wait-and-see attitude which is largely foreign to the domestic realm. Precisely because of this inherent importance of international legal discourse, we need to pay special attention, be especially vigilant, concerning what we are saying and how we are talking when we talk about international law, international relations, and international legal theory. The discourse of international law is a moral force in and of itself. It propagates stereotypes and creates power relationships. It sneaks up on us because it is so essential to the process of creating law.

International law is not made in a vacuum. By this I mean we must remember the practical, pragmatic, real-world nature of international law. International law, like domestic law, is made out of a feedback mechanism. International law is, as Allott has written, the world community becoming conscious of itself, waking up and looking around, putting out small fires and big ones, and generally trying to coordinate and harmonize the multifarious relationships which arise in our current stage of globalization.<sup>19</sup> This is important to keep in mind because the nature of the legal rules of course must be seen in connection with the real-world state of affairs and the circumstances, against the backdrop of these circumstances, which force adjudicators and parties to treaties to create these rules in the first place. Many authors recently have noted the relevance of international relations to international law and are working to bridge the gap between the two fields.<sup>20</sup> This practical aspect of international law, this close connection between "the world" and international law—international law as a series of real-time, real-

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19. See Phillip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 13–14 (1988).

20. See, e.g. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 503 (1995).

world responses to actual situations—is also, however, another place where bias is especially likely to creep in.

This point, regarding the danger of what I call “real-world” bias, is manifest by the all-too-easy way facts may seem to be objective, settled, and are all too often taken for granted as true. Despite the seeming concreteness of the reported facts, the so-called “facts” in any particular case are always a social construction, always someone’s social construction, and most often the social construction of the most powerful players in the world arena. This is not to make the very obvious claim that the facts are often in dispute, which they often are and very well may be. Rather, the point is that the range of possible explanations for events—the facts themselves as conceived by all the players to a dispute—may be imposed by the power elite and this imposition often goes unnoticed and unchallenged. Events happen in the world. Unfortunately (or fortunately), events are not perceived as actually happening or as have happened until we have the language, conceptual tools, and will to explain through discourse what has happened, why it has happened, and what remedies, if any, exist to try to ameliorate the harm caused.

Bias also seeps in and surrounds international law by its very attempt to be a postmodern institution and activity. This point is elucidated by Nathaniel Berman in his article, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, concerning the relationship between international law and modern art.<sup>21</sup> In this article, Berman draws a parallel between four aspects, as he sees them, of modernism and then maps these aspects onto the contemporary conception of international law.<sup>22</sup> For Berman, modernism, as seen through the lens of modern art, embraces the following characteristics: “1) the critique of representation; 2) an openness to so-called ‘primitive’ sources cultural energy; 3) innovative experimentation . . . and 4) the juxtaposition, in a single work, of elements considered [heretofore] irreconcilable . . . .”<sup>23</sup> These four characteristics also inform our understanding of the new international law—after the world wars—when international law fashioned itself as a way of appeasing nationalistic energies and harmonizing competing and discordant voices within the world. The new international law has the following four characteristics, reminiscent of modern art: “1) the critique of...[sovereignty] as the object which defines international law; . . . 2) an openness to [heretofore] repressed . . . forces of nationalism; 3) the unprecedented invention of a wide variety of techniques, understood as specifically

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21. Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351, 352 (1992).

22. *Id.* at 354.

23. *Id.*

‘legal’; and 4) the juxtaposition, in international legal discourse, doctrines, and institutions, of elements incompatible under traditional legal criteria.”<sup>24</sup>

This insight of Berman highlights one further way in which the new international law (and for that matter modernism itself) reinforces traditional (and even non-traditional) biases under the guise of a more reactive, calibrated, and sensitive international legal structure. For example, the notion under the new conception of international law of “primitivism” (viewed in the new vocabulary as “nationalism”)<sup>25</sup> is especially pregnant with meaning. This notion sets up an implicit dichotomy between the “modern” and the “primitive” and at the same time tries to contain, mediate, and deconstruct the “primitive” to provide an outlet for nationalistic feelings and aggressions. To a large extent bias is built into modernity itself, which has to define itself to a large extent against the rubric of the primitive, the primordial, and the irrational.

As a final consideration in this preliminary and introductory exploration of the concept of bias in international law, the practical importance of this enterprise must be emphasized. As Charles Taylor has noted, groups, like individuals, manufacture their identities—their self-worth and self-conceptions—based largely on others’ recognition or absence of recognition.<sup>26</sup> The importance of uncovering bias is fundamental to allowing groups to fully develop and evolve because their development and actualization is not dependent merely on their own actions and their own perceptions alone.<sup>27</sup> Rather, as the traditional jurisprudence of international law teaches, it is dependent on the perceptions of the international community as a whole and on the way other states, governments, and courts view individual states. A people’s, government’s, or social minority’s search for “recognition” may be described as a mirror, created and maintained by the international community, upon which the group can view their own identity and their own reality. With this insight, it becomes apparent that a people’s conception of itself is especially susceptible to bias: as Taylor says, a colonized people’s “own self-deprecation . . . becomes one of the most potent instruments of their own oppression.”<sup>28</sup>

Bias, prejudice, and blind spots have unintended consequences and inflict costs on both the development of international law and human life and well-being. They impact the plight of the injured and the oppressed; they

24. *Id.* at 362.

24. *Id.* at 363.

26. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

27. *Id.* at 25–26.

28. *Id.* at 26.

form hidden impediments, which obscure pain, injustice, and oppression. In some cases, they may even directly be the cause of pain, injustice, and oppression.<sup>29</sup> It is the aim of this paper to uncover the more insidious structural and procedural biases of international law, those which exist just beneath the surface, as well as those which are firmly embedded deep within the subterranean consciousness of the discipline's conception of itself.

The paper proceeds first with a discussion of three major procedural or structural discourses of contemporary international law: those revolving around sovereignty, jurisdiction, and state responsibility. Within the sovereignty discussion, I further distinguish between three categories of bias: 1) biases emanating from the concepts which remain as remnants of nineteenth century and pre-nineteenth century discourses; 2) biases surrounding the major metaphors of international law, specifically examined are those illuminated by feminism's critique of the state and state power; and 3) biases surrounding the major substantive areas of international law, focusing specifically on the environment and the Kyoto Protocol. Lastly, Part III contains a discussion of "fairness" discourse, an attempt to define and reign in the concept of bias, and to thereby deal with and resolve the paradox of universalism and the conundrum this paradox has created for international law and society.

## II. BIAS AND THE MAJOR CONTEMPORARY PROCEDURAL/STRUCTURAL INTERNATIONAL LEGAL DISCOURSES UNDERLYING PRESENT-DAY INTERNATIONAL LAW

### A. *Sovereignty*

The first topic of international legal discourse to be considered is perhaps the most basic and fundamental one serving to ground and delimit the state, the actor traditionally considered at the center of international legal relations. It is not difficult to see many of the actual and potential biases surrounding the conception of "sovereignty," that aspect of statehood, which has served as both sword and shield, as the basis for justifying the actions of states and immunizing them from sanctions. "Sovereignty" often has functioned to retard or freeze the evolution of international law by protecting states from paying out claims and even from the disapprobation of the international community, despite an emerging international legal rule or trend which otherwise would have condemned their behavior. As will be discussed, it is a concept which has its genesis in mid-sixteenth and early seven-

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29. See Kennedy I, *supra* note 12, at 249.

teenth century Europe and has undergone its own peculiar evolution, but still is relied on as an implicit backstop and failsafe, utilized as an important — albeit eroding—cloak of protection.

Stephane Beaulac has explored the origins of the term “sovereignty” from its introduction in the sixteenth century in Jean Bodin’s *Six Livres de la Republique*.<sup>30</sup> Beaulac undertakes to examine the history of the term, pointing out that it was originally employed by Bodin and his contemporaries for purposes of domestic governance.<sup>31</sup> Beaulac’s analysis is premised on the important insight (echoing Wittgenstein) that language is not merely a “thing,” but an activity which communicates “tremendous social power within the shared consciousness of humanity.”<sup>32</sup> Beaulac relies upon Philip Allott to help explain the importance of understanding the pivotal words which have shaped international law and society.<sup>33</sup> In Allott’s words,

As persons and as societies, we are what we were able to be, and we will be what we are now able to be. *So it is with the history of words.* We are what we have said; we will be what we are now able to say. *Words contain social history, distilled and crystallized and embodied and preserved, but available also as a social force, a cause of new social effects.*<sup>34</sup>

Bodin in *Six Livres* defines “sovereignty” as follows: “Majesty or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth.”<sup>35</sup> Beaulac points out that the French text identifies two characteristics of sovereignty as it being “absolute” and “perpetual.”<sup>36</sup> But the “absolute” or “unlimited” nature of Bodin’s “sovereignty” was tempered by the caveat that the prince still is subject to “the laws of

30. See Stephane Beaulac, *The Social Power of Bodin’s ‘Sovereignty’ and International Law*, 4 MELB. J. INT’L L. 1 (2003). Beaulac acknowledges that although Bodin did not invent the term, Bodin is considered “the ‘father’ of ‘sovereignty’ because he provided the first systematic discussion of the nature of this . . . powerful word.” *Id.* at 6–7.

31. *Id.* at 4.

32. *Id.* at 2.

33. *Id.*

34. Beaulac, *supra* note 30, at 2 (quoting PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 9 (Oxford University Press 1990) (emphasis added)).

35. Beaulac, *supra* note 30, at 11 (quoting JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE*). Only 19 copies are recorded of the original French edition of *SIX LIVRES DE LA REPUBLIQUE*, published in 1576. *Id.* at 9 n.48. The version quoted is JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALE* (Richard Knolles trans., 1606) (translation of *LES SIX LIVRES DE LA REPUBLIQUE*) [hereinafter *SIX BOOKS I*]. The version used by this Law Review is the English translation, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., Basil Blackwell Oxford) [hereinafter *SIX BOOKS II*].

36. *Id.* (quoting JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE* 124).

God, of nature, and of nations.”<sup>37</sup> Bodin more specifically outlines three limits on supreme power: “i) to honor contracts; ii) to respect private property; and iii) to consent to taxation.”<sup>38</sup> Furthermore, Bodin wrote that there existed other certain “fundamental laws” which the prince must accept, concerning essentially “rules of succession of the throne . . . and . . . the inalienability of the public domain.”<sup>39</sup> Bodin envisioned the power of the Prince resting upon a pyramidal structure, and the power of sovereignty as that of the “highest unified power, distinguished from that of the subordinate decentralised power.”<sup>40</sup>

As Beaulac explains, Bodin’s use of the term “sovereignty” arose out of the specific social and historical context of France and the French monarchy in the late sixteenth century.<sup>41</sup> It was a term designed to support and maintain the monarchy and especially “to place the ruler at the apex of a pyramid of authority.”<sup>42</sup> It was only subsequently, in Vattel<sup>43</sup> and later in Wheaton,<sup>44</sup> that the “internal” sovereignty of which Bodin wrote was distinguished from “external sovereignty,” i.e., “the independence of one political society, in respect to all other political societies.”<sup>45</sup> As Beaulac points out, the transformation of the term “sovereignty,” from internal to external, shows its malleability, its rhetorical force, and power as a term that is continually and continuously changing.<sup>46</sup>

This transmutation of “sovereignty” from its internal to its external usage allowed states, rulers, and governments to project their power outward as well as inward. It allowed for the propagation and instantiation of idiosyncratic attitudes and prejudices, even in contravention of trends supported by the majority of states within the international community. The biased nature of external sovereignty was especially apparent in the context of slavery and the slave trade. An early example of sovereignty’s role in preserving and

37. *Id.* at 13 (quoting SIX BOOKS I at 90; SIX BOOKS II at 28).

38. *Id.* at 14 (citing SIX LIVRES 152–57, 855–913; SIX BOOKS I 106–110, 649–686; SIX BOOKS II at 29–33, 185–90).

39. *Id.* at 14–15 (citing SIX LIVRES 973–1013, 857–863; SIX BOOKS I at 721–754, 651–54; SIX BOOKS II at 25–31, 8).

40. Beaulac, *supra* note 30, at 19 (emphasis in original).

41. *Id.*

42. *Id.* at 22.

43. See EMER DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS/FROM THE FRENCH OF MONSIEUR DE VATTEL (1797).

44. See HENRY WHEATON, HISTORY OF THE LAWS OF NATIONS IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON (1845).

45. Beaulac, *supra* note 30, at 27 (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 27 (Richard Henry Dana ed., 1866)).

46. *Id.*

justifying such trade occurred in *The Antelope*, a decision by the United States Supreme Court in 1825.<sup>47</sup> In that case, the Spanish and Portuguese consuls filed claims concerning “certain Africans as the property of subjects of their nation,” after the ship transporting them was brought back to the United States under the command of an American captain, John Smith.<sup>48</sup> Smith also brought a claim for possession of the Africans as slaves captured *jure belli*.<sup>49</sup>

The Court in adjudicating the various claims went to great pains to emphasize that although public sentiment was against the slave trade, the matter was “unsettled,” and the Court must not yield to such feelings.<sup>50</sup> The Court, after reviewing prior cases, concluded that the following rule was to be applied: “that the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed.”<sup>51</sup> This rule was premised on several propositions emanating directly out of the external sovereignty of states: e.g., “No principle of general law is more universally acknowledged, than the perfect equality of nations . . . . Each legislates for itself, but its legislation can operate on itself alone.”<sup>52</sup> Consent becomes required before a nation can be seen to have relinquished a “right” to engage in the slave trade, a trade “in which [historically] all have participated.”<sup>53</sup> Applying these principles, the Supreme Court entered into a calculation based upon testimony and documentary evidence as to the precise number of Africans taken from Spanish ships.<sup>54</sup> Since the number belonging to any Portuguese ships could not be determined, the Court ultimately held that the Africans be divided between Spain and the United States “to be disposed of according to law.”<sup>55</sup>

The other paradigmatic use of “sovereignty” in the nineteenth century, was as a tool for state actors to justify expansion of their empires, as a means for legitimating the process of colonization. Antony Anghie has written extensively on this subject.<sup>56</sup> He explains the myriad effects that positivism

47. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

48. *Id.* at 67–68.

49. *Id.* at 68.

50. *Id.* at 114.

51. *Id.* at 118.

52. *The Antelope*, 23 U.S. at 122.

53. *Id.*

54. *Id.* at 126–28.

55. *Id.* at 132–33.

56. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L. J. 1 (1999).

and notions of sovereignty had in supporting the colonial encounter.<sup>57</sup> Anghie's main thesis goes further, however, in that he asserts that "the problem of order among states, is a problem that has been peculiar . . . to the specificities of European history . . . the extension and universalization of the European experience, which . . . has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied."<sup>58</sup> For Anghie, his interest lies "not only in the important point that positivism legitimized conquest and dispossession, but also in the reverse relationship—in identifying how notions of positivism and sovereignty were themselves shaped by the encounter."<sup>59</sup>

The reverberations of nineteenth and pre-nineteenth century thought—with its sharp distinction between "civilized" and "uncivilized" states—still are heard today, as will be discussed.<sup>60</sup> Anghie sums up his argument as follows: "that central elements of nineteenth-century international law are reproduced in current approaches to international law and relations."<sup>61</sup> This insight is based upon the fact that the "naturalist notion of a mythic state of nature [was] replaced by a positivist notion of a mythic age when European states constituted a self-evident family of nations."<sup>62</sup> Sovereignty became a tool for dividing the European from the non-European world: "since the non-European world was not 'sovereign,' virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples."<sup>63</sup>

"Sovereignty," as a concept, certainly has evolved since the days of *The Antelope* and its use in furthering the colonial encounter; but still is utilized to justify state power, as a means of immunizing states from international sanction, and as a shield from international disapprobation. Before World War II, for example, there was unbounded optimism that the external sover-

57. *See id.*

58. *Id.* at 7.

59. *Id.* at 6.

60. *Id.* at 23. Anghie cites Wheaton for standing behind the proposition that what counts as law is the custom "which is practiced only among 'civilized countries.'" Anghie, *supra* note 56, at 23. Wheaton wrote:

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.

*Id.* (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 17 (Richard Henry Dana ed., 1866)).

61. Anghie, *supra* note 56, at 8.

62. *Id.* at 68.

