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International Law in Perplexing Times

JEFFREY L. DUNOFF[†]

It is a great honor to have been invited to present the keynote address at this conference. In her remarks, former Secretary of State Madeleine Albright provided us with an insightful overview of the role of international law in international relations. Drawing from her rich experiences, she detailed both the potential and the limits of international norms and institutions in a complex and rapidly changing world. I will try to complement Secretary Albright's thoughtful observations by approaching similar themes from the relatively detached perspective of an international law scholar.¹

Our conference title directs us to explore evolving conceptions of international law and governance. I take this as an invitation to engage in the wonderfully creative task of imagining the future of the global legal order. It would be difficult to identify a topic that is more

[†] Professor of Law and Director, Institute for International Law & Public Policy, Temple University Beasley School of Law. This paper is a slightly expanded version of a keynote presentation delivered at a Symposium on *Multilateralism and Global Law: Evolving Conceptions of International Law and Governance* at the University of Maryland School of Law on October 23, 2009 and retains the informal nature of my oral remarks. I am grateful to Professors Michael Van Alstine and Peter Danchin and the editors of the *Maryland Journal of International Law* for inviting me to speak at the Symposium and for their outstanding hospitality at the event itself. I am also grateful to Duncan Hollis, Laura Little, and conference participants for useful feedback on earlier versions of this paper.

1. For reflections on the potential tensions between viewing international law from a practitioner's perspective and doing so from an academic perspective, see generally Jeffrey L. Dunoff, *International Legal Scholarship at the Millennium*, 1 CHI. J. INT'L L. 85 (2000).

important, more timely, or more challenging. Mindful of Yogi Berra's observation that "it's tough to make predictions, especially about the future," how can we realistically—but imaginatively—predict international law's future?

I wonder if we might start by reflecting on the organization of this important event. The conference title directs our attention to the ways that international law and global governance will likely evolve. However, the lens through which the conference asks us to imagine international law's future is quite unusual. Strikingly, the conference panels did not address classic and enduring issues such as the use of force and self-defense or core public international law issues like human rights or sovereignty. No panels were devoted to emerging issue areas such as international criminal law or public health. Perhaps most surprisingly, none addressed highly salient issues such as terrorism or the proliferation of weapons of mass destruction. Instead, the conference panels were organized around international environmental issues and international economics. Panelists addressed specific international regimes within these broad fields: the trade regime, the climate regime, the chemicals regime. In foregrounding these specific topics, the conference presents us with a vision of an international legal order structured around discrete regulatory regimes.

The intriguing question presented is how the conference title relates to the conference panels. The relationship is not obvious, because our large topic of inquiry—the evolution of the international order—looks to the future, while the structure of the panels—organized along the lines of functionally separate regimes—reflects international law's recent past. Thus embedded into the very structure and organization of the conference is a tension between looking back and looking ahead. It is precisely this Janus-faced duality, simultaneously engaging international law's past and future, that I wish to explore. Specifically, can we discern international law's future using the conceptual apparatus and vocabulary of international law's past?

This is an extremely large inquiry, and I cannot possibly do it justice in this short paper. Hence my more modest goal is to outline some analytical frameworks for conceptualizing international law's future trajectory. To do so, this paper will address three related topics. First, it will briefly describe the conventional understanding of

international law as a field organized along functional lines. Next, the paper will discuss how certain recent developments, which I will label as “regime interactions,” are rendering the standard account increasingly obsolete. Finally, the paper will outline three conceptual approaches to the field’s future, each of which seeks to address the discipline’s current challenges, but in quite different ways. The ultimate question we face—as scholars, practitioners, and global citizens—is which of these three approaches is both politically realizable and normatively desirable.

I

Let us start by considering why international law is organized along functional regimes. This question points us backwards and invites a very quick foray through international law’s recent history.² A necessarily truncated version of a rather more complex story would run as follows.