63. *Id.* at 69.

eignty of individual nations could be mediated by the League of Nations.<sup>64</sup> Geoffrey Butler opined in an article published in the *British Year Book of International Law* (1920-21), that sovereignty can be checked by the League, but in a way that preserves fundamental rights.<sup>65</sup> His own summarization of his point is as follows:

in so far as the League of Nations supplies a mechanism for the preservation of these rights and values, the conception of sovereignty, with its necessary implication of moral authority, can for the first time be applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.<sup>66</sup>

For Butler, the League represented a way to ensure peace, so that “sub-conscious” activities of states, e.g., mining, engineering, locomotion engineering, and preventative medicine, could be conducted without the interruption of war.<sup>67</sup>

Unfortunately, the League failed in its mission to keep the peace and the tragedy of World War II resulted. During and after the Second War, international legal scholars and jurists were beginning to reconceive the notion of sovereignty just as they began to reconceive the nature of the state itself. This conceptual transformation is evident in Hans Kelsen’s 1942 work, *Law and Peace in International Relations*.<sup>68</sup> Kelsen questioned the Austinian assumption that a state is sovereign because “no order can be conceived to exist above the state or the legal order of the state such that it can obligate the state or the individuals representing it.”<sup>69</sup> For Kelsen, sovereignty (like the state itself) does not exist “in the world of physical reality,” but rather as a mental construct.<sup>70</sup> “The state is sovereign if we conceive it to be sovereign, if we conceive the order of the state to be the highest. It is not sovereign if we proceed from a different assumption.”<sup>71</sup> Kelsen speaks of the “dogma of sovereignty” which functions to support the state, just as “[t]he concept of the state is a typical product of political theology.”<sup>72</sup>

64. See Geoffrey Butler, *Sovereignty and the League of Nations*, BRIT. Y.B. INT’L L. 35 (1920-21).

65. *Id.* at 41.

66. *Id.*

67. *Id.* at 42–44.

68. HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS*, THE OLIVER WENDELL HOLMES LECTURES 1940-41 (2d prtg. 1948).

69. *Id.* at 79.

70. *Id.* at 78.

71. *Id.*

72. *Id.* at 74, 78.

The principles espoused in 1942 by Kelsen in a theoretical sense were later articulated and expanded upon in a practical setting by Judge Alejandro Alvarez in the *The Corfu Channel Case (U.K. v. Albania)* in 1949.<sup>73</sup> Alvarez, in the late 1920s, had previously written about the importance of the “new” international law embracing a new psychology and ideology, where the artificial division between law and politics was not so clearly defined.<sup>74</sup> Alvarez continued this thinking and applied it in practical terms to decide a case between Britain and Albania arising out of an incident that occurred in the Corfu Strait on October 22, 1946.<sup>75</sup> On that date, two British destroyers struck mines in Albanian waters, causing damage to the ships and loss of life.<sup>76</sup> In *Corfu Channel*, Alvarez had this to say regarding the evolving concept of sovereignty:

[b]y sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States....Some jurists have proposed to abolish the notion of the sovereignty of States, considering it obsolete. That is an error. This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted . . . . This notion has evolved, and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted [i.e., as in *The Antelope*, discussed *supra*]. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.<sup>77</sup>

Alvarez, in his individual opinion, then proceeded to discuss state responsibility, concluding *inter alia* that there is a place under international law for—what he termed—the concept of a “misuse” or “abuse” of right.<sup>78</sup>

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73. *Corfu Channel (U.K. v. Albania)*, 1949 I.C.J. 4 (Apr. 9).

74. Alejandro Alvarez, *The New International Law*, in TRANSACTIONS OF THE GROTIUS SOCIETY 35–51 (1929).

75. *Corfu Channel*, 1949 I.C.J. at 12–13.

76. *Id.*

77. *Id.* at 43.

78. *Id.* at 43–46.

For Alvarez, states could be held liable even if their actions were undertaken within their sovereign rights.<sup>79</sup>

It is clear from the above-discussed sources that sovereignty has undergone a radical change from the days of *The Antelope*, Wheaton, Vattel, and Bodin. At this point, I will begin consideration of some examples of modern discourses of sovereignty, to determine the biases within these discourses, and to map out how the above-discussed “proto-sovereignities” which existed at various points in international law’s historical past are still with us, permeating the conceptual space of international law and its language-games. Before making this transition, it is worth considering the four propositions regarding discourses on sovereignty noted in *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*.<sup>80</sup> These propositions may be rendered in condensed form as follows:

1. Discourses of sovereignty cannot relate to their object, sovereignty, as other than a problem or question. [This statement emanates from the realization that] sovereignty enters discourse . . . as a reflection on a lack, on a loss, on something that might have been but is no longer.
2. The problem of sovereignty is profoundly paradoxical. [The paradox is derived from the dual nature of sovereignty, as referring to something that is] a fundamental principle, a supporting structure, a base [but at the same time dependent on activity that proceeds without foundations], hence a foundation beyond doubt.
3. It follows that texts or discourses that would produce a semblance of a resolution to the problem of sovereignty must engage in a kind of duplicity.
4. [And, finally, that all] ‘resolutions’ to the problem of sovereignty proffered by texts or discourses can only be unstable and tentative.<sup>81</sup>

It is important to bear in mind the ultimate tentativeness of any discourse involving sovereignty.<sup>82</sup> As the authors of *Reading Dissidence* conclude, “[t]he word [sovereignty] can but connote a boundless region of am-

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79. *Id.* at 44.

80. See Richard K. Ashley & R. B. J. Walker, *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*, 34 INT’L STUD. Q. 367 (1990).

81. *Id.* at 381–83.

82. *Id.* at 383.

biguous activity that a vagabond desire . . . would mark off, fill, and claim as a territory of its own.”<sup>83</sup> In sovereignty’s ambiguity, I submit, lies its ambition, as well as its effectiveness as a strategic tool for those who use it to preserve the status quo and their power.

The following discussion revolves around three groupings of bias surrounding the notion of sovereignty in international law. I focus on a representative sample of bias from each group. The groups may be labeled as follows: 1) remnants of bias in the still extant *concepts* of nineteenth and pre-nineteenth century international law; 2) bias existing in the prevailing *metaphors* of contemporary international law; and 3) bias in the use of sovereignty in the major substantive areas of international law.

I have chosen the following topics to focus on within each group: within the “concepts” category, the civilized/uncivilized distinction; within the “metaphors” category, feminism, and new conceptions of state sovereignty; and within the “substance” category, the environment, specifically, the Kyoto Protocol.

### 1. Remnants of Bias in the Still Extant Concepts of Nineteenth Century and Pre-Nineteenth Century International Law: The “Civilized/Uncivilized” Distinction

An important remnant of nineteenth century sovereignty discourse directly shaping and influencing contemporary international law discourse is the “civilized/uncivilized” dichotomy.<sup>84</sup> One of the most glaring examples may be found in Article 38 of the Statute of the International Court of Justice (“ICJ”), used universally today as the main mode of determining appropriate sources of international law.<sup>85</sup> Article 38, subsection 1(c), provides as follows: “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (c) the general principles of law recognized by civilized nations.”<sup>86</sup> This use of “civilized” in the most foundational document of modern international law is a clear indication that some nations—i.e., those deemed “uncivilized”—will be excluded from the discourse of international law.<sup>87</sup>

More than that, the civilized/uncivilized dichotomy, as Anghie has written, represented a technology of control, an ordering for non-European

83. *Id.*

84. Anghie, *supra* note 56, at 23.

85. *See id.* at 75 n.267.

86. 1947 I.C.J. Acts & Docs. 38, *reprinted in* 2 THE FUTURE OF THE INTERNATIONAL COURT JUSTICE app. 1, at 789 (Leo Gross ed., 1976).

87. *See id.*; *see also* Anghie, *supra* note 56, at 75.

states.<sup>88</sup> It presented “non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves.”<sup>89</sup> Sovereignty for the non-European nations was “a profoundly ambiguous development, as it involved alienation rather than empowerment, and presupposed the submission to alien standards rather than the affirmation of authentic identity.”<sup>90</sup> Anghie makes the point that this dichotomy and its racial overtones became “something of an embarrassment” for the new international law which tried in large part to expunge this language from the discourse.<sup>91</sup>

While the *language* may have been largely expunged—with the explicit exception of Article 38—the *concept* still remains with us in insidious and thinly-veiled ways. An example is the new liberalism, epitomized in the work of Anne Marie Slaughter.<sup>92</sup> Slaughter utilizes international relations theory and applies it to fashion a new international law based on the distinction between liberal and non-liberal states.<sup>93</sup> In her article, *International Law in a World of Liberal States*, she outlines her project, “consistent with an overall commitment to a new generation of interdisciplinary scholarship ... to re-imagine international law based on an acceptance [of the distinction between liberal and non-liberal states] and an extrapolation of its potential implications.”<sup>94</sup> At the outset, it should be mentioned, Slaughter openly acknowledges the potential “distastefulness” of this enterprise with the following caveat:

[t]he very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall nineteenth century distinctions between ‘civilized’ and ‘uncivilized’ States, re-wrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern

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88. Anghie, *supra* note 56, at 72 n.257.

89. *Id.* at 73.

90. *Id.*

91. *Id.* at 74–75.

92. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

93. *Id.* at 505.

94. *Id.*

a world of liberal and non-liberal States. *Exclusionary norms are unlikely to be effective in regulating that world.*<sup>95</sup>

For Slaughter, the division between states based on “liberality” is a tool that can be “used or abused” and such use or abuse depends, as she asserts, on the “normative system” governing such a system.<sup>96</sup> In a further attempt to distance herself from the ethical implications of her project she self-consciously labels it a “self-professed ‘thought-experiment,’” as opposed to a call to action, a proposal for the future, or some other more ambitious real-world enterprise.<sup>97</sup>

Slaughter’s caveat is ineffective to insulate the project from the “distasteful” bias of the nineteenth century for at least two reasons. First, there is the implicit assumption that the “normative system,” developed to govern a world of liberal and non-liberal states, will shy away from “[e]xclusionary norms,” allegedly because such norms would be “unlikely to be effective in regulating that world.”<sup>98</sup> However, this assumption is unwarranted. The “exclusionary norms” of the nineteenth century were quite “effective” in creating a normative order for the “civilized” world, and providing a legal context which supported slavery, the slave trade, and colonialism. There is no reason to suppose categorically that exclusionary policies would not be “effective” to order contemporary society just because the term used to describe preferred states has been changed from “civilized” to “liberal.” Such policies and norms are very often effective and may be used to create alliances and trading practices, which may have widespread economic advantages causing deleterious consequences to so-called “non-liberal” states.

A second reason to call into question Slaughter’s distinction concerns the other implicit assumption contained in her caveat: that the “normative order” can be divorced from the distinctions, language-games, and analytic framework used to build that order, as if the normative order is somehow separate and distinct from the conceptual distinctions that it itself uses to carve up reality.<sup>99</sup> The normative order is created out of, and directly reflects, the language we use to represent the state of affairs of contemporary international reality. Slaughter attempts to wash her hands clean of any racist connotations or disadvantageous consequences flowing to non-liberal states by supposing that some “normative order” will be able to swoop down

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95. *Id.* at 506 (emphasis added).

96. *Id.*

97. Slaughter, *supra* note 92, at 514.

98. *Id.* at 506.

99. *Id.* at 510.

(*deus ex machina*) to prevent abuses.<sup>100</sup> Such an assumption is ill-conceived, unrealistic, and simplistic. It presupposes a faith in a reified order, which exists somehow outside the “liberal/non-liberal” construct created to do the governing in some hypothetical world. Such an un-tethered normative order is a fantasy.

Under Slaughter’s model, the very notion of sovereignty is radically re-defined.<sup>101</sup> The State is a “disaggregated entity.”<sup>102</sup> This redefinition, the “new sovereignty,” operates however for the purpose of facilitating the acquisition and retention of power for the so-called “liberal” states.<sup>103</sup> In the newly conceived world of liberal states:

- ‘the State’ is composed of multiple centres of political authority— legislative, administrative, executive, and judicial;
- each of these institutions operates in a dual regulatory and representative capacity . . . defined in terms of a specific set of functions it performs . . .
- the proliferation of transnational economic and social transactions creates links between each of these institutions and individuals and groups in transnational society.
- [I]nteractions among counterpart or coordinate institutions from different States . . . are shaped by . . . an awareness of a common or complementary function transcending a particular national identity . . .<sup>104</sup>

Under the new system, a “‘negarchy’” is created; “a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically.”<sup>105</sup> As Slaughter observes, “the norm of sovereignty would have to be constructed so as *to constitute and protect* the political institutions of liberal States in carrying out their individual functions and in checking and balancing one another.”<sup>106</sup>

It should be mentioned at this juncture that it is not my contention that Slaughter’s entire project should be dismissed outright because of the potential bias inherent in her redefinition and re-conception of the international

100. *See id.* at 538.

101. *See id.* at 534.

102. Slaughter, *supra* note 92, at 505.

103. *Id.* at 534.

104. *Id.* at 534–35.

105. *Id.* at 535 (quoting Daniel H. Deudney, *The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, Circa 1787-1861*, 49 INT’L. ORG. 191, 208 (1995)).

106. *Id.* (emphasis added).

legal order. To the extent that she points out the disaggregated nature of power and the many-layered intricacies of power relationships between and among international actors and political institutions, I agree that her project adds an important level of realistic sophistication to our model of international community.<sup>107</sup> My argument instead is that a harder look needs to be taken concerning Slaughter's assumptions, specifically, for example, the primary empirical and neo-Kantian assertion that liberal states do not make war with each other, or that the world (as a whole) would be better off with the imposition of such a stark distinction between states based on some characterization of their liberal nature.<sup>108</sup> This more searching inquiry actually has been undertaken by José Alvarez in a critique of Slaughter's liberal theory, in which he argues that she relies upon questionable assumptions about how "liberal" or "democratic" states behave.<sup>109</sup>

Alvarez first points out that Slaughter's liberal theory is prescriptive and not merely descriptive; it is not merely a "thought-experiment" as she initially envisioned and characterized it.<sup>110</sup> According to Alvarez, "[t]he liberal theory of international relations, or 'transgovernmental[ism],' is . . . presented as a 'blueprint for the international architecture of the 21st century, offering nothing less than 'answers to the most important challenges facing advanced industrial countries.'"<sup>111</sup> Slaughter's liberal theory, for Alvarez, is "millenist, triumphalist, upbeat," and he underscores the exceedingly positive reception it has received among policy-makers, at least in the United States.<sup>112</sup>

In contrast to this good reception, Alvarez notes that there have been several critiques of liberal theory, but most have failed to grapple with the assumptions the theory makes about how states actually behave.<sup>113</sup> For example,

Harold Koh has criticized liberal theory for being "essentialist" and for failing to recognize that nations are not permanently liberal or non-liberal. Susan Marks has criticized Slaughter's liberal theory as part and parcel of . . . "liberal millenarism" . . . [and its] uncritical and superficial view of democracy, noting that liberal mil-

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107. See Slaughter, *supra* note 92.

108. See *id.*

109. José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

110. *Id.* at 187, 193 (quoting Slaughter, *supra* note 92, at 505).

111. *Id.* at 188 (quoting Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 197).

112. *Id.* at 189-90.

113. *Id.* at 192.

lenarists too readily assume that periodic elections ensure a genuine political choice or a real free market of ideas. Harsher critiques have emerged from . . . 'critical' legal scholars, 'new streamers' or scholars of the "sub-altern" or the "post-colonial" For these critics, liberal theory does more than "shift attention away from the scale, character and sources of deprivation, oppression and conflict in the contemporary world:" it *is* the oppressive voice of neo-liberal hegemony.<sup>114</sup>

Alvarez's critique, however, is more limited and pointed.<sup>115</sup> He asks a central question behind Slaughter's liberal theory: whether liberal states behave better than non-liberal states?<sup>116</sup> An inquiry into this question is crucial because it was just such an unquestioned assumption about the allegedly self-evident moral superiority of so-called civilized states in the nineteenth century that created and supported the regimes of slavery and colonialism, which we now abhor.<sup>117</sup> He concludes, in answer to the question—Do Liberal States Behave Better?—as follows: "we do not know for sure but . . . there is plenty of reason to be sceptical [sic]."<sup>118</sup>

Alvarez makes clear that his inquiry "[does] not take issue with many of Slaughter's premises," e.g., the ethical attractiveness of democracy, its importance in fostering civil and political rights as well as economic development, and its benefits in quelling violence especially in the context of ethnic conflict.<sup>119</sup> Alvarez instead investigates the "little that we know about compliance, [and] whether liberal theory accurately describes the international law-making practices of liberal states, whether in the context of traditional treaties, transnational networks, or 'transjudicial communication.'"<sup>120</sup> He also explores *inter alia* whether "liberal theory and its prescriptions will further peace among nations."<sup>121</sup> His conclusions, as he describes them, are "a great deal more equivocal than those reached by Slaughter," and at the same time "less damning than those reached by her harshest critics."<sup>122</sup>

While it is beyond the scope of this paper to recount each of Alvarez's arguments, I would like to mention a couple representative arguments made in support of his critique. Alvarez points out that the paradigm of a liberal

114. Alvarez, *supra* note 109, at 192 (citations omitted).

115. *See id.*

116. *Id.* at 193.

117. *See id.* at 240.

118. *Id.* at 194.

119. Alvarez, *supra* note 109, at 193.

120. *Id.*

121. *Id.* at 193.

122. *Id.* at 193–94.

state, the United States itself, “has plainly not taken the route followed by European states with respect to direct or vertical enforcement of human rights conventions.”<sup>123</sup> Enforcement of international human rights in United States courts has been made “notoriously difficult” given the reservations and limitations placed upon human rights agreements by the United States.<sup>124</sup> Alvarez makes the further point that contrary to the predictions of the liberal theorists:

the leading examples of US treaty obligations permitting “vertical” enforcement by US domestic courts have not been treaties with other liberal nations but bilateral investment treaties (BITs), *mostly with non-liberal nations* . . . [the list includes:] Bangladesh, Cameroon, Egypt, Grenada, Morocco, Senegal, Turkey and Zaire . . . [and later] Haiti, Panama, the Congo and Poland.<sup>125</sup>

The example of BITs (and also FCN treaties, i.e. treaties of Friendship, Commerce, and Navigation) appear to undermine Slaughter’s presuppositions about compliance and liberal and non-liberal states’ treaty-making practices.<sup>126</sup>

Alvarez next addresses liberal theorists’ assumptions regarding the general law-abiding nature of liberal regimes, and challenges Slaughter’s prescriptive claim regarding “transnational networks,” namely that “liberal states are . . . more likely to establish, maintain, and adhere to these networks, and all the ‘soft’ informal obligations that result from them.”<sup>127</sup> Alvarez suggests that perhaps Slaughter’s descriptive reliance on such networks as a basis for a prescriptive argument is circular since:

[i]t may be true that the kinds of transgovernmental contacts that Slaughter describes prevail among Western industrialized states . . . . [I]f one defines the relevant governmental contacts to be those that one finds among the West’s quasi-autonomous governmental institutions, it stands to reason that we would find more such contacts in the West.<sup>128</sup>

Later in the paper, Alvarez attacks Slaughter’s description of how international law norms are nationalized under the classic sources of international

123. *Id.* at 194.

124. Alvarez, *supra* note 109, at 194.

125. *Id.* at 196–97 (emphasis added).

126. *Id.* at 210.

127. *Id.* at 211.

128. *Id.*

law, arguing that “[t]he suggested dichotomy—traditional international law is coercive and top-down while regulatory networks are soft and bottom-up—does not accurately describe either approach to norm-making or the complex interplay between the two.”<sup>129</sup>

Alvarez also calls into question Slaughter’s assumptions regarding the purported connection between liberal theory and peace.<sup>130</sup> In support of her assumption, “Slaughter says nothing about the many debates about which wars or how many casualties ought to ‘count,’ [or] about arguments that the thesis of a liberal peace may only be viable for the relatively short post-1945 period.”<sup>131</sup> Alvarez is especially critical of the liberal theorists’ failure to provide a convincing rationale for liberal peace.<sup>132</sup> Slaughter’s explanation of attitudes shared by liberal states “point in all directions at once” and do not provide a basis, according to Alvarez, for prescriptive claims.<sup>133</sup> As Ido Oren has written, cited by Alvarez, liberal peace is “not about democracies per se as much as it is about countries that are perceived to be ‘of our kind.’”<sup>134</sup> If Oren is correct, it leaves room for the possibility that “liberal states may have a tendency, perhaps a greater tendency than non-liberal states, to wage war on those that they perceive to be non-liberal.”<sup>135</sup>

The Slaughter-Alvarez conversation is a healthy one for the future of international law. The kind of critique proposed by Alvarez challenges the somnambulistic tendency of any adherent acting, judging, or speaking within a conceptual structure to fall back into the patterns of the past. There is the real danger, which discourse itself engenders, of allowing our thinking to be shaped by the processes, distinctions, and underlying prejudices of prior discourses. The answer is to be ever-vigilant against the subconscious urges that drive us toward rationalization and justification of the current sphere. The theories of mainstream international law, as quoted at the beginning of this paper, are always “for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space.”<sup>136</sup>

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129. Alvarez, *supra* note 109, at 213.

130. *Id.* at 234–38.

131. *Id.* at 234–35.

132. *Id.* at 235.

133. *Id.* at 236.

134. Alvarez, *supra* note 109, at 236 (quoting Ido Oren, *The Subjectivity of the “Democratic” Peace: Changing U.S. Perceptions of Imperial Germany*, 20 INTERNATIONAL SECURITY (1995), <http://www.mtholyoke.edu/acad/intrel/oren.htm> (last visited Feb. 10, 2005)).

135. *Id.* at 238.

136. Ashley & Walker, *supra* note 1, at 369 (quoting Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, in NEOREALISM AND ITS CRITICS 204, 207 (Robert O. Keohane ed., 1986)).

## 2. Bias Existing in the Prevailing Metaphors of Contemporary International Law: Feminism and New Conceptions of State Sovereignty

The next modern discourse of sovereignty to be considered is an especially good example of the perspective nature of theory, of how preconceived notions of “the State” can have far-reaching consequences in terms of state practice and norm creation. Feminist writers have attacked biased notions of the state, specifically ways in which bias arises from and shapes background conceptions held by international lawyers, jurists, scholars, and other international actors.<sup>137</sup> Karen Knop has noted “[i]nternational law does not yield easily to feminist legal methods.”<sup>138</sup> I would submit that this is a very polite—a perhaps consciously toned down—understatement of the true state of affairs. A more accurate description of international law is a discipline which has on occasion “looked the other way,” one in which until recently the subjugation of women and other minority groups have either been ignored, permitted, justified, or condoned in times of war and in times of peace.

Knop begins her analysis by noting the ambivalent notion of sovereignty under international law.<sup>139</sup> She eloquently describes the nature of sovereignty as “at once brute fact of power and central metaphor of normativity, obstacle to the paradisiacal future worlds and means of their realization, barrier to transparent global relations between individuals and groups and essential sanctuary for them.”<sup>140</sup> These ambivalent, ambiguous, and contradictory natures of sovereignty are at once its power and its poison. Knop’s first self-described project is to “increase women’s participation in the process of international lawmaking.”<sup>141</sup> Her second project, interconnected with the first, is to examine “[t]he implications of feminist theory for alternative conceptions of sovereignty.”<sup>142</sup> I will focus on this second question, specifically Knop’s discussion of how the “metaphor of the sovereign State as a bounded, unified self returns us to the problematic equation of State sovereignty with individual autonomy.”<sup>143</sup>

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137. See Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 293 (1993).

138. *Id.* at 294.

139. *Id.* at 295.

140. *Id.*

141. *Id.* at 296.

142. Knop, *supra* note 137, at 296.

143. *Id.* at 297.

Before discussing the prevailing metaphor of the state as a “bounded, unified self,”<sup>144</sup> Knop makes an interesting and effective move in identifying those aspects of sovereignty which can be viewed as at the “center” and those at the “periphery” of international law.<sup>145</sup> Inasmuch as the center-periphery distinction itself is merely a metaphor for the locus of entrenched power relations, the distinction functions mainly as a mode of instantiating and reproducing the structural bias of the system.<sup>146</sup> Knop turns the center-periphery distinction on its head, however, with her insight into a further dimension to the international civil society, beyond “statism,” i.e., the notion that states are the central and most important players in the international arena.<sup>147</sup> For Knop, “international civil society is a creature both liberated and enslaved by its *marginality*. Its existence at the edges of the system of States frees this mix of non-governmental organizations, unofficial groups of experts, and other initiatives from the narrow confines of self-interest.”<sup>148</sup> Knop accepts the center-periphery distinction, but at the same time uses it to catapult herself to a new understanding of power in the international community.<sup>149</sup>

Knop’s discussion continues by citing other feminist thinkers who also seek to get beyond the center-periphery dichotomy.<sup>150</sup> Anne Marie Goetz, for example, “struggles to eliminate the elements of centre, unity, and totality that organize structures into hierarchical oppositions [and] allows for the fact that women experience simultaneously many oppressions and must engage in a multitude of struggles that conflict and supplement each other.”<sup>151</sup> Knop calls this trend that operates outside the mainstream statist system, “dancing in the normative margins.”<sup>152</sup> She notes, however, that gender conscious groups have to “contend with the fact that these margins are defined by the mainstream fora.”<sup>153</sup> More than this, it also may have a dark side: “the dark side of unregulated international civil society is its tendency to replicate the imbalance of political and economic power that characterizes

144. *Id.*

145. *Id.* at 296.

146. *See id.*

147. *See* Knop, *supra* note 137, at 296–97.

148. *Id.* at 316 (emphasis added).

149. *See id.*

150. *Id.*

151. *Id.* at 316 (citing Anne Marie Goetz, *Feminism and the Claim to Know: Contradictions in Feminist Approaches to Women in Development*, in GENDER AND INTERNATIONAL RELATIONS 133, 149–53 (Rebecca Grant & Kathleen Newland eds., 1991)).

152. Knop, *supra* note 137, at 316.

153. *Id.*

the system of States, an imbalance apparent in relations between First World and Third World NGOs [for example]."<sup>154</sup>

With respect to the metaphor of the state as a "bounded, unified self," Knop points out the limitations of making such an analogy between the state and an individual being: "the analogy cannot take into account that States are not like individuals in the significant respect that they are not unified beings, they are not irreducible units of analysis."<sup>155</sup> Knop identifies the bias that flows from the individualistic conception of the state when she observes that "the analogy renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic State."<sup>156</sup> She further argues that some feminist approaches to international law are colored by two resulting viewpoints emanating from such analogy: "the territory of the State as the physical body of the individual and the territory of the State as the individual's private property."<sup>157</sup> Her salient point is that these metaphors arising out of the bias of statism prevent our progress toward a greater appreciation of the rights of women and people within states.<sup>158</sup>

Knop concludes with an examination of two "normative approaches" to sovereignty: "limited sovereignty" and "overlapping sovereignty."<sup>159</sup> The concept of limited sovereignty takes into consideration the question "why the State should have a monopoly on representation in international fora when it may not [be able to] decide the issue at hand domestically," because, for example, "ethnic minorities are claiming greater autonomy within the State."<sup>160</sup> In contrast, the concept of "[o]verlapping sovereignty is at odds with this monocular view of sovereignty," instead embracing "the recognition of overlapping legal orders."<sup>161</sup> The paradigm here is the European Community which coexists with its constituent states, and contains mediating institutions which at the same time allow for the retention of an intact, albeit more porous state sovereignty.<sup>162</sup>

Knop's work should be applauded for utilizing the center-periphery distinction to highlight ways women can be empowered by "the [relatively]

154. *Id.* at 317 (citations omitted).

155. *Id.* at 320.

156. *Id.*

157. Knop, *supra* note 137, at 322.

158. *Id.* at 321-22.

159. *Id.* at 341.

160. *Id.*

161. *Id.* at 342. The term "overlapping sovereignty" is Neil MacCormick's. Knop, *supra* note 137, at 342 n.207 (citing Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993)).

162. *Id.* at 342.

fluid and un-constricted nature of emerging international civil society”<sup>163</sup> and, even more importantly, for her ability to see the detrimental as well as the beneficial aspects of working at the margins. Knop also deserves credit for examining the various conceptions of state power as being determined by pre-existing metaphors. She takes the existing literature concerning new ways to conceptualize international law—for example, the policy-oriented perspective of McDougal and Lasswell, the transition toward a new world order system of Richard Falk, the functionalism of Julius Stone, and Douglas Johnston—and suggests ways feminist thinkers can harness these ideas to better represent women’s and group’s interests.<sup>164</sup>

### 3. Bias in the Use of Sovereignty in the Major Substantive Areas of International Law: A Study of the Discourses Surrounding the Kyoto Protocol and the Environment

I will focus in this section on the Kyoto Protocol because it has become the situs of an acrimonious debate over national sovereignty and the perceived dangers of a new enviro-imperialism, balanced against the necessity for a new international framework to deal with global and transnational problems. Couched within the arguments proffered on both sides of the debate are the remnants of nineteenth century conceptions of sovereignty, as well as new metaphors created to deal with the monumental problems of our new society.<sup>165</sup> The Protocol derives from the 1992 Framework Convention on Climate Change, which was designed to set up a regime to address the problem of global warming by the eventual lowering of green house gas emissions.<sup>166</sup> “[I]n 1997 more than 160 nations met in Kyoto, Japan to negotiate binding limitations on greenhouse gases for the developed nations, pursuant to the objectives of the Framework Convention.”<sup>167</sup> The Kyoto Protocol was produced as a result of the 1997 meeting, “in which the developed nations agreed to limit their greenhouse gas emissions, relative to the levels emitted in 1990.”<sup>168</sup> “The United States agreed to reduce emissions from 1990 levels by 7 percent during the period 2008 to 2012.”<sup>169</sup> However, the United States subsequently failed to ratify the Protocol.<sup>170</sup>

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162. *Id.* at 316.

164. *Id.* at 335, 339–40.

164. See Shalini Prakash, *Enforcement of International Environmental Law: The Kyoto Protocol*, at [http://www.devalt.org/newsletter/nov03/of\\_7.htm](http://www.devalt.org/newsletter/nov03/of_7.htm) (last visited Feb. 10, 2005).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. See Prakash, *supra* note 164.

The core critique of the Protocol made by the staunch pro-traditional state sovereignty voices, tracks a familiar narrative concerning the inviolability of state power, and especially relies on rhetoric concerning the necessity that the state be permitted to withdraw its consent to treaty conditions.<sup>171</sup> In addition, supporters of the traditional sovereignty decry the Protocol's authority to set energy emissions.<sup>172</sup> This is the rhetoric of one such position encapsulated in the following quotation:

[t]he Protocol does not limit emissions in the developing countries. China will rapidly surpass America's emissions early in the next century. Greenhouse gas emissions will not be slowed by the Protocol; they will simply be shifted from the northern hemisphere to the southern hemisphere.

So will America's jobs, industry, and wealth. The first-step Protocol is designed to start a series of five-year "budget periods" for which the Conference of the Parties is empowered to adjust the emissions limits on developed countries. By limiting America's emissions, the UN effectively limits our energy use. By embracing this Protocol, America is willingly giving up its authority to set its own energy policy. The Gore/Clinton Administration has embraced the Protocol and has the audacity to claim that it is not a surrender of national sovereignty.<sup>173</sup>

Later in the article, the author creates an alarming picture of the dangers of the Protocol, characterizing it as invading "every facet of American life."<sup>174</sup>

The consequences of the Kyoto Protocol include another giant step toward global governance. The international bureaucracy being constructed by the UN is reaching its tentacles into every facet of American life—hiding behind the scary scenario of planetary impoverishment. Society is being transformed incrementally to conform to the vision of Al Gore's 1992 declaration

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171. See Ray Evans, *The Kyoto Protocol: Fast Road to Global Governance*, Address to the Samuel Griffith Society Sydney Conference (Nov. 10-12, 2000), (transcript available at <http://www.lavoisier.com.auf/papers/articles/EvansKyoto.html>).

172. *Id.*

173. Henry Lamb, *Kyoto: The Consequences*, <http://www.citizenreviewonline.org/news/stories/398c5.html> (last visited Feb. 11, 2005).

174. *Id.*

that societies must be restructured around the central organizing principle of protecting the environment.<sup>175</sup>

The above-voiced American position has also been echoed by other national voices, including those in other developed countries.<sup>176</sup> Here is an example from an Australian perspective:

[w]hy should the Kyoto Protocol, of itself, presage a new imperialism? What distinguishes the Kyoto Protocol from every other international treaty which Australia has ratified? The difference between Kyoto and every other international treaty is this: If Kyoto is brought into effect, the economic dislocation which must follow its implementation will be unprecedented in modern times. It will be equivalent to the famines of the early nineteenth century in its disruptive power, (except that the famines were followed by good seasons). There are some treaties which Australia has ratified which have caused economic loss to Australians and to people in other countries. The Basel Convention is the best known example. But the extent of the economic loss due to Basel is minuscule, at least in Australia, and understood by very few people. The Kyoto Protocol is a different thing indeed, compared with Basel.<sup>177</sup>

In contrast to these voices, the other side of the narrative stresses the benefits to both the environment and to developing countries.<sup>178</sup> As stated in a recent World Bank article entitled *Supporting Poor Communities Under the Kyoto Protocol*:

[t]he [Community Development Carbon Fund] will provide financial support to small-scale greenhouse gas reduction projects in the least developed countries and poor communities in developing countries. Poorer communities will get the advantage of development dollars coming their way, and participants in the fund will receive carbon emission reduction credits for reductions in carbon emissions.<sup>179</sup>

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175. *Id.*

176. *See id.*

177. Evans, *supra* note 171.

178. *See* Press Release, The World Bank Group, Supporting Poor Communities Under the Kyoto Protocol (July 15, 2003) (*available at* <http://lnweb18.worldbank.org/ESSD/sdvtxt.nsf/43ByDocName/NewsandMediaPressReleasesArchive>).