A century ago, international law’s domain was relatively limited. The field lacked a robust institutional infrastructure; there were few international organizations and no permanent international courts. The international legal order, such as it was, largely permitted states to do that which they were not expressly prohibited from doing, and restrictions on sovereign rights were not easily presumed. This order permitted a potentially Hobbesian state of nature controlled by a limited number of basic ground rules rooted in the equal sovereignty

2. *See generally* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (rev. ed. 1954); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: VOLUME I: GENERAL SUBJECTS (1968); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART II: INTERNATIONAL PERSONS (1969); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART III: STATE TERRITORY (1970); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IV: STATELESS DOMAIN (1971); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART V: NATIONALITY AND OTHER MATTERS RELATING TO INDIVIDUALS (1972); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART VI: JURIDICAL FACTS AS SOURCES OF INTERNATIONAL RIGHTS AND OBLIGATIONS (1973); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART VII: STATE SUCCESSION (1974); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART VIII: INTER-STATE DISPUTES AND THEIR SETTLEMENT (1976); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IX-A: THE LAWS OF WAR (1978); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IX-B: THE LAW OF NEUTRALITY (1979); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IX-C: THE LAW OF MARITIME PRIZE (1992); WALTER SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954).

of all states.

The minimalist legal order and sparse institutional landscape began to change in the aftermath of World War I. The war's immense carnage—including a military death toll of between nine and ten million—was understood as a powerful indictment of pre-war political and social structures, and there was a widespread sense that the pre-war diplomatic and legal system needed substantial reform. Diplomats turned to international law to accomplish this task. Indeed, “there has never been more talk about international law and organization than in the years immediately following World War I.”³

Woodrow Wilson and other elites believed that the pre-war “balance of power” system was inherently unstable and incapable of securing lasting peace.⁴ Moreover, the war's fearsome violence—including the widespread use of tanks, flame throwers, poison gas, submarines, airplanes, and other powerful weapons—convinced states that unlimited recourse to war was no longer acceptable and that armed conflict should be regulated through legal arrangements. Hence leading states negotiated the League of Nations, premised upon the idea of collective security, as a way of ensuring that future international disputes did not escalate into threats to international peace and security. Less than a decade later, states entered into the Pact of Paris, condemning recourse to war and agreeing to the pacific solution of international controversies.⁵

International law also addressed various other forms of international cooperation, often in contexts of interdependence. States entered into important treaties in areas such as communications, airspace, navigation, labor, and railways. The era also marked the

3. Martti Koskenniemi, *History of International Law, World War I to World War II*, in MAX PLANCK & RUDOLF BERNHARDT, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW.

4. Wilson's famous “Peace Without Victory” speech claimed that a new European balance of power could not produce a “stable equilibrium.” Woodrow Wilson, Address of the President of the United States of America: A League for Peace, S. DOC. NO. 64-685, at 5 (1917). In pressing for the Versailles Treaty, Wilson argued that the balance of power system had caused the Great War. Woodrow Wilson, Treaty of Peace with Germany, S. DOC. NO. 66-50 (1919). For more on the history of balance of power approaches to international relations, see generally Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555 (1979).

5. General Treaty for Renunciation of War as an Instrument of National Policy art. II, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

start of the institutionalization of international law,⁶ including the creation of specialized bodies such as the International Labour Organization and the establishment of the Permanent Court of International Justice. Finally, international law began to address issues like self-determination and minority rights, albeit in circumscribed ways.⁷

Of course, these efforts were hardly unqualified successes. The League was hampered by its lack of universality, including the United States' failure to join and its inability to achieve independence from the policies of its most powerful European members. Shortly thereafter, the failure to respond meaningfully to Japan's invasion of Manchuria and Italy's invasion of Abyssinia signaled the demise of the League's collective security system. The cataclysm that followed—including some fifty million dead, Germany's efforts to destroy European Jewry and other groups, and the use of nuclear weapons—marked the end of the inter-war system.

Perhaps surprisingly, the aftermath of World War II saw an intensification of many of the doctrinal and institutional trends that began during the inter-war years. In the United Nations (UN) Charter, states agreed to ban the use of force against the territorial integrity or political independence of states, with limited exceptions, including when a state is responding in self-defense to an armed attack and when the use of force is authorized by the UN itself. Hence the League of Nations' failures prompted states to modify, rather than reject, the project to build an international collective security system.