179. *Id.*

The pro-Kyoto Protocol side of the debate also minimizes the impact on the infringement to traditional notions of national sovereignty.<sup>180</sup> For example, in the 1998 hearings before the United States House of Representatives International Relations Committee, there was much discussion of the effects of the Protocol on sovereignty and especially its economic effect given the mandated reduced emissions.<sup>181</sup> During the hearings, experts addressed several key concerns, namely that the Protocol would not be applied to DOD (Department of Defense) emissions and fears that the Protocol would create a “super U.N. Secretariat.”<sup>182</sup> With respect to the first concern, it was reported that “the President determined recently that to ensure defense readiness, he will propose that military operations and training be completely held harmless from any national emissions limits that might be adopted.”<sup>183</sup> With respect to the second concern, Mr. Eizenstat, United States Under Secretary of State for Economics, Business and Agriculture Affairs, attempted to allay fears of a world dominating U.N. such as those reflected in the above.<sup>184</sup> He had this to say:

[a] second misconception is that somehow the protocol will create a super U.N. Secretariat, threatening U.S. sovereignty. That is also fallacious. The review process and the protocol simply codifies already existing practices under the 1992 Rio Convention.

The review process is not by some centralized U.N. Secretariat; it is intergovernmental. The review teams are chosen by the government officials and then they can only come into a country with the invitation of that government. They cannot come onto any private property unless the property owner himself or herself permits it. *There will be no black helicopters swooping down on farms.*

Also, this intergovernmental team recently visited in April the U.S. Capitol, met with congressional staff and Members of the Congress, *and the Capitol still stands. So the notion that somehow people are going to be intruding on our sovereignty is simply and totally untrue.*

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180. See *The Kyoto Protocol: Problems with U.S. Sovereignty and the Lack of Developing Country Participation: Hearing Before the House Comm. on Int'l Relations*, 105th Cong. (1998), available at [http://commdocs.house.gov/committees/intlrel/hfa49425.000/hfa49425\\_0.htm](http://commdocs.house.gov/committees/intlrel/hfa49425.000/hfa49425_0.htm) (last visited Feb. 11, 2004) [hereinafter *The Kyoto Protocol*].

181. *Id.* at 5.

182. *Id.* at 31, 46–47.

183. *Id.* at 31.

184. *Id.*

Finally, there are some who suggest the protocol is going to result in a huge government transfer of foreign aid to Russia. That is also not true. U.S. private sector firms may on their own choose to purchase international emissions credits from Russia or any other country that wants to sell them. It will be purely a private decision. The U.S. Government is not transferring taxpayers' money to anyone. Indeed, this will be one of the crucial ways that the private sector can achieve cost-effective reductions. It will be their decision.<sup>185</sup>

The various positions of the two sides, as reflected in the above quotations, make clear that each has internalized a traditional and monolithic conception of sovereignty.<sup>186</sup> No one, it seems (except perhaps law professors and other academics) came out and said that there is no such thing anymore as an impermeable membrane called sovereignty surrounding national territories that must never be relinquished, even in matters of global environmental concern. The territorial conception of sovereignty is apparent in Mr. Eizenstat's response, when he states that there is no intrusion of national sovereignty because "[t]here will be no black helicopters swooping down on farms."<sup>187</sup> This overly-simplistic (and perhaps jocular) expression of this pro-Kyoto position shows that the porous and post-modern notions of sovereignty have not trickled down at least to discourse occurring on the domestic level.

On the international plane, however, there was a different conception of sovereignty being discussed and employed in operative ways.<sup>188</sup> The new sovereignty became apparent in the interaction between states and environmental non-governmental organizations (ENGOs).<sup>189</sup> As reported in a law review article on the subject, at the sixth Framework Convention Conference of the Parties at The Hague in November 2000, "representatives of NGOs outnumbered representatives of States."<sup>190</sup> It should be mentioned that NGOs are frequently excluded from "closed-door" sessions at formal treaty negotiation sessions and are further disadvantaged because "the institutional setting favors a more moderate approach than is often advocated by EN-

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185. *The Kyoto Protocol*, *supra* note 180, at 31 (emphasis added).

186. *Id.*

187. *Id.*

188. See Michele Betsill, *Environmental NGOs Meet the Sovereign State: The Kyoto Protocol Negotiations on Global Climate Change*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 49 (2002).

189. See *id.*

190. *Id.* at 50.

GOs.”<sup>191</sup> But this institutional bias is counteracted when NGOs are able to exert their force through public opinion and in other less formal ways. Betsill underscores the important role of NGOs:

[i]n the Kyoto Protocol negotiations, ENGOs played important roles behind the scenes and influenced the negotiations in ways that cannot readily be observed in the treaty text. By focusing only on the effects of NGO activity on the outcome of international negotiations, one runs the risk of missing the ways that NGOs shape the process of the negotiations. ENGOs influenced the Kyoto Protocol negotiations by catalyzing and framing debates on emissions trading and sinks, and by increasing pressure on States to reach agreement. Thus, ENGO activities have had indirect effects on the final agreement.<sup>192</sup>

Betsill further reports that “[d]uring the Kyoto Protocol negotiations, some ENGOs organized demonstrations and protest activities to draw public and media attention to the negotiations and the issue of climate change.”<sup>193</sup>

In the context of the new international law, according to Betsill, “the notion of sovereignty is being redefined in the post-Cold War era, suggesting that there could be greater opportunity for ENGOs to shape international climate change negotiations.”<sup>194</sup> The President of the Carnegie Endowment for International Peace, Jessica Mathews, contends “that power is shifting to new actors. ‘National governments are not simply losing autonomy in a globalizing economy. They are sharing powers—including political, social, and security roles at the core of sovereignty—with businesses, with international organizations, and with a multitude of citizens groups . . . .’”<sup>195</sup> Betsill also cites Professor Karen Litfin, who points out “that the development of international environmental regimes challenges the authority of States. ‘[O]nce States have acceded to nonbinding principles or other weak agreements, they usually find it difficult not to agree to increasingly more robust

191. *Id.* at 51.

192. *Id.* at 56–57.

193. Betsill, *supra* note 188, at 55.

For example, during COP 1 in Berlin, three Greenpeace activists suspended themselves from a smoke stack near Cologne, Germany, in an effort to highlight the role of coal-burning power stations as carbon dioxide emitters. At COP 3, Japanese ENGOs covered bushes outside the conference hall with messages, such as “Are U going to save us, AI?,” and Greenpeace erected a dinosaur made out of used oil cans and spare car parts.

*Id.*

194. *Id.* at 52.

195. *Id.* (quoting Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50).

commitments.”<sup>196</sup> Betsill concludes “NGOs can influence negotiations by holding States accountable to their prior commitments to protect the environment, thereby limiting the ability of States to make autonomous decisions.”<sup>197</sup>

Taking a step back for a moment, beyond the scope of the Kyoto Protocol and outside of the specific problems concerning the Protocol’s implementation, there is a further consideration which must be addressed which has exerted its own independent force in recent years in an increasing way against efforts to support environmental protection, in general terms. Richard Falk has identified the very process of economic globalization as exerting a “downward pull on the efforts to address various environmental challenges through effective regulatory efforts.”<sup>198</sup> He argues that “given the time horizons of policy makers, economic globalization and environmental protection stress fundamentally inconsistent policy objectives that could be rendered compatible only by the imposition of effective regulatory authority based on an underlying political equilibrium between the competing economic and environmentalist constituencies.”<sup>199</sup>

This is an important insight because it suggests another bias, which exists simultaneously overlaid onto the puzzle of state-centric sovereignty. As Falk explains, the old paradigm, which explained the downside of the state-centered system, is no longer explanatorily adequate.<sup>200</sup> The old paradigm was characterized by the “essentially inward-looking nature of political authority in the world,” and held that the state as a self-interested party could not therefore protect the global commons.<sup>201</sup> “This was attributed to a generalized reluctance of states to cooperate externally, and, more specifically, to the related inability to solve the free-rider problem . . . .”<sup>202</sup> But the new paradigm, defined and shaped by globalization, presents an even greater difficulty.<sup>203</sup> Under the new paradigm, “all governments are increasingly subject to the discipline of global capital in relation to organizing their activities and setting their priorities with respect to public expenditures and goals.”<sup>204</sup>

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196. *Id.* at 52 (quoting Karen T. Litfin, *Sovereignty in Work Ecopolitics*, 41 MERSHON INT’L STUD. REV. 167, 181 (1997)).

197. Betsill, *supra* note 188, at 52.

198. Richard Falk, *Environmental Protection in an Era of Globalization*, 6 Y.B. INT’L ENVTL. L. 3, 3 (1995).

199. *Id.*

200. *Id.* at 4.

201. *Id.* at 5.

202. *Id.*

203. Falk, *supra* note 198, at 5.

204. *Id.*

Globalization, for Falk, is a tremendous force that exists and functions to a large extent on its own accord or—to use another metaphor—like a runaway train.<sup>205</sup>

[T]he increasingly globalized character of trade, finance, and investment, as reinforced by media, computerization, and advertizing [sic], have created strong regulatory imperatives that appear for various reasons to go beyond the capacity and will of states to manage, either directly on their own, or indirectly through the establishment of international regimes.<sup>206</sup>

Thus conceived, Falk views globalization as a “world-order crisis of a structural and ideological character that has not existed in prior historical periods.”<sup>207</sup> Under this view, the traditional individuated state is sapped of its power, not by any concerted conscious effort at global governance or regime change (like the Kyoto Protocol), but instead because of a basic, systemic, and structural condition that is changing the landscape of the world—both literally and figuratively.<sup>208</sup>

Falk is careful in his conclusion to temper his remarks about the dangers and pressures created by globalization by the caveat that “globalization by its nature is not weighted against environmentalism.”<sup>209</sup> Rather, “[i]t is globalization as shaped by neo-liberalism in a world of very diverse sovereign states . . . .”<sup>210</sup> There are pressures that work to counteract environmental regulation, for example, “the unevenness of material conditions around the world, which makes it difficult for some actors to feel responsible for environmental decay of a global scope and others to feel unfairly expected to bear disproportionate costs in relation to environmental cleanups.”<sup>211</sup> In Falk’s view, the neo-liberal willingness to promote economic growth makes environmentalist concerns “less pressing.”<sup>212</sup> An ensuing crisis in public goods has resulted, one which “places a premium on reduced government expenditures of public goods of all varieties . . . definitely including environmental protection.”<sup>213</sup>

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205. *See id.*

206. *Id.* at 4.

207. *Id.* at 4–5.

208. *See Falk, supra* note 198, at 5.

209. *Id.* at 24.

210. *Id.*

211. *Id.* at 6.

212. *Id.*

213. Falk, *supra* note 198, at 6.

Globalization may be viewed as another bias, which may force state actors into positions of reduced responsibility. It is a new and awe-inspiring characteristic of international life not encompassed by any of the old metaphors of the sovereign state or even by the “society or system of states.”<sup>214</sup> Instead, globalization is a metaphor itself for the problems, which exist beyond the comprehension of one state. These are problems—like global environmental degradation, terrorism, and fluctuations in trade and the world economy—for which it does not make sense anymore for one state or even a minority of individuated powerful states to lay claim to and to attempt to solve alone.<sup>215</sup>

### B. *Jurisdiction*

The next major procedural/structural international legal discourse to be discussed revolves around the changing concept of jurisdiction. Like sovereignty, notions of jurisdiction have developed in many ways, influencing how state actors, corporate entities, and individuals conceive of the limitations placed upon the exercise of state power. The evolving concept of jurisdiction over time is intimately linked with the changing conceptions of sovereignty, discussed above in Part A. Jurisdiction, like sovereignty, has become divested from the strictly territorial, the strictly physical-self of the state; it has been expanded to meet the needs of an increasingly interdependent and globalized world. To the extent jurisdictional discourse, like the discourse surrounding sovereignty, holds onto, perpetuates, and engenders antiquated and biased modes of viewing the world, it must be reinterpreted and reformulated to better meet the needs of our evolving international society. To place contemporary jurisdictional discourse in perspective, I begin with a look at the way jurisdiction was conceived of by United States courts in the nineteenth and early twentieth centuries.

In *The Schooner Exchange v. McFaddon*,<sup>216</sup> decided in 1812, the United States Supreme Court was called upon to decide the following issue: “whether an American citizen can assert, in an American court, a title to [a public] armed national vessel” found within United States waters.<sup>217</sup> The

214. *Id.* at 4.

215. *See id.* at 4–7. For Falk, this realization leads to his conclusion that globalization should serve as the basis, as he says, for “the negotiation of an unprecedented global social contract, an undertaking of immense complexity, and one that will arouse the ideological fury of those who believe in neo-liberal approaches.” *Id.* at 7.

216. 11 U.S. (7 Cranch) 116 (1812).

217. *Id.* at 135.

Court answered in the negative.<sup>218</sup> The decision necessarily hinged on the Court's understanding of the nature of jurisdiction, territorial sovereignty, and consent.<sup>219</sup> Its jurisdictional discourse was framed as follows:

[t]he jurisdiction of *courts* is a branch of that which is possessed by the nation *as an independent sovereign power*.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, *would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction*.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.<sup>220</sup>

As this passage shows, jurisdiction was intimately connected with the state's territory, not to be infringed except by consent.<sup>221</sup>

Because of the mutual exclusivity of sovereign power, the general rule described in *The Schooner Exchange* was that "[the] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."<sup>222</sup> This shows the Court's reluctance to presume any type of extra-territorial application of jurisdiction.<sup>223</sup> A state could, however, exercise jurisdiction over foreign persons or entities within its borders. Such exercise would be suspended however, provided a specific license was given for the activity under consideration or if certain exceptions applied.<sup>224</sup>

218. *Id.* at 147.

219. *Id.* at 136.

220. *Id.* at 136 (emphasis added).

221. *The Schooner Exchange*, 11 U.S. at 136.

222. *Id.* at 137.

223. *See id.*

224. For example, the exemption of the person of a foreign sovereign from arrest or detention, the immunity of foreign ministers, and waiver of jurisdiction over troops of a foreign prince allowed to pass through a territory.

In *American Banana Co. v. United Fruit Co.*,<sup>225</sup> decided in 1909, the Supreme Court again wrestled with whether jurisdiction should apply, but this time in the context of activities occurring outside the territory of the United States, and, as the Court further explicitly noted, “within that of other states.”<sup>226</sup> The plaintiff brought an action to recover threefold damages under the Sherman Act alleging that its operations had been unfairly interfered with by the defendant-corporation.<sup>227</sup> The plaintiff claimed *inter alia* that “in July [1904], Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the [plaintiff’s] plantation and railway.”<sup>228</sup>

Justice Holmes, writing for the Court in *American Banana Co.*, took great pains to base his jurisdictional narrative on the precept that “[a]ll legislation is *prima facie* territorial.”<sup>229</sup> Holmes begins his analysis by expressing surprise that any other conception of jurisdiction could be conceived: “[i]t is obvious that, however stated, the plaintiff’s case depends on several rather *startling* propositions. In the first place the acts causing the damage were done . . . outside the jurisdiction of the United States . . . . It is *surprising* to hear it argued that they were governed by [an] act of Congress.”<sup>230</sup> For the court, “not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute.”<sup>231</sup> Although the Court acknowledges that an American defendant-corporation is bound by the laws of the United States, it found dispositive the fact that the acts of other states—namely Panama and Costa Rica—were involved: “a seizure by a state is not a thing that can be complained of elsewhere in the courts [of a foreign nation].”<sup>232</sup>

It is fascinating to juxtapose the “proto-jurisdictional” discourse within *The Schooner Exchange* and *American Banana Co.* with the more modern and sophisticated conceptions of jurisdiction exemplified in the *Restatement (Third) of Foreign Relations Law* and recent cases.<sup>233</sup> The modern discourses regarding jurisdiction have developed beyond looking strictly at the

225. 213 U.S. 347 (1909).

226. *Id.* at 355.

227. *Id.* at 353–54.

228. *Id.* at 354–55.

229. *Id.* at 357 (quoting *Ex parte Blain*, 12 Ch. D. 522, 528 (1879)).

230. *Am. Banana Co.*, 213 U.S. at 355 (emphasis added).

231. *Id.* at 357.

232. *Id.* at 357–58.

233. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

territorial locus of the parties' actions and instead encompass a broad range of further principles, which focus on the nationalities of parties and national interest, and which coexist and overlap with the territorial principle.<sup>234</sup> These other discourses can be found embedded within section 402 of the Restatement.<sup>235</sup> That section provides in full as follows:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.<sup>236</sup>

Within section 402 is the still thriving "territorial principle" reflected in three parts of section 402(1).<sup>237</sup> Section 402(2) embodies the so-called "nationality principle" and section 402(3), the "protective principle."<sup>238</sup>

Section 403 of the Restatement, referenced explicitly in section 402, provides the limitations on the exercise of jurisdiction to prescribe, even where the section 402 rules would be otherwise applicable.<sup>239</sup> The extreme flexibility of section 403 is especially apparent in its reliance on the tort concept of reasonableness.<sup>240</sup> Under section 403(1), "a state may not exercise jurisdiction . . . with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."<sup>241</sup> Section 403(2) gives further guidance to the legislator, adjudicator, or party by

234. *See id.*

235. *Id.*

236. *Id.*

237. *See* DAMROSCH ET AL., *International Law: Cases and Materials* 1090–91 (4th ed. 2001).