States similarly revisited the issues of human rights and self-determination. In 1948, the UN General Assembly proclaimed the Universal Declaration of Human Rights, which sparked the creation of a large corpus of human rights law. In addition, the World War II victors organized trials of German and Japanese political and military leaders, solidifying the notion that international law imposes duties directly upon individuals. The decades following the war also saw the independence of many former colonial possessions and formal

6. For a comprehensive discussion, see generally David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

7. See PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 47 (1991). See also generally THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* (1997); *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS* (Yoram Dinstein & Mala Tabory eds., 1992).

recognition that decolonization had become a “principle of international law.”⁸

The institutionalization of the international order that began in significant part with the League of Nations accelerated in the post-war era. In addition to the United Nations, states created numerous specialized bodies such as the International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), and the General Agreement on Tariffs and Trade to address international economic issues. Other specialized international bodies were formed to address aviation (the International Civil Aviation Organization), intellectual property (the World Intellectual Property Organization), and public health (the World Health Organization). In addition, a series of important regional bodies were established, including the European Community, the Organization of American States, the North Atlantic Treaty Organization, and the Association of Southeast Asian Nations.

These separate bodies and institutions reflected deliberate efforts by groups of states to respond to new and emerging political, economic, and social developments. For current purposes, it is significant that the various regimes and institutions developed in a relatively *ad hoc* and uncoordinated fashion. Within the academic discipline, each specific substantive field, such as trade or human rights or environment, was understood to be a part of public international law. But each was typically taught and learned as if it were an independent and autonomous field. The implicit message was that the whole consists of a collection of fragmentary parts and that these different parts seldom, if ever, connect.

Many of these post-war trends have accelerated in the last two decades. International institutions and norms have continued to proliferate, and today virtually every sphere of social life is subject to some type of international regulation.⁹ Recent institutional

8. *See, e.g.*, Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 66–67, U.N. GAOR, 15th Sess., 947th plen. mtg., U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960).

9. LEGALIZATION AND WORLD POLITICS 17–28 (Judith L. Goldstein et al. eds., 2001). To be sure, the legalization of international relations has not been even across all areas of international affairs, *see generally* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000), and even within specific areas it can wax and wane over time, *see, e.g.*, Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT’L ORG. 573 (2000).

developments include the Group of 20 Finance Ministers and Central Bank Governors (G-20) that first met in 1999, the Leaders-20 (L-20) formed in 2003, and the UN Peacebuilding Commission established in 2005.

As the density of norms and institutions has increased, so has their reach. International rules have become more demanding and intrusive and now reach far inside the domestic domain. The growing density of international bodies has been accompanied by dramatic shifts in power and authority to the international plane. At the same time, as Professors Percival and Osofsky emphasized in their conference contributions, international law-making processes have grown more diffuse. Today, a growing array of domestic agencies, transnational organizations, and experts engage in decision making and implementation.¹⁰

These various developments have given rise to important doctrinal, conceptual, and normative challenges. In democratic societies, sovereignty resides in “we the people.” To the extent polities understand themselves to be self-governing, legal rules from outside can seem problematic.¹¹ Critics perceive an erosion of sovereignty when power is delegated to international bodies¹² and question the legitimacy of international law.¹³ Others argue that international

10. See, e.g., Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MD J. INT'L L. 64 (2010); Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 MD. J. INT'L L. 37 (2010). See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); David Zaring, *Three Challenges for Regulatory Networks*, 43 INT'L LAW. 211 (2009).

11. See, e.g., John O. McGinnis, *Medellín and the Future of International Delegation*, 118 YALE L.J. 1712 (2009). Notably, an important strand of scholarship argues, to the contrary, that international law can enhance democracy on the domestic plane. See Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2008).

12. For example, Julian Ku claims that UN member states “have given up one of the most precious rights of absolute sovereignty, the right to use military force against another state.” Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 84 n.38 (2000) (citing U.N. Charter art. 2, para. 4).

13. See JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 244–48 (2005). See also generally Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343 (2009); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006);

bodies are “bureaucratic, diplomatic, technocratic – everything but democratic.”¹⁴ Troubled by rules and rulings from afar, some critics claim that international law suffers from a democracy deficit.¹⁵

II

As if the changes to the international legal order and the attendant critiques reviewed above were insufficiently challenging, developments in the last several years have made standard functional approaches to organizing the field appear increasingly obsolete. The heightened interdependence associated with globalization has increasingly given rise to fact patterns that cross regimes and that involve what we might call regime interaction. Consider, for example, the international transfer of hazardous materials from one state to another. A single transboundary shipment involves international environmental law, the law of the sea, international trade law, the law of maritime transit, and probably international labor law, human rights, and other fields as well.¹⁶ Each of these

LEGITIMACY IN INTERNATIONAL LAW (Rüdiger Wolfrum & Volker Röben eds., 2008); THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); John Tasioulas, *The Legitimacy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2009). For important defenses of international law’s legitimacy, see generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88 (2006).

14. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2018 (2004).

15. For various perspectives on this debate, see, e.g., Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221 (2008); Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic’s View*, in DEMOCRACY’S EDGES 19–36 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Andrew Moravcsik, *Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 GOV’T & OPP. 336 (2004); Joseph S. Nye, Jr., *Globalization’s Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFFAIRS 2 (2001); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 534 (2001). Much of the literature has focused on the WTO. See, e.g., James Bacchus, *A Few Thoughts on Legitimacy, Democracy, and the WTO*, 7 J. INT’L ECON. L. 667 (2004); B.S. Chimni, *The World Trade Organization, Democracy and Development: A View From the South*, 40 J. WORLD TRADE 5 (2006).

16. I borrow the example from the ILC report on fragmentation. See Int’l Law Comm’n, Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, paras. 21–26, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

regimes has its own rules, practices, and institutions. The rules of any one regime are typically developed in relative isolation and ignorance of the rules of other regimes. Fact patterns that involve regime overlap raise the very real possibility of regime collision and regime conflict. Although international law's fragmented order is not new, recent developments have highlighted this feature of the field and given rise to serious difficulties in law creation, application, interpretation, and enforcement.

Today, regime overlap and interaction is ubiquitous;¹⁷ contemporary international law is marked by the following sorts of doctrinal and conceptual puzzles. First, as international courts and tribunals proliferate, what should happen when a court in one regime is asked to apply a rule from another regime? Should a World Trade Organization (WTO) panel, for example, invoke non-WTO law, such as the Biodiversity Convention or the Cartagena Protocol, in a dispute over European bans on genetically modified organisms?¹⁸ Second, what should happen when the same fact pattern is the subject of simultaneous proceedings before multiple international tribunals? Consider the Swordfish dispute.¹⁹ In an effort to discourage certain fishing practices, Chile banned access to its ports to Spanish vessels. The European Community (EC) claimed that these acts violated

17. For a detailed description and typology, see Jeffrey L. Dunoff, *Rethinking Regime Interaction* (unpublished manuscript, on file with author).

18. See Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (Sept. 29, 2006). For the definitive study of this dispute, see generally MARK A. POLLACK & GREGORY C. SHAFFER, *WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS* (2009). Whether WTO panels should use non-WTO law has sparked a large and at times contentious literature. See, e.g., Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002); Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979 (2001); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998); JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

19. See generally Marcos A. Orellana, *The Swordfish Dispute Between the EU and Chile at ITLOS and the WTO*, 71 NORDIC J. INT'L L. 55 (2002).

international trade norms and initiated dispute resolution proceedings at the WTO. At the same time, Chile argued that Spanish fishing practices violated the Law of the Sea and initiated proceedings before a chamber of the International Tribunal for the Law of the Sea.²⁰ How should tribunals housed in different legal regimes relate to each other?²¹ How should the international legal system deal with parallel or sequential litigation?²² Third, what should happen when the same legal issue comes before tribunals in different regimes and these tribunals produce different interpretations? One high profile example occurred when the World Court and the International Criminal Tribunal for the former Yugoslavia (ICTY) produced different interpretations of the foundational international law doctrine on the appropriate legal standard for imputing the actions of an individual, or group of individuals, to a state.²³

20. Although this dispute quickly settled, other times parallel litigation proceeds. Consider the MOX Plant Case, involving litigation over UK efforts to build a nuclear reprocessing plant. This case gave rise to litigation before two different tribunals under the Law of the Sea Convention, litigation at the European Court of Justice under EU law, and litigation before an arbitral tribunal formed under a regional environmental treaty, the Convention for the Protection of the North-East Atlantic.

21. The proliferation of international courts and tribunals has given rise to a substantial literature. For a sampling of the scholarship, see Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919 (1999); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 217 RECUEIL DES COURS 101 (1998); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999). This literature focuses on horizontal relationships among international tribunals and should be distinguished from scholarship that addresses the vertical relations between international and domestic courts. For an example of this latter scholarship, see Jeffrey L. Dunoff, *Less Than Zero: The Effects of Giving Domestic Effect to WTO Law*, 6 LOY. U. CHI. INT'L L. REV. 279 (2008).