238. *Id.*

239. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

240. *Id.*

241. *Id.* § 403(1).

enumerating various factors to be applied in determining unreasonableness, including:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.<sup>242</sup>

Section 403(3) imposes a hortatory duty of good-faith and deference upon two states where a conflict in jurisdiction exists: “a state should defer to the other state if that state’s interest is clearly greater.”<sup>243</sup>

The jurisdictional principles set forth within these Restatement sections, as applied by modern United States courts, have resulted in inconsistent and diverging results.<sup>244</sup> In some instances, the net has been cast very wide,

242. *Id.* § 403(2).

243. *Id.* § 403(3).

244. See Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1293 (1990) [hereinafter *State Extraterritorially*].

namely in those cases involving drug trafficking,<sup>245</sup> trade and business interests, and alleged Sherman Act violations.<sup>246</sup> However, in other types of cases, namely those involving employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"),<sup>247</sup> the environment,<sup>248</sup> and constitutional guarantees such as the Fourth Amendment, courts have refused to extend jurisdiction extraterritorially.<sup>249</sup> Is there a clear line of demarcation between these two sets of cases, an underlying rationale that helps to explain their divergences that preserves some underlying consistent jurisdictional discourse which is both coherent and appropriately tailored to modern social, political, and cultural conditions? Or, are the courts instead laboring under biased notions of jurisdiction rooted in outmoded and inappropriate conceptions of sovereignty, territory, and national interest?

Take for instance, *United States v. Aluminum Co. of America*,<sup>250</sup> where in 1945 the Second Circuit considered whether the Sherman Act applied to activities of a foreign corporation allegedly to constrain trade in aluminum ingots, which had taken place outside the United States.<sup>251</sup> In that case, the court was careful to formulate the main issue such that it concerned the consequences which could be found to flow to the United States.<sup>252</sup> This crucial move is apparent in the following passage:

[d]id either the agreement of 1931 or that of 1936 violate § 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations

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245. See *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

246. See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

247. See 42 U.S.C. §§ 2000e-2000e-17 (2004); *Boureslan v. Aramco*, 857 F.2d 1014, 1016 (5th Cir. 1988).

248. See *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981).

249. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

250. 148 F.2d 416 (2d Cir. 1945).

251. See *id.* at 421.

252. See *id.* at 443.

which generally correspond to those fixed by the “Conflict of Laws.” *We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.*<sup>253</sup>

This emphasis on “consequences within the United States”<sup>254</sup> is wholly absent from the subsequently overruled *American Banana Co.* case, which took a less sophisticated, more bright-line, on-off approach to jurisdiction.<sup>255</sup> For the *Aluminum Co. of America* court, the consequences must be determined and will be determined by the court.<sup>256</sup>

The Second Circuit in *Aluminum Co. of America* candidly admitted that it was going slightly beyond the precedent in a sense by reading the Sherman Act so broadly.<sup>257</sup> Judge Learned Hand, writing for the court, remarked as follows:

[i]t is true that in [prior] cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal’s purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot.<sup>258</sup>

This transition from “animate” to “inanimate” means, while made almost as an aside, represents a major transition.<sup>259</sup> It shows the willingness of the court to begin to apply and formulate a more common-sense “reasonable-ness” test, undeterred by technicalities.

Before looking at cases on the other side of the ledger, i.e. to those cases where jurisdiction was *not* granted, consider the language (and its origins) pervading *United States v. Noriega*,<sup>260</sup> decided by the Eleventh Circuit in 1997.<sup>261</sup> Manuel Noriega appealed his convictions in the Southern District of Florida for drug trafficking.<sup>262</sup> Noriega’s principal arguments were that the indictments against him should have been dismissed by the district court

253. *Id.* at 443 (emphasis added).

254. *Id.*

255. *See Am. Banana Co v. United Fruit Co.*, 213 U.S. 347 (1909).

256. *See Aluminum Co. of Am.*, 148 F.2d at 421–22.

257. *See id.* at 443–44.

258. *Id.* at 444.

259. *Id.*

260. 117 F.3d 1206 (11th Cir. 1997).

261. *Id.*

262. *Id.* at 1209.

due to “his status as a head of state and the manner in which the United States brought him to justice.”<sup>263</sup> In addressing the “head-of-state” argument the court relied explicitly on *The Schooner Exchange*:

[t]he Supreme Court long ago held that “[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.” (citations omitted). The Court, however, ruled that nations, including the United States, had agreed implicitly to accept certain limitations on their individual territorial jurisdiction based on the “common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other . . .” (citations omitted). Chief among the exceptions to jurisdiction was “the exemption of the *person of the sovereign* from arrest or detention within a foreign territory” (citations omitted).<sup>264</sup>

The Eleventh Circuit proceeded to discuss how *The Schooner Exchange* doctrine subsequently led to the development of the modern notions of foreign sovereign immunity and its eventual codification in the Foreign Sovereign Immunities Act, passed in 1977.<sup>265</sup> Since the Act did not address “head of state” immunity in the criminal context, the court held that the only way immunity could attach was through reference to “the principles and procedures outlined in *The Schooner Exchange* and its progeny.”<sup>266</sup> Moreover, the court found itself obligated to “look to the Executive Branch for direction on the propriety of Noriega’s immunity claim.”<sup>267</sup>

By providing that the Judicial Branch “must look to the Executive Branch”<sup>268</sup> for guidance, the court has in effect self-consciously circumscribed and de-emphasized its role in deciding the case in deference to the recognition bestowed or withheld by the political branch.<sup>269</sup> The Executive Branch, generally, follows one of three paths with respect to such recognition: “(1) explicitly suggests immunity; (2) expressly declines to suggest

263. *Id.*

264. *Id.* at 1211 (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812)) (alterations in original).

265. *Noriega*, 117 F.3d at 1211–12; See *Jurisdictional Immunities of Foreign States*, 28 U.S.C. §§ 1602–1611 (2000).

266. *Noriega*, 117 F.3d at 1212.

267. *Id.*

268. *Id.*

269. *See id.*

immunity; or (3) offers no guidance.”<sup>270</sup> “Some courts have held that absent a formal suggestion of immunity, a putative head of state should receive no immunity.”<sup>271</sup> In *Noriega*, the court ultimately denied the defendant’s immunity claim, noting that the Executive Branch had “not merely refrained from taking a position . . . [but pursued] Noriega’s capture and [his] prosecution . . . [thus manifesting] its clear sentiment that Noriega should be denied head-of-state immunity.”<sup>272</sup> Moreover, the court further pointed out that “Noriega never served as the constitutional leader of Panama [and] that Panama has not sought immunity for Noriega.”<sup>273</sup>

Although *Aluminum Co. of America* was a civil action<sup>274</sup> and *Noriega* involved criminal drug-trafficking,<sup>275</sup> both cases illustrate the various techniques courts have used to justify and articulate their exercise of extraterritorial jurisdiction over foreign defendants.<sup>276</sup> In *Boureslan v. Aramco*,<sup>277</sup> however, the court rejected the exercise of jurisdiction in an (arguably) more compelling case for jurisdiction, involving a United States plaintiff and defendant.<sup>278</sup> In that case, the Fifth Circuit framed the issue as follows: “Does Title VII regulate the employment practices of businesses which, although incorporated in the United States, employ citizens of the United States in foreign countries?”<sup>279</sup> The plaintiff’s employer had its principal place of business in Saudi Arabia.<sup>280</sup> Plaintiff, a naturalized American citizen of Lebanese descent, alleged he was discriminated against on the basis of his race, religion, and national origin while working in the defendant’s offices in Saudi Arabia.<sup>281</sup> The court rejected plaintiff’s main argument that extraterritorial application of Title VII was mandated by drawing a “negative inference” from the statute’s “alien exemption provision.”<sup>282</sup> The court similarly rejected the EEOC’s reliance on the legislative history of Title VII, suggesting extraterritorial application, holding that it fell “far short of the clear ex-

270. *Id.*

271. *Noriega*, 117 F.3d at 1212 (citing *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988)).

272. *Id.*

273. *Id.*

274. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

275. See *Noriega*, 117 F.3d at 1206.

276. See *Aluminum Co. of Am.*, 148 F.2d at 416.

277. 857 F.2d 1014 (5th Cir. 1988).

278. *Id.* at 1015.

279. *Id.* at 1015–16.

280. *Id.* at 1016.

281. *Id.* at 1015.

282. *Boureslan*, 857 F.2d at 1018 (quoting *Bryant v. Int’l Sch. Servs., Inc.*, 502 F. Supp. 472, 482 (D. N.J. 1980)).

pression of congressional intent required to overcome the presumption against extraterritorial application.<sup>283</sup>

What lurks beneath the surface of the court's reasoning in *Boureslan* is its worry about the sovereign rights of other nations, as evidenced by its observation that "[t]he religious and social customs practiced in many countries are wholly at odds with those of this country."<sup>284</sup> Although not addressed directly by the majority, this subconscious preoccupation is apparent. The subtext of the opinion is that by applying Title VII abroad, other nations' sovereign rights could be infringed in violation of the territorial principle enshrined in *The Schooner Exchange* and *American Banana Co.*<sup>285</sup> As made clear in the dissent, one of the arguments against extraterritorial application was that "because labor relations are a peculiarly domestic matter, it would be an affront to the sovereignty of other nations to apply Title VII extraterritorially."<sup>286</sup> Both the defendant and *amicus curiae* argued that application of Title VII abroad would be "unreasonable" under section 403 of the Restatement.<sup>287</sup>

The dissent conducted an exhaustive analysis of the reasonableness of applying Title VII to United States citizens abroad under the factors set out in section 403.<sup>288</sup> It found dispositive that the statute was expressly exempted from application to aliens as provided in 42 U.S.C. § 2000e-1.<sup>289</sup> "Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provision would be meaningless if Title VII did not apply extraterritorially."<sup>290</sup> For the dissent, it was not unreasonable to apply the statute abroad because there would be no conflict with other nations' local laws:

[t]he argument that extraterritorial application of Title VII is unreasonable because it would offend the sovereignty of other nations is not persuasive. The fact that another nation may exercise jurisdiction over employment relations on the basis of territory does not render the exercise of U.S. jurisdiction on the basis of nationality unreasonable. The likelihood that concurrent jurisdiction

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283. *Id.* at 1019.

284. *Id.* at 1020.

285. *See* *Am. Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909); *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

286. *Boureslan*, 857 F.2d at 1026 (King, J., dissenting).

287. *Id.* at 1025; *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

288. *Boureslan*, 857 F.2d at 1021-1035 (King, J., dissenting).

289. *Id.* at 1032.

290. *Id.*

would produce international discord is minimized by the fact that the United States seeks to regulate *only* the conduct of its own nationals and by the fact that Title VII may be reconciled with foreign law in the event of a conflict.<sup>291</sup>

The fact that there might be “concurrent jurisdiction” does not automatically result in a determination of unreasonableness: “[i]nternational discord does not arise from the existence of concurrent jurisdiction alone as much as it arises from an attempt to regulate the conduct of foreign nationals.”<sup>292</sup>

In addition to labor law cases, a similar result, denying application of United States laws extraterritorially, has been found in the context of the environment and environmental impact assessment.<sup>293</sup> In *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission* (“NRDC”), the District of Columbia Circuit Court of Appeals considered whether the National Environmental Protection Act (“NEPA”) applied to the sale for export of a nuclear reactor and related nuclear materials to the Philippines.<sup>294</sup> As the court noted, the United States Nuclear Regulatory Commission “decided in the case before us to license a nuclear export without evaluating health, safety and environmental impacts *within the recipient nation*.”<sup>295</sup> In deciding that NEPA did not apply, the court hinged its decision on the anticipated infringement of the foreign nation’s sovereign regulatory framework by imposing NEPA’s requirements on exports:

[w]e do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours. This calls for a thorough understanding of our interests as defined by Congress—we can then reasonably balance the scope of our own regulation alongside the rightful regulatory jurisdiction of the Philippines.<sup>296</sup>

The court’s opinion in *NRDC* is laden with concerns about “imperialism” and “coercion.”<sup>297</sup> For example, the court acknowledged that some amount of “regulatory coercion [is a possibility] across national borders . . .

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291. *Id.* at 1031.

292. *Id.* at 1029.

293. *See, e.g.,* *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981).

294. *Id.* at 1346, 1348.

295. *Id.* at 1347.

296. *Id.* at 1357.

297. *See id.* at 1345.

for the United States when we hold the cards. But when a foreign development program—the public provision of electricity—is at stake, we should not assign an insignificant place to the foreign political interest.”<sup>298</sup> Although the court held “[t]his is not a case of the United States imperiously imposing its will on the Philippines,”<sup>299</sup> it nevertheless found that “conditioning export licenses on the satisfaction of standards fashioned in the United States may unnecessarily displace domestic regulation by the government of the Philippines.”<sup>300</sup>

In other instances, United States courts have been able to decide cases without reaching (or by sidestepping) the issue of extraterritoriality in the context of NEPA.<sup>301</sup> For example, as noted in *NRDC* itself, the court in *Sierra Club v. Adams* did not decide the extraterritoriality issue because the government “never questioned the applicability of NEPA to the construction of this highway in Panama.”<sup>302</sup> The District of Columbia Circuit in *NRDC* further distinguished *Adams* by pointing out that in that case the United States had “two-thirds of the ongoing financial responsibility and control over the South American highway construction. Moreover, the [Environmental Impact Statement] (EIS) requirement had been originally triggered by health effects on United States livestock herds.”<sup>303</sup>

A subsequent case in 1993 also concerned the extraterritorial application of NEPA.<sup>304</sup> In *Environmental Defense Fund, Inc. v. Massey*,<sup>305</sup> the plaintiff brought an action against the National Science Foundation to enjoin it from permitting incineration of food waste in Antarctica.<sup>306</sup> Again, sovereignty (or more specifically, the lack of sovereign power) was pivotal for the court in deciding the extraterritoriality question:

the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control.<sup>307</sup>

298. *Natural Res. Def. Council, Inc.*, 647 F.2d at 1357.

299. *Id.* at 1356.

300. *Id.*

301. *See, e.g., Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

302. *See id.* at 392.

303. *Natural Res. Def. Council, Inc.*, 647 F.2d at 1368.

304. 986 F.2d 528 (D.C. Cir. 1993).

305. *Id.* at 528.

306. *Id.* at 529.

307. *Id.*

The *Massey* court emphasized that both parties had acknowledged that Antarctica is unique in that it “is the only continent on earth which has never been, and is not now, subject to the sovereign rule of any nation.”<sup>308</sup>

Efforts by plaintiffs after *Massey*, to extend the decision’s scope to regions *with* sovereignty, have been wholly unsuccessful.<sup>309</sup> For example, in *NEPA Coalition of Japan v. Aspin*,<sup>310</sup> the plaintiffs argued that NEPA should be applied to the U.S. Secretary of Defense concerning the environmental impact of American military installations in Japan.<sup>311</sup> In finding NEPA not applicable, the court was careful to distinguish *Massey*, holding that the prior case involved the “unique status of Antarctica . . . not a foreign country.”<sup>312</sup> Subsequent courts have agreed that NEPA is not applicable extraterritorially when foreign sovereign rights are found to be implicated.<sup>313</sup>

Commentators on these jurisdictional discourses running through the American cases have noted that the language of “national interest” or “common good” serves to reflect and reinforce the “dominant, hierarchical structures and naturalizes the position of those in power who decide what is best for the ‘we.’”<sup>314</sup> As the authors of the leading critical article on this subject, point out:

[o]n the domestic level, appeals to “shared values” have been used to justify the subordinated position of, among others, blacks and women. Similarly, in discussions of extraterritoriality, appeals to “shared” beliefs have justified an expansive conception of jurisdiction in such fields as antitrust and securities, but a more constricted

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308. *Id.* Consistent with the holding in *Massey*, courts have held similarly in cases involving NEPA’s application on the high seas. See *Ctr. for Biological Diversity v. Nat’l Sci. Found.*, No. C02-5065JL, 2002 WL 31548073 (N.D. Cal. Oct. 30, 2002); *Natural Res. Def. Council, Inc. v. U.S. Dep’t of Navy*, No. CV-01-07781CAS(RZX), 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002).

309. See, e.g., *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

310. *Id.* at 466.

311. *Id.* at 467.

312. *Id.*

313. See, e.g., *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 179 (D.P.R. 1999) (holding that NEPA did not require United States’ consent for retransfer of irrecoverable nuclear waste); see also *Born Free USA v. Norton*, 278 F. Supp. 2d 5, 8 (D.D.C. 2003) (holding that preliminary injunction not warranted when animal welfare organizations interested in welfare of elephants brought action against the U.S. Department of the Interior and the Fish and Wildlife Service, challenging its decision to issue permits to two zoos for the importation of eleven African elephants, because the Fish and Wildlife Service had no discretion with respect to Swaziland’s determination to remove the elephants from their indigenous habitat).

314. *State Extraterritorially*, *supra* note 244, at 1293.

version in areas such as the constitutional rights of aliens and anti-discrimination laws. Thus, the securities fraud activities of a foreign defendant against a foreign company in Canada have been prescribed, although the discriminatory practices of Aramco against American workers in Saudi Arabia have gone unchecked.<sup>315</sup>

These authors make the important point that “the language of jurisdictional argument matters, because language both communicates social meaning and, by circumscribing the ways in which communication takes place, creates meaning.”<sup>316</sup>

One solution to the divergences and inconsistencies of the judicial application of jurisdiction in these American cases is to apply an *alternative* discourse, one embracing a new conception of the state and sovereign power.<sup>317</sup> For Malley, Manas and Nix:

jurisdictional arguments couched in the univocal language of territory, citizenship, or national interest obscure the complexity of the substantive issues at stake and fail to provide meaningful guidance to decision-makers. As one commentator has argued, debates about extraterritoriality “protect the discourse from having to assert its own normative theory.” Although perceived and presented as a ‘preliminary’ matter, determination of justiciability actually regiments the outcome of the inquiry.<sup>318</sup>

While these commentators admit that:

[f]raming the issue differently might not have led the courts in any of these cases to reach different *jurisdictional* result . . . [the point is that] [t]he courts’ rhetoric corresponded to a particular geography of the jurisdictional world, one in which self-proclaimed national interests were given precedence over transnational groups’ normative claims.<sup>319</sup>

While I am in general agreement with Malley, Manas, and Nix about their approach and project of imagining alternative discourses, it should be noted that alternative discourses *also* are susceptible to bias, mislabeling, and

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315. *Id.* at 1293–94 (citing *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988)).

316. *Id.* at 1290.

317. *See id.* at 1304–05.

318. *Id.* at 1303–04 (quoting DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 126 (1987)).

319. *State Extraterritorially*, *supra* note 244, at 1300.

misunderstanding, because what counts as “interests” and what counts as components of the diffuse and disaggregated power of the state may vary among cultures, societies, and even among individuals. In particular cases, the interests at stake necessarily will be largely defined by the parties themselves and other interests will be left out of the discussion—just by the very nature of the litigation process. Moreover, although these authors admit that *perhaps* jurisdictional results would not change given application by the judges of alternative conceptual paradigms, discourses, and conceptualizations of the state power, it is certainly true that *in reality* the jurisdictional results in these and some future cases will indeed change if different discourses and assumptions are used. Assuming *arguendo* that such changes in discourse *will* lead to changes in outcomes in specific cases, the next question is: is this a good or bad thing?

The answer to this question necessarily brings us to the paradox of universalism. On one hand, there is the attractiveness of exporting liberal values and of the beneficial effects which greater rights and regulation may have on people’s lives around the world, either by applying NEPA’s environmental standards in the Philippines, American anti-discrimination labor laws in Saudi Arabia, or the guarantees of the Fourth Amendment in Mexico.<sup>320</sup> On the other hand, there is the equally serious counter-tension straining at the other end of our normative tug of war: the dangers of cultural, ideological, and value imperialism. Malley, Manas, and Nix attempt to address this objection in their discussion of the critique they term “[i]mperialism in [d]isguise.”<sup>321</sup> Their answers, however, do not resolve the conundrum of universalism.<sup>322</sup> First, they counter-argue that “recognition of alternative solidarities does not imply disregard for national ties.”<sup>323</sup> Their second counter-argument is that:

normative orders do not coincide strictly with national entities; rather, they cut through national boundaries. Within the framework suggested here, then, norms are imposed neither *by* nor *on* nations, but by certain transnational groups on others. Hence, *all* jurisdictional resolutions encroach upon the normative order of *some* transnational group. This is as true of assertions of jurisdiction as it is of denials of jurisdiction.<sup>324</sup>

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320. See, e.g., *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988); *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981).

321. *State Extraterritorially*, *supra* note 244, at 1301.

322. *Id.*

323. *Id.*

324. *Id.*

With respect to the first argument, there are situations where using an alternative discourse *does not necessarily* mean disregarding national ties.<sup>325</sup> Take for instance, the Cuna and Choco Indians' interest in *Sierra Club v. Coleman*.<sup>326</sup> But, of course, the use of an alternative discourse in other cases *may* mean that one set of laws is being privileged over another, namely in those situations of concurrent jurisdiction where a conflict exists.<sup>327</sup> In such cases, section 403 mandates application of a "reasonableness" test, to balance certain factors, and to ensure that the outcome is fair to all parties.<sup>328</sup> But the problem with this is that the actor doing the balancing is in most cases a judge who is operating under his own underlying assumptions, with his own biases, cultural presuppositions, values, and indoctrinated societal goals. These goals and values may be at odds with the laws and practices of people in another nation.

With respect to the second response, that "normative orders do not coincide strictly with national entities," while this is true in some cases, it does not assist us in answering the paradox of universalism.<sup>329</sup> As the authors correctly observe, "[w]ithin the framework suggested here, then, norms are imposed neither by nor on nations, but by certain transnational groups on others."<sup>330</sup> While I agree, the conundrum in which we find ourselves in with respect to the purported dangers of imperialism on the one hand and universal values on the other is not resolved by renegotiating and re-labeling the group doing the imposing as a "transnational group" as opposed to a "nation" within the context of specific cases.<sup>331</sup> The salient and important point made by the authors is that over-reliance on notions of sovereignty and self-determination can "take on an ironic, even hollow quality" in specific cases in light of the fact that our cultural values (and those of many other nations) appear to dictate a different outcome.<sup>332</sup> I agree. However, while this may be true, my point is that the "hollowness" which rings in our ears may not be the same ring heard in other persons' ears, especially those on the other side

325. See *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976).

326. *Id.* at 63. This example is used by the authors in their article. *State Extraterritorially*, *supra* note 244, at 1284.

327. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

328. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

329. *State Extraterritorially*, *supra* note 244, at 1301.

330. *Id.*

331. See *id.* at 1275.

332. *Id.* at 1303. I refer here to the author's use of *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987), as an example of a case where "sovereignty" and "self-determination" rang "hollow" due to the fact that the discriminatory conduct in that case—leaving a black man at the scene of an accident—was violative of a fundamental norm. *Id.* at 1302–03.

of the case arguing for the preservation of their transnational groups' values and interests—or what we may consider as their biases and prejudices.

I am thinking here of one of the prime examples of conflict between local laws and Western liberal values: women's rights and the host of issues surrounding this contentious subject. In cases such as these, the conflict between cultural imperialism and respect for sovereignty or self-determination is *not* resolved by the use of an alternative discourse. Part III of this paper will return to this thorny subject, in its discussion of a proposal for dealing with the theoretical and practical implications of diverse viewpoints in an increasingly interconnected, interactive, and interdependent world.

### C. *State Responsibility*

This section examines the international legal discourses revolving around the evolving concept of “state responsibility,” and the built-in biases, prejudgments, and prejudices surrounding this term. As the name itself suggests, there is great emphasis placed upon the “state,” along with certain assumptions in the discourse about state power, attribution, and how liability attaches (or does not attach) to individuals within the state structure. The International Law Commission's (ILC) recent efforts to articulate and give substance to the rules surrounding state responsibility through their Draft Articles will be discussed. Especially important to this inquiry is the impact and effect of these articles on the future of international law. As some scholars have concluded, the Articles may do more harm than good, and may represent a counter-productive and even dangerous path, which does a disservice to the deeper and more long-lasting goals of international society.<sup>333</sup>

One of the first discussions of state responsibility in the modern discourse is found in the *Corfu Channel* case, discussed in Part II.A of this article.<sup>334</sup> In the International Court of Justice's principal judgment on the merits of April 9, 1949, the first of two issues articulated by the court related to state responsibility and was as follows: “[I]s Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?”<sup>335</sup>

The second issue concerned whether the United Kingdom had breached Albanian sovereignty by the actions of the Royal Navy.<sup>336</sup> In the court's opinion, “[f]rom all the facts and observations [set forth previously in the

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333. See Allott, *supra* note 19.

334. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

335. *Id.* at 6.

336. *Id.*

opinion] . . . the Court draws the conclusion that the laying of the minefield which caused the explosions . . . could not have been accomplished without the knowledge of the Albanian Government.”<sup>337</sup>

What is interesting is that, as the court reported, “[t]he obligations resulting for Albania from this knowledge [were] not disputed between the Parties.”<sup>338</sup> Thus, even at this early date in the development of the state responsibility discourse, there remained a general consensus and acceptance by the states themselves of certain principles, which entailed certain responsibilities flowing to states based on “their knowledge” of a particular state of affairs.<sup>339</sup> It is, however, unclear and not directly addressed in the opinion what it would mean exactly for a “state” to “know” something, in other words, what level and how many individuals, within the state or “behind” the state, would satisfy this knowledge requirement.<sup>340</sup> Assuming, as the court found, this knowledge existed, then the Albanian “state” had a duty to notify shipping in the area of the minefield.<sup>341</sup> This duty did not arise from the Hague Convention of 1907,

which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.<sup>342</sup>

The other important outcome for the state in *Corfu Channel* is that it may be held liable not just for its acts, but—just as persons in some contexts under municipal law—also for its omissions, or its failure to act.<sup>343</sup> In the words of the court: “In fact nothing was attempted by the Albanian authorities to prevent the disaster. These *grave omissions* involve the international responsibility of Albania.”<sup>344</sup> Counterbalanced against this finding against Albania, however, is the court’s further determination with respect to the second issue, regarding Albanian sovereignty, that “the United Kingdom violated the sovereignty of the People’s Republic of Albania, and that this

337. *Id.* at 22.

338. *Id.*

339. *Corfu Channel*, 1949 I.C.J. at 22.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Corfu Channel*, 1949 I.C.J. at 23 (emphasis added).

declaration by the Court constitutes in itself appropriate satisfaction.”<sup>345</sup> Interestingly, the sovereignty issue gets subsumed or overshadowed to an extent under the importance of the state responsibility issue.<sup>346</sup> This is apparent in light of the court’s acknowledgment that money damages are available in favor of the United Kingdom for the explosions and loss of life, but the Albanian state gets nothing but a declaration for its loss of sovereignty.<sup>347</sup>

The explanation for this imbalance, in terms of the disparate remedies available to each side of the dispute, is illuminated by Judge Alvarez’s separate concurring opinion.<sup>348</sup> There, he provided a more sophisticated and nuanced view of state responsibility.<sup>349</sup> For Alvarez, state responsibility may be claimed with respect to a variety of acts or omissions with different character and level of severity, consisting of three general categories: “*international delinquencies, prejudicial acts, and unlawful acts.*”<sup>350</sup> One example of an international delinquency is the very inaction complained of in the instant case: “acts contrary to the sentiments of humanity committed by a State in its territory, even with the object of defending its security and its vital interests; for instance, the laying of submarine mines without notifying the countries concerned.”<sup>351</sup> For Alvarez, “[a] *prejudicial act* is one which causes prejudice to a State or to its nationals, but which does so by means of acts not constituting an international delinquency, e.g., as a consequence of an insurrection, civil war, etc.”<sup>352</sup> Finally, an “*unlawful act*”—i.e., the one committed by the United Kingdom in violating Albanian sovereignty—is “one which disregards or violates the rights of a State, or which is contrary to international law . . . . *The responsibility of the State which committed it varies according to the nature of the act.*”<sup>353</sup> This sliding scale of responsibility with respect to unlawful acts explains why the acts of the United Kingdom, although unlawful, did not rise to the level of condemnation and seriousness triggered by Albania’s omissions.<sup>354</sup>

Taking a step back from *Corfu Channel* for a moment, it becomes clear that *both* sides were acting—in accordance with their own understanding, conception, and view of the situation—under the impression that each was exercising a legitimate and valid right: for Albania, the right to self-

345. *Id.* at 36.

346. *Id.*

347. *Id.* at 22–23.

348. *Id.* at 43–46.

349. See *Corfu Channel*, 1949 I.C.J. at 43–46.

350. *Id.* at 45.

351. *Id.* (emphasis added).

352. *Id.*

353. *Id.* (emphasis added).

354. See *Corfu Channel*, 1949 I.C.J. at 45–46.

protection, preservation, and territorial integrity; for the United Kingdom, the right of free passage through an international strait in time of peace.<sup>355</sup> For both sides, however, their actions represented a “misuse of right.”<sup>356</sup> This limitation on the exercise of rights, as articulated by Alvarez, provides another lens from which to view the case and prevents states from gaining immunity just because they believed they acted within their rights.<sup>357</sup> The problem, as discussed *supra*, becomes one of line-drawing, where does the legitimate right end and the “misuse” or “abuse” of the right begin.<sup>358</sup>

The decision in *Corfu Channel*<sup>359</sup> may be compared with another more recent one involving a finding of state responsibility, the *Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*<sup>360</sup> (“*United States Hostages Case*”).<sup>361</sup> In the *United States Hostages Case*, the court characterized the initial facts leading up to the hostage-taking as follows:

At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy’s premises.<sup>362</sup>

The facts thus immediately set up a situation, analogous to *Corfu Channel*, where *at least* a state may be liable not just for its positive acts—mine-laying or hostage-taking—but also for its omissions or failure to act—failure to notify interested countries of the danger from the mines or failure to protect the safety of foreign diplomatic personnel.<sup>363</sup>

It is significant that Iran did not appear before the court in order to fully present its case and proffer arguments in support of its position.<sup>364</sup> However,

355. *See id.*

356. *Id.* at 47–48. See Alvarez’s opinion, arguing that “in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law.” *Id.* at 48.

357. *See id.*

358. *Corfu Channel*, 1949 I.C.J. at 47–48.

359. *Id.*

360. 1980 I.C.J. 3 (May 24).

361. *Id.*

362. *See id.* ¶ 17, at 12.

363. *See id.* ¶ 63, at 31.

364. *Id.* ¶ 33, at 18.

the ICJ did examine the initial question of admissibility (or jurisdiction) of the United States' claim and Iran's objections thereto contained in the letter of 9 December 1979.<sup>365</sup> In the manner of Albania's assertions, the Iranian position centered around its own somewhat loosely conceived notions of sovereignty:

The Iranian Government in its letter . . . drew attention to what it referred to as the "deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters." The examination of the "numerous repercussions" of the revolution, it added, is "a matter essentially and directly within the national sovereignty of Iran."<sup>366</sup>

In the 9 December 1979 letter, Iran further argued that the ICJ could not exercise jurisdiction over the matter because:

[the U.S. hostages] question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.<sup>367</sup>

According to Iran, therefore, "the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years."<sup>368</sup> The court rejected Iran's claims of lack of admissibility and found that the general reliance on such historical circumstances, without further explanation, was not sufficient to divest the court of jurisdiction.<sup>369</sup>

365. *Iran*, 1980 I.C.J. ¶¶ 33–34, at 18.

366. *Id.* ¶ 34, at 18.

367. *Id.* ¶ 35, at 19.

368. *Id.*

369. *Id.* ¶ 37, at 20. Additionally, in paragraph 81, the court further addressed this argument based on the "more than 25 years of continual interference by the United States in the internal affairs of Iran" by again emphasizing that "it was open to Iran to present its own case regarding those activities to the Court by way of defense to the United States' claims. The Iranian Government, however, did not appear before the Court." *Iran*, 1980 I.C.J. ¶¶ 81–82, at 37–38.

With respect to the merits of the case, the court directly addressed the responsibility of Iran for the attacks on the embassies and subsequent hostage-taking:

[t]he first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants *not having an official character*, and successful because of lack of sufficient protection.<sup>370</sup>

However, this fact did not absolve Iran of responsibility.<sup>371</sup> Even though the attacks were not directly imputable to the actions of the state, this “does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations.”<sup>372</sup> As in *Corfu Channel*, the state was found liable due to its omissions, i.e., the government’s failure to act to protect the embassies and diplomatic personnel in contravention of the Vienna Conventions of 1961 and 1963.<sup>373</sup>

Another important stream of discourse part and parcel of the state responsibility inquiry in the *United States Hostages Case* concerned the legitimacy and appropriateness of counter-measures taken by the United States subsequent to the hostage-taking.<sup>374</sup> The ICJ noted that the United States had acted unilaterally *after* instituting its action before the court and *after* provisional measures had been ordered.<sup>375</sup> The United States imposed economic sanctions, began freezing assets of Iranian nationals, and conducted an aborted military rescue attempt which included invading Iranian territory.<sup>376</sup> The court did not condone these attempts at “self-help,” but instead “expressed its concern” in the following manner:

[b]efore drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units . . . . No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for

370. *Id.* ¶ 60, at 30 (emphasis added).