22. Current examples include litigation arising out of the Georgia–Russia conflict over Southern Ossetia and Abkhazia, which are currently pending before both the World Court and European Court of Human Rights, and the dozens of investment arbitrations arising out of Argentina's efforts to address an economic emergency in 2001.

23. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91 (Feb. 26); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, App. Ch. (July 15, 1999); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27). For scholarly reactions, see, e.g., Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on*

The highly fragmented nature of the international legal system permits, and perhaps invites, regime collisions and conflicts. To be sure, rule conflicts exist in every legal order. But most domestic legal orders have relatively well-developed rules for dealing with conflict. These rules set out hierarchical relations among different courts and often among different bodies of law. International law, in contrast, remains fundamentally a horizontal order,²⁴ and few, if any, rules address the relationships between different regimes or different courts. The doctrinal lacuna and conceptual confusion in this area have led some to conclude that we inhabit a “global disorder of normative orders.”²⁵ In short, if international law’s past is marked by the rise of specialized functional regimes—as the organization of the conference panels suggests—then a key challenge of the field’s present is making sense of regime interaction.²⁶

III

Hence contemporary challenges to international law and global governance are indeed formidable. If we take traditional concerns over international law’s lack of enforcement, add modern critiques of international law being insufficiently democratic or legitimate, and then add the challenges posed by regime interaction, we might say that the discipline now faces its own version of the four horsemen of the apocalypse. For international lawyers, these are indeed perplexing times.

In these circumstances, it is not surprising that many question whether familiar conceptual and analytic tools are up to the task of explaining and managing current challenges.²⁷ Nor is it surprising that

Genocide in Bosnia, 18 EUR. J. INT’L L. 649 (2007); Richard J. Goldstone & Rebecca J. Hamilton, *Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, 21 LEIDEN J. INT’L L. 95 (2008).

24. See generally J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L. 545 (1997).

25. Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373, 373 (2008).

26. For one thoughtful attempt, see generally REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (Margaret Young ed., forthcoming 2010).

27. The sense of deep unease and the accompanying calls for rethinking the field are not limited to academics. See, e.g., The Rule of Law at the National and International Levels, G.A. Res. 63/128, U.N. Doc. A/RES/63/128 (Dec. 11, 2008).

so many in the fields of international law, political science, sociology, and cognate disciplines are attempting to rethink our capacity for effective and sustainable global governance. Do emerging approaches to international law offer promising ways to productively address the field's current perplexities?

Although efforts to develop analytical and normative tools to address international law's current challenges are in their early stages, I think we can already identify at least three different conceptual approaches to the field that are on offer: (1) international constitutionalism, (2) global administrative law, and (3) global legal pluralism.²⁸ Each of these approaches has different goals and comes in many variants, so at the risk of oversimplification, let me briefly describe each.

A. *International Constitutionalism*

International constitutionalists urge the application of constitutional principles to improve the effectiveness and fairness of the international legal order.²⁹ Constitutionalist approaches vary widely in the scope of their ambitions; the most far-reaching of the constitutionalist visions attempt to set out a fully justified global order.³⁰ However, even in its more modest guises, the constitutionalist

28. I do not mean to suggest that these three approaches exhaust innovative approaches to rethinking the field. Indeed, Jutta Brunnée, one of the contributors to this volume, see Jutta Brunnée, *From Bali to Copenhagen: Towards a Shared Vision for a Post-2012 Climate Regime?*, 25 MD. J. INT'L L. 86 (2010), has developed an alternative understanding of international law. JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (forthcoming 2010) (combining Lon Fuller's legal theory with constructivist insights to generate a theory of how international legal norms are created). However, the three approaches discussed above represent three of the most prominent of the emerging schools of thought.

29. See generally Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397 (2009). Although it is not always clear whether the constitutionalism literature purports to be descriptive or aspirational, much of this literature argues that the international order is already significantly constitutionalized. See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535 (2009) (analyzing the "constitutional elements" of the law of international responsibility); Christian Tomuschat, *International Law as the Constitution of Mankind*, in UNITED NATIONS, INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION 37-50 (1997).

30. See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006).

turn can be understood as an effort to give the largely unstructured and historically accidental order of global governance a rational, justifiable shape.