371. *Id.* ¶ 61, at 30.

372. *Id.* ¶ 61–62, at 30.

373. *Id.* ¶ 61, at 30.

374. *Iran*, 1980 I.C.J. ¶ 30, at 16.

375. *Id.*

376. *Id.* ¶¶ 31–32, at 17.

over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.<sup>377</sup>

The dissenting opinion of Judge Morozov was even more condemnatory of the United States counter-measures and would have denied reparations to the United States.

[T]aking into account the extraordinary circumstances which occurred during the period of judicial deliberation on the case, when the Applicant itself committed many actions which caused enormous damage to the Islamic Republic of Iran, the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation.<sup>378</sup>

The doctrine of state responsibility, as expressed in these two cases, is interestingly devoid of any real substance, bright-lines, or any clear indication where exactly the right stops and the abuse of right begins.<sup>379</sup> For the

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377. *Id.* ¶ 93, at 43.

378. *Id.* ¶ 5, at 53 (Morozov, J., dissenting).

379. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9); *Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

majority in *United States Hostages Case*, the court condemned the American counter-measures but stops short of holding that such actions will preclude reparations for Iranian breaches.<sup>380</sup> The court makes its condemnation in the softest voice possible—by expressing its “concern” and recalling that it had formerly ordered the parties not to “aggravate the tension.”<sup>381</sup> Judge Morozov attacked the majority’s characterization of these counter-measures as well as the depiction of the facts themselves by the majority:

[s]ome parts of *the reasoning* of the Judgment described the circumstances of the case in what I find to be *an incorrect or one-sided way* . . . . I was unable to accept paragraphs 32, 93, and 94. The language used by the Court in those paragraphs does not give a full and correct description of the actions of the United States which took place on the territory of the Islamic Republic of Iran on 24-25 April 1980. Some of the wording used by the Court for its description of the events follows uncritically the terminology used in the statement made by the President of the United States on 25 April 1980, in which various attempts were made to justify, from the point of view of international law, the so-called rescue operation. But even when the President’s statement is quoted, some parts thereof, which are important for a correct assessment of those events, are omitted.<sup>382</sup>

This alternative interpretation of the facts and the different ramifications for the United States’ alleged violations of international law shows that there is no clear line: no *a priori* legal (although good political) reasons for the majority to treat American counter-measures as frowned upon, yet tolerable and tolerated.<sup>383</sup>

This inherent lack of bright-line rules in the state responsibility discourse brings us to the quest for substance and codification pursued by the ILC in the form of its Draft Articles.<sup>384</sup> These articles have become greatly influential, not as “hard” but as “soft” law, in spite of the fact that they are only provisional and have not been ratified by states as parties to any formal treaty.<sup>385</sup> The ICJ has considered “certain aspects of the Draft Articles as reflecting the customary international law of state responsibility.”<sup>386</sup> Other

380. *Iran*, 1980 I.C.J. ¶ 93, at 43.

381. *Id.*

382. *Id.* ¶¶ 7–8, at 55 (Morozov, J., dissenting) (emphasis added).

383. *Id.*

384. See DAMROSCH, *supra* note 4, at 686.

385. *Id.*

386. *Id.* (citing Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 47–52, at 34–36 (Sept. 25)).

tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, “have likewise considered various parts of the Draft Articles and the ILC’s commentary as authoritative expressions of customary law.”<sup>387</sup> As noted in the leading textbook, some aspects of the articles have also been strenuously objected to by states, especially those articles dealing with international crimes and counter-measures.<sup>388</sup>

The Draft Articles begin with the statement that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”<sup>389</sup> Phillip Allott has written that the notion of “state responsibility” is a “dangerous fiction” which in effect creates more harm than good.<sup>390</sup> His first point is that “it consecrates the idea that wrongdoing is the behavior of a general category known as ‘states’ and is not the behavior of morally responsible human beings.”<sup>391</sup> His second point is that:

[i]f responsibility exists as a legal category, it must be given legal substance . . . general conditions of responsibility have to be created which are then applicable to all rights and duties. The net result is that the deterrent effect of imposition of responsibility is seriously compromised . . . by leaving room for argument in every conceivable case.<sup>392</sup>

At a basic level, Allott is concerned with the “nefarious effects” of interposing the concept of responsibility between wrongdoing and liability.<sup>393</sup>

The first critique is reminiscent of the point made in the context of the sovereignty and jurisdictional discourses concerning the idiosyncratic and outmoded conception of the state and state power.<sup>394</sup> As discussed, the reification of the state can result in certain viewpoints being privileged over others, namely those with nationalistic ties and those allied with narrowly-defined national interests.<sup>395</sup> Alternative discourses get discounted or left

387. *Id.* (citing *Blaskic*, Case No. IT-95-14-AR108bis (Judgment of Appeals Chamber, Oct. 29, 1997), ¶ 26, at n.34).

388. *Id.*

389. *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Comm., 53rd sess., Supp. No 10, at 43, U.N. Doc. A/56/10 (2001), [http://www.un.org/law/ilc/texts/state\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm)

390. See Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 13 (1988).

391. *Id.* at 13–14.

392. *Id.* at 14.

393. See generally *id.* at 15–16.

394. *Id.* at 14–15.

395. See *State Extraterritorially*, *supra* note 244, at 1293.

out, especially those based on the interests of transnational groups.<sup>396</sup> A similar phenomenon occurs in the context of state responsibility.<sup>397</sup> The result in this context, as Allott makes clear, “is that those human beings who implement the law’s rights and duties are able to perceive themselves, on the one hand, as entitled to implement the state’s rights and duties and, on the other hand, as bringing about responsibility in the state if they implement them unlawfully.”<sup>398</sup> For Allott, “it is not surprising that states behave badly” under such circumstances.<sup>399</sup> In effect, the state acts as a shield (and sword) for individuals to hide (or fight) behind: “[t]he moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails.”<sup>400</sup>

With respect to the second critique, Allott focuses on those articles concerning “circumstances precluding wrongfulness,” which by defining the limits of responsibility also thereby provide copious arguments to states and their lawyers to justify otherwise unlawful behavior.<sup>401</sup> These articles define six circumstances precluding wrongfulness: “consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of necessity, and self-defense.”<sup>402</sup> As we saw, with respect to the *United States Hostages Case*, the use of counter-measures by the United States was not approved by the court, although no negative repercussions were imposed beyond the rather mild language of disapprobation found in the majority’s opinion.<sup>403</sup> Allott identifies the self-defense exception and its close relation—counter-measures—as akin to “self-help”.<sup>404</sup> Allott takes a hard stance with respect to self-help, commenting that it is “indistinguishable from anarchy in practice if it is regarded by the subjects of the law as the normal sanction of the law.”<sup>405</sup>

Allott’s viewpoint and interpretation of the state responsibility concept is one which sees through the discourse to something deeper, hidden, and even pernicious lying beneath its surface.<sup>406</sup> His conception and evaluation

396. *Id.*

397. *See generally* Allott, *supra* note 390.

398. *Id.* at 14.

399. *Id.*

400. *Id.*

401. *Id.* at 17.

402. Allott, *supra* note 390, at 17.

403. *See Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. ¶ 93, at 43 (May 24).

404. Allott, *supra* note 390, at 21.

405. *Id.*

406. *See generally* Allott, *supra* note 390.

of state responsibility is an important one, which forces us to question the perceived wisdom and surface structures of the doctrine.<sup>407</sup> Out of the three discourses explored in the present paper, state responsibility appears to be—on its surface level and at first glance—the most beneficial and helpful in protecting the state and preserving international society.<sup>408</sup> A doctrine which professes to “impose responsibility” on rogue nations, could also simultaneously and perhaps in a greater number of instances, function to do just the opposite—to allow states to escape responsibility—is an apparent paradox and a chimera for international law and the international lawyer.<sup>409</sup> Allott’s perspective also recognizes the dangers surrounding the bureaucratization of international law and society, which in a Weberian sense, “involves not only the dominance of a certain social group but also the dominance of a certain mentality.”<sup>410</sup>

From a sociological perspective, bureaucratization “is no longer precisely the spirit of autocracy or oppression characteristic of old regimes.”<sup>411</sup> Rather, it is a spirit, “which seeks to get the job done with the minimum of spiritual commitment and the maximum of personal security.”<sup>412</sup> For Allott, this spirit is especially sympathetic to the state and to state power.<sup>413</sup> It is a system, which supports and sustains the state structure, and is especially detrimental to—what for Allott is the proper focus and concern of international law—the people who exist within the state.<sup>414</sup> Allott’s view has its own particular perspective (and some may say bias), one that envisions the role of the international lawyer as serving not just governments, but “international society” as a whole: “[a]s lawyers they are servants not of power but of justice.”<sup>415</sup>

This utopian view imbues law with special, almost supernatural powers, as the overseer and restrainer of state power. For Allott, law functions (ideally) as a great mediator—allowing the relationship between the people and the state to be one of growth, prosperity, and stewardship, not subjugation.<sup>416</sup> At the same time, law’s articulations, especially as manifested in the work of the ILC, the codifiers and bureaucrats, tend to devalue and erode the very legitimacy of law itself. The view of law as a great social phenomenon, as

407. *See generally id.*

408. *Id.* at 25.

409. *Id.* at 14.

410. *Id.* at 9.

411. Allot, *supra* note 390, at 10.

412. *Id.*

413. *See id.*

414. *See id.* at 14–16.

415. *Id.* at 24.

416. *See Allot, supra* note 390, at 24.

an experiment for the future and a promise for mankind's well-being and happiness, is life-affirming and positive. As Allott points out, though, this is a view which is yet to be realized, because international law is trapped—to varying degrees, as this paper seeks to show—in the pre-revolutionary and antiquated discourses of the eighteenth, nineteenth, and twentieth centuries.<sup>417</sup>

### III. EXAMINING THE STRUCTURE OF FAIRNESS DISCOURSE AND ITS NECESSARY PRESUPPOSITIONS

The previous section, Part II, had as its concern the discourses surrounding the various procedural and structural aspects of contemporary international law, specifically sovereignty, jurisdiction, and state responsibility. These discourses were singled out, both for their representative capacity to highlight certain trends running like threads through the fabric of international law, and for their strong similarities, the inter-relationships between the various discourses, revealing their interconnectedness, and interdependence. In Part III, below, I examine another discourse; the one surrounding fairness. “Fairness” has become, for many, a round-trip ticket on the “universal express.” It may be thought of as a vehicle, which (for its proponents at least) enables the transplantation of western, liberal values to other parts of the world. It is also, according to its adherents, able to function to allow those values to be legitimized, i.e., to avoid the imperialism critique, to conquer charges of ethnocentrism, culture-centrism, and—most important for our purposes—to defeat the challenge of bias launched by those who reject the universalist stance.

Thomas Franck analyzed the notion of fairness and finds it the most important basis behind the creation of modern international legal norms.<sup>418</sup> For Franck, international law has reached a new level of maturity and complexity.<sup>419</sup> It is now in its post-ontological stage, meaning that the question “whether international law is law” no longer needs to be asked, proved, defended, or fought over; rather, now the issue turns to the content of the new international law.<sup>420</sup> The new questions, which must be asked include those such as: “is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?”<sup>421</sup> Fairness,

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417. See *id.* at 25.

418. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter *FRANCK I*].

419. *Id.* at 4–6.

420. See *id.* at 3–9.

421. *Id.* at 6.

therefore, has become *the* meta-discourse, which rises above and preserves the other internal discourses, providing legitimacy, acceptance, and stability to the system of international law.<sup>422</sup>

The importance of fairness to international law's self-conscious justification of itself cannot be overstated. If it is fair to impose our cultural values universally throughout the world—on all other societies—then on what basis do recipient societies have to object? Does fairness solve all our problems? My answer is that while it may seem like a panacea and a way out of the paradox of universalism, we need to dig a little deeper to determine on what fairness is based. At the bottom, if the discourse fails to give us something to stand on, to provide justifications for the transplantation of legal values, or if the presuppositions of fairness discourse are unsatisfactory, then we must look elsewhere for alternative discourses or better ways to resolve the critique of cultural imperialism.

Franck identifies two presuppositions of modern fairness discourse: moderate scarcity and community.<sup>423</sup> The condition of moderate scarcity, as Franck says citing Rawls, presents an optimal opportunity for fairness discourse to be productive: “[it] is most likely to be productive when the allocation of rights and duties occurs in circumstances which make allocation both necessary and possible.”<sup>424</sup> The implication is that for a discourse to be productive it must be able to convince others (i.e., the less fortunate) of the distributional justness of their assigned allocations.<sup>425</sup> Just as state responsibility discourse was most likely to be productive, effective, or efficient in situations where the most powerful had been wronged and needed a remedy against a less powerful adversary, and even *in spite of* the technical wrongs committed by the more powerful, as we saw for example in the *Corfu Channel* and *United States Hostages* cases.<sup>426</sup> In other words, fairness discourse would not be “productive” if it failed to pacify and assuage the discontent felt by those less well-off.<sup>427</sup>

With respect to the second structural presupposition of fairness, Franck argues that a community is “based, first, on a common, conscious system of reciprocity between its constituents.”<sup>428</sup> The community, Franck emphasizes, is not just about shared rights and rules, but about “shared moral imperatives

422. *Id.* at 7.

423. FRANCK I, *supra* note 418, at 9–10.

424. *Id.* at 9.

425. *Id.* at 10.

426. See *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. 3 (May 24); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

427. See FRANCK I, *supra* note 418, at 7–9.

428. *Id.* at 10.

and values.”<sup>429</sup> This point echoes Slaughter’s distinction raised in Part II between liberal and non-liberal states, where the so-called liberal states constitute the community.<sup>430</sup> If we look at who is defining liberal, and who is defining the community, it becomes painfully obvious that there is something deeply tautological and circular here. *We* define who is able to join the community and who gets excluded. So it is no wonder that fairness can thrive in this limited context.

The concern raised above regarding the exclusivity of the community of states and the apparent bias emanating from its self-defined nature may be dealt with, as Franck does, by stressing the global nature of contemporary problems, issues, media, and culture. For example, he says:

[a]s we enter the third millennium, there is much evidence of a global community, emerging out of a growing awareness of irrefutable interdependence, its imperatives and exigencies. It may be tempting to speak of emerging ‘global communities’: of trade, of environmental concerns, of security, of health measures, et cetera. It would, however, be inaccurate because these regimes are linked. A state’s conformity with environmental policy will have an effect on its credit-worthiness in borrowing from the World Bank; most favored nation trade benefits may be linked to a state’s human rights record, and so forth. These multiple linkages, making different regimes interdependent, are evidence of community.<sup>431</sup>

The trend of globalization certainly points toward a more interactive relationship between states, toward a larger and larger encompassing community. But we are not completely there yet. There are many states and people living within states, which do not share a sense that they belong in any real sense to the global community.

At this point, there is the urge to ask, “so what?” What does it matter that a few or minority of rogue nations do not (or do not choose) to participate in a larger community of states? Let them alone or just inflict measures to force their compliance if they do not feel the voluntary obligations of the “liberal” states.<sup>432</sup> Indeed, some sort of discord, disarray, and indeterminacy is a necessary part of the fairness discourse.<sup>433</sup> As Franck acknowledges, regarding the subjectivity of the concept:

429. *Id.*

430. See Slaughter, *supra* note 20, at 509–11.

431. FRANCK I, *supra* note 418, at 12.

432. See FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998).

433. See FRANCK I, *supra* note 418, at 14.

[e]ven if ‘everyone’ were to agree, at least in theory, that fairness is a necessary condition of allocational rules, this unfortunately would not assure that everyone shared the same sense of fairness or agreed on a fixed meaning. Fairness is not ‘out there’ waiting to be discovered, it is a product of social context and history . . . What is considered allocationally fair has varied across time, and still varies across cultures.<sup>434</sup>

What this tells us, however, can be easily misrepresented.

It does not tell us that the search for allocational fairness is the pursuit of a chimera. What the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective . . . a human, subjective, contingent quality which merely captures in one word a *process*, . . . *reasoning*, and [a] *negotiation* leading, if successful, [on] an agreed formula.<sup>435</sup>

What this quotation shows is that Franck is, of course, aware of the subjective and viewpoint-laden nature of the fairness discourse.<sup>436</sup> Any one conception of fairness *may* (paradoxically) be biased from someone else’s perspective.<sup>437</sup> To be fair means to be unfair to someone, some of the time. One person’s freedom fighter *may be* another’s terrorist. One person’s liberation, is another’s subjugation. One person’s sacred values, is another’s outlawed taboos.

Given this admittedly subjective nature of fairness, the question still remains, what to do with rogue or non-compliant nations? One way the fairness discourse deals with this question is by subdividing fairness, so that it can function on different levels, for different parties, simultaneously. This subdivision move is encapsulated in what Franck calls his caveat to the fairness discourse.<sup>438</sup> It distinguishes between “legitimacy as process fairness” and “distributive justice as moral fairness.”<sup>439</sup> The important point here is that these conceptions can (and do) conflict and clash, although there is much

434. *Id.*

435. *Id.*

436. *See id.*

437. *See id.* at 14–15. I don’t say “is” but “may” instead, because I acknowledge the logical possibility of a universally fair rule, i.e., in theory, there is a possible state of affairs where a rule could be devised which everyone would be convinced produced a fair result. For example, if our entire community consisted of a small group of people, or perhaps a large group with homogenous interests, and no other people in the universe were in existence, then a rule could be devised that everyone would consider fair.

438. *See FRANCK I, supra* note 418, at 22–24.

439. *Id.* at 22.

overlap between legitimacy and justice.<sup>440</sup> Just as sovereignty had state sovereignty and people's sovereignty, fairness has legitimacy and justice.<sup>441</sup> Both are viable options in the discourse.<sup>442</sup> Franck says,

[t]he notion of 'fairness' encompasses two different and potentially adversary components: legitimacy and distributive justice. These components are indicators of law's, and especially *fair* law's, primary objective: to achieve a negotiated balance between the need for order and the need for change . . . What matters is how this tension is managed discursively through what Koskeniemi calls 'the social conception' of the legal system. This 'social conception' manifests itself in the discursive pursuit of fairness.<sup>443</sup>

Thus, for example, there were fairness arguments made on both sides of the United States's intervention in 1990 against Iraq after it had invaded Kuwait.<sup>444</sup> Supporters of the United States argued legitimacy-as-fairness, i.e., that concepts such as "*uti possidetis*" and "territorial integrity" gave legitimacy to Kuwait's claim of sovereignty and to be free from invasion.<sup>445</sup> The other side argued justice-as-fairness, maintaining that there was gross unjust resource allocation and that the people of Kuwait and Iraq had been artificially and unjustly divided by colonial intervention.<sup>446</sup>

This nuanced view of fairness captures some of the depth and flexibility of the fairness discourse and goes a long way in meeting the charge that "fairness" does not take into account alternative views and cultures. But the charge of ethnocentrism is still not answered, because one could imagine a situation where both "legitimacy-as-fairness" and "justice-as-fairness" operated in tandem and synchronously *within* one community, but *not between* different communities. (An example here might be specific family law or divorce rules operating in different cultures, where in one culture they may be viewed as completely legitimate and distributionally just, but imagined in another context (such as in the United States) they would be viewed as sexist, unfair, and degrading to women).

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440. *Id.* at 22–23.

441. *Id.*

442. *See id.* at 22–24.

443. FRANCK I, *supra* note 418, at 23.

444. *Id.*

445. *Id.* (emphasis added).

446. *Id.*

John Tasioulas has written a paper directly critiquing Franck's discussion of fairness.<sup>447</sup> Tasioulas criticizes Franck for, among other things, his failure to deal adequately with the problem of ethnocentrism.<sup>448</sup> Tasioulas acknowledges that Franck does not accept the objectivist basis of fairness, but instead, as we have seen, embraces an inter-subjective, indeterminate, and flexible conception.<sup>449</sup> In order to highlight the importance of culture and the imperialist dilemma that is not rectified merely because of one community's inter-subjective conception of fairness, Tasioulas relies on the work of Italian political philosopher Daniel Zolo.<sup>450</sup> Zolo attacks the liberal enterprise of universalism by first asserting:

[t]he incompatibility of the values expressed in human rights norms with 'the dominant ethos in countries like China, Pakistan, Saudi Arabia, the Sudan or Nigeria.' Second, he insists that the lack of objective foundations for such norms renders their invocation 'a perfect continuation of the missionary, colonizing tradition of the Western powers.'<sup>451</sup>

Tasioulas suggests that "[n]othing in Fairness [in International Law and Institutions] . . . really dispels the threat of ethnocentrism."<sup>452</sup> He does, however, acknowledge that elsewhere Franck argues that "personal freedom is not a parochial, specifically Western value and hence not an ethnocentric imposition on non-Western cultures."<sup>453</sup> As Franck says in that other context:

[t]here is no reason to believe that these underlying emancipatory forces [e.g., developments in industrialization, urbanization, scientific and technological discoveries, transportation, communication, information processing and education] . . . are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under

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447. John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT'L L. 993 (2002), WL 13 EURJIL 993.

448. *Id.* at \*995.

449. *See, e.g., id.* at \*996.

450. *Id.* at \*996.

451. *Id.* (quoting Danilo Zolo, COSMOPOLIS: PROSPECTS FOR WORLD GOVERNMENT 118–19 (1997)).

452. Tasioulas, *supra* note 447, at 1000.

453. *Id.* (referring to THOMAS FRANCK, *Is Personal Freedom a Western Value?* 91 AM. J. INT'L L. 593 (1997) [hereinafter FRANCK II] substantially reprinted as chapter 6 of THOMAS FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* (1999)).

the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy.<sup>454</sup>

In addition, Franck presents another argument which speaks to the non-parochial character of liberal values and ideas.<sup>455</sup> This occurs in his discussion of democracy, as Tasioulas correctly notes:

[t]his almost complete triumph of . . . notions of democracy (in Latin America, Africa, Eastern Europe, and to a lesser extent Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which future development of global society will turn. It is the unanswerable response to claims that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of Western industrial states.<sup>456</sup>

For Tasioulas, these arguments are a “valuable corrective to the tendency to reify cultures and ascribe to them an historically invariant essence.”<sup>457</sup>

Despite the attractiveness of the “independent variable” argument and the “empirical democracy” claim, this still does not adequately answer why certain states are left out of the community of states, why some cultures are privileged over others, nor does it provide a prescriptive, normative explanation for the universal nature of liberal values.<sup>458</sup> As Tasioulas notes, “it is unlikely that such empirical considerations, pertaining to modernity . . . can blunt the real force of the ethnocentric challenge.”<sup>459</sup> Indeed, while it provides a sociological or descriptive explanation for the *fact* of the permeation and instantiation of liberal values throughout the world, it does little to explain why these values *should* be predominant, preemptive, and prevailing.<sup>460</sup>

I reside with Tasioulas in my skepticism of Franck’s utopian vision of the fairness discourse as really having all the justificatory and explanatory power, which it is advertised to have.<sup>461</sup> But, at the same time, I am in agreement with Franck that there is no objective fairness, no fairness “out there” which we can tap into in order to assuage the rumblings of “the natives” and the malcontents.<sup>462</sup> Fairness discourse suffers from the kind of blind adher-

454. *Id.* at 1001. (quoting FRANCK II, *supra* note 453, at 608) (alterations in original).

455. *Id.*

456. *Id.* (quoting FRANCK I, *supra* note 418, at 88) (alterations in original).

457. Tasioulas, *supra* note 447, at 1001.

458. *See id.* at 1002.

459. *Id.*

460. *See id.*

461. *Id.*

462. FRANCK I, *supra* note 418, at 17.

ence, which Wittgenstein discussed in *On Certainty*, and Tasioulas aptly cites: “Men have judged that a king can make rain; we say this contradicts all experience. Today they judge that aeroplanes and the radio etc. are means for the closer contact of peoples and the spread of culture.”<sup>463</sup> This statement is made in connection with Wittgenstein’s general discussion of how we come to know (and believe) things about the world.<sup>464</sup> A brief discussion of Wittgenstein’s philosophical ruminations on the nature of experience and judging will follow and will then be applied to help analyze the fairness discourses at the heart of contemporary international law.

One of Wittgenstein’s main points in *On Certainty* is that it is a fallacy to think that incremental *experience* in individual cases teaches us how to *judge* the world.<sup>465</sup> For Wittgenstein, “experience is not the ground for our game of judging. Nor is it its outstanding success.”<sup>466</sup> This should not be confused with an objectivist stance. Wittgenstein is not saying, like Kant, that judging is dependent on *a priori* structures common to all mankind through reason.<sup>467</sup> Instead, Wittgenstein has in mind an inter-subjectivist idea, an organically arising structure of propositions mutually dependent and mutually reinforcing.<sup>468</sup> This is elucidated by Wittgenstein’s further insight that “[w]hen we first begin to *believe* anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.)”<sup>469</sup> “We do not learn the practice of making empirical judgments by learning rules: we are taught *judgments* and their [connection] with other judgments. *A totality* of judgments is made plausible to us.”<sup>470</sup> For Wittgenstein, “[i]t is not single axioms that strike me as obvious, it is a system in which consequences and premises give one another *mutual support*.”<sup>471</sup>

These insights help to understand both the limitations and the power of fairness discourse.<sup>472</sup> Fairness is a “language-game” which we all speak in the Western liberal world. It has been learned and has come to be seen as the primary mode upon which we judge other propositions, arrangements, and

463. Tasioulas, *supra* note 447, at 1003 (quoting LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 132, at 19e (G.E.M. Anscombe & G.H. von Wright eds., 1969)).

464. *See id.*

465. LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 131, at 19e (G.E.M. Anscombe & G.H. von Wright eds., 1969) [hereinafter WITTGENSTEIN II].

466. *Id.*

467. *See id.* ¶ 143, at 21e.

468. *See id.* ¶¶ 140–42, at 21e.

469. *Id.* ¶ 141, at 21e.

470. WITTGENSTEIN II, *supra* note 465, ¶ 140, at 21e.

471. *Id.* ¶ 142, at 21e.

472. *See id.* ¶¶ 140–142, at 21e.

institutions, as well as the extraterritorial application and transplantation of our laws on other nations and peoples.<sup>473</sup> But Wittgenstein reminds us that “fairness”—like any other judgment—is only one facet in a web of interconnecting concepts which all hang together in a certain conceptual structure.<sup>474</sup> The strength of the fairness discourse derives not from its individual “rightness” or “wrongness,” but rather from its co-existence and co-dependence with other concepts in the Western liberal vocabulary: for example, legitimacy, equity, freedom, and justice. Each of these terms gains credibility, and is defined by, and with reference to, fairness and vice-a-versa.

This point may be seen more clearly in an example Wittgenstein provides regarding how we *know* that the earth existed before our birth.<sup>475</sup> In Wittgenstein’s parlance, “everything speaks for . . . and nothing against” this proposition.<sup>476</sup> The following discussion in *On Certainty* shows the progression of Wittgenstein’s thoughts toward this conclusion:

“[i]t is certain that we didn’t arrive on this planet from another one a hundred years ago.” Well, it’s as certain as such things *are*.

It would strike me as ridiculous to want to doubt the existence of Napoleon; but if someone doubted the existence of the earth 150 years ago, perhaps I should be more willing to listen, for now he is doubting our whole system of evidence. *It does not strike me as if this system were more certain than a certainty within it.*<sup>477</sup>

“I might suppose that Napoleon never existed and is a fable, but not that the *earth* did not exist 150 years ago.”

“Do you *know* that the earth existed then?”—“Of course I know that. I have it from someone who certainly knows all about it.” [I think Wittgenstein is being humorous here].

It strikes me as if someone who doubts the existence of the earth at that time is impugning the nature of all historical evidence. And I cannot say of this latter that it is definitely *correct*.

At some point one has to pass from explanation to mere description.

473. Think of the reasonableness balancing conducted under Restatement Section 403. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

474. WITTGENSTEIN II, *supra* note 465, ¶¶ 140–42, at 21e.

475. *Id.* ¶ 190, at 26e.

476. *Id.* ¶ 191, at 27e.

477. *Id.* ¶¶ 184–85, at 26e (emphasis added).

What we call historical evidence points to the existence of the earth a long time before my birth;—the opposite hypothesis has *nothing* on its side.

Well, if everything speaks for an hypothesis and nothing against it—is it then certainly true? One may designate it as such—But does it certainly agree with reality, with the facts?—With this question you are already going around in a circle.

To be sure there is justification; but justification comes to an end.<sup>478</sup>

These thoughts regarding the empirical certainty of such bedrock principles as the earth's existence can be applied to the question of our *moral* "certainty" of applying such bedrock principles as "fairness" (and other liberal values) across cultures.<sup>479</sup>

In keeping with Wittgenstein's thinking on the certainty of "bedrock principles," it is apparent that we might have the same reaction to someone who doubted the moral certainty of fairness or the use of justice as one of the aspirational goals for a society.<sup>480</sup> We might look at such a person in a new light, as crazy or confused. Perhaps we would think that they must not understand what we mean by "fairness," "justice," or that they were not able to speak our language correctly. Wittgenstein makes this point in reverse when he says, "Even if I came to a country where they believed that people were taken to the moon in dreams, I couldn't say to them: 'I have never been to the moon—Of course I may be mistaken.'"<sup>481</sup> What Wittgenstein teaches us is that at some level our certainty—moral, empirical, philosophical—is dependent on a certain set of foundational assumptions about the world, how it operates, and what objects, institutions, and structures reside within it.<sup>482</sup>

In *Culture and Value*, another collection of writings published posthumously collecting the late Wittgenstein's thoughts, he remarks that:

[n]othing we do can be defended absolutely and finally. But only by reference to something else that is not questioned[,] [i.e. no reason can be given why you should act (or should have acted) *like this*, except that by

478. *Id.* ¶¶ 186–192, at 26–7e.

479. *See* WITTGENSTEIN II, *supra* note 465, ¶¶ 184–192, at 26–27e.

480. *See id.* ¶¶ 184–92, at 26e–27e.

481. *Id.* ¶ 667, at 88e.

482. *See id.* ¶¶ 184–192, at 26e–27e; ¶ 667, at 88e.

doing so you bring about such and such a situation, which again has to be an aim that you *accept*.<sup>483</sup>

This thought is really another way of making the point that at a certain level justification and explanation must stop; at bottom, at some fixed point there is no further reason for our actions which can be given or articulated outside the confines of our language-game; i.e., from outside our way of seeing the world. The second Gulf War comes to mind. Just as Franck commented, with regard to the first Gulf War, there was no absolute and final justification for American intervention just as there was no absolute and final justification for Iraq's position.<sup>484</sup> At the end of the day, each side had to rely on the bed-rock principles which were justified ultimately not by further concepts, but instead by the bringing about of "such and such a situation," a new reality, the legitimacy of which the majority of the rest of the world by consensus would either accept or reject.<sup>485</sup>

In one sense, Wittgenstein's insight regarding certainty does not resolve the charge of ethnocentrism raised against fairness discourse.<sup>486</sup> In a very real sense, it actually *strengthens* this charge by acknowledging that our concepts derive their meaning and their commitment from the socially accepted complex structure of interconnecting principles, which we have learned as part of our own language, culture, upbringing, and development as members in a particular society.<sup>487</sup> But, in another (and I propose more important and) wider sense, Wittgenstein's philosophy provides a solution to the charge by acknowledging that the notion of *certainty* is a function of an inter-subjective commitment reached by persons operating within and as part of a functioning community.<sup>488</sup> Because each system (or each culture) operates within its own conceptual structures and language, it is true that no one system has any *a priori* claim of primacy or priority. But, it is also true that *under the real-world state of affairs* as they exist presently and increasingly in the future, a new community is emerging and its values will gain primacy and priority because of globalization, modernization, and the sheer number of its participants.

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483. WITTGENSTEIN I, *supra* note 3, at 16e.

484. See THOMAS M. FRANCK, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

485. See WITTGENSTEIN I, *supra* note 3, at 16e.

486. See *id.*

487. See *id.*

488. WITTGENSTEIN II, *supra* note 465, ¶ 194, at 27e.

## IV. CONCLUSION

This is the case in the world today: because we are faced with the problems (and blessings) of globalization, we *must* operate as a society of states, transnational groups, peoples, individuals, and other entities. We have no choice if we are to survive, as a planet, as a species. I find myself in agreement and in sympathy with Phillip Allott's view: that "[l]aw forms part of the *self-constituting* of a society," and that "[l]aw is a *universalizing* system, reconceiving the infinite particularity of human willing and acting, in the light of the common interest of society."<sup>489</sup> From the abstract heights of Allott's almost Hegelian project of law realizing itself, I am drawn to the recognition that there may not be any ethical justification for cultural imperialism which can be articulated *outside* the language of our own idiosyncratic cultural context.<sup>490</sup> However, that fact, although it may be hard to accept, does not require abandonment of the project of international society, international law, and liberal values. Instead, it requires that we accept a commitment to take a hard look at our biases and assumptions. Once that is accomplished, only then can we begin the process of constituting an international society for all humankind, only then can we honestly forge a new and better reality for the future.

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489. Philip Allott, *The Concept of International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 3.1, 3.4, at 69 (Michael Byers ed. 2000).

490. *See id.* at 69–89.