The notion of an international constitution may strike many as odd, perhaps even fantastic. Constitutions are historically rooted in domestic political settings. So the very concept of an international constitution might appear to be a category error. Even those who believe that international constitutions could exist in principle might reasonably ask whether they exist in practice. Finally, discourse about international constitutions might prompt skepticism because constitutions are powerful and foundational legal instruments, and international law is said to be marked by weakness and ineffectiveness.³¹ So to even invoke this term begs a series of challenging empirical, conceptual, and normative questions: as an analytic matter, what is an international constitution? As a descriptive matter, are international regimes constitutionalized? And, as a normative matter, is international constitutionalization desirable?

Within the rapidly expanding literature on international constitutionalism, all of these questions are highly contested.³² My contribution to these debates is found in a recent book entitled *Ruling the World? Constitutionalism, International Law and Global Governance*. In this volume, Joel Trachtman and I detail an approach to international constitutionalism that highlights international rules that enable or constrain the creation of international law.³³ Hence our

31. For an intriguing critique of this conventional divide between international and constitutional law, see generally Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1792 (2009).

32. For a sampling of the literature, see, e.g., de Wet, *supra* note 30; Bardo Fassbender, *The Meaning of International Constitutional Law*, in TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES 307–28 (Nicholas Tsagourias ed., 2007); JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005); Ernst-Ulrich Petersmann, *Justice in International Economic Law? From the 'International Law Among States' to 'International Integration Law' and 'Constitutional Law'*, 6 GLOBAL CMTY. Y.B. INT'L L. & JURISPRUDENCE 105 (2006); Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT'L L. 170 (2001).

33. Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in RULING THE WORLD? CONSTITUTIONALISM,

focus is on “rules about rules,” or what H.L.A. Hart called secondary rules.³⁴ Our functionalist approach joins other constitutionalist approaches, ranging from those that emphasize human rights and judicial review in international institutions,³⁵ to broader calls for a legalization of transnational politics,³⁶ to visions of a global order governed by an identifiable constitutional text.³⁷

B. *Global Administrative Law*

An alternative approach to understanding the emerging global legal order is offered by “global administrative law” (GAL) scholars.³⁸ The key insight in this literature is that much modern global governance can be understood as regulation and administration. This activity occurs not in high-profile diplomatic conferences or treaty negotiations but in less visible settings that GAL scholars identify as a “global administrative space.” GAL describes these little-known international, transnational, and domestic processes and urges that they be reformed along lines that advance administrative law values, such as transparency, consultation, participation, reasoned decision making, and review processes.

INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 3–36 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

34. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

35. See, e.g., Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 *LOY. U. CHI. INT’L L. REV.* 209 (2008); Ernst-Ulrich Petersmann, *Judging Judges: From ‘Principal-Agent Theory’ to ‘Constitutional Justice’ in Multilevel ‘Judicial Governance’ of Economic Cooperation Among Citizens*, 11 *J. INT’L ECON. L.* 827 (2008); Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *EUR. J. INT’L L.* 621 (2002).

36. See generally Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT’L L.* 907 (2004).

37. See generally Bardo Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order*, in *RULING THE WORLD*, *supra* note 33, at 133–48.

38. See Benedict Kingsbury et al., *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 *L. & CONTEMP. PROBS.* 1, 5 (2005) (discussing the early studies of the Global Administrative Law Research Project at New York University). See also generally Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490 (2006); Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 *ADMIN. L. REV.* 415 (2002); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 1 (2006).

GAL offers an intriguing challenge to conventional ways of understanding international legal processes. Conventional understandings rely on certain fundamental dichotomies—such as the distinctions between international and domestic law and between public and private governance—that GAL problematizes. GAL scholars highlight the ways that different types of actors and different layers of governance together “form a variegated ‘global administrative space’ that includes international institutions and transnational networks as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects” and that transcend the traditional distinctions between public and private and national and international.³⁹ Through their richly textured analysis of many little-known international legal processes and their impressive conceptualization of a diverse set of practices across a wide range of otherwise disparate areas of global governance, GAL scholars have already made important contributions to our understanding of current governance regimes.

C. *Global Legal Pluralism*

A third emerging conceptual approach to international law is global legal pluralism. This approach is the intellectual heir to earlier sociological and anthropological examinations of the legal pluralism that resulted from the interactions between official and nonofficial law, often in colonial settings.⁴⁰ Hence this earlier literature typically addressed the plurality or multiplicity of legal norms or regimes applicable within a single domestic legal order, a situation Samantha Besson has usefully labeled “internal legal pluralism.”⁴¹ In its more recent international law iterations, legal pluralism has taken on several connotations.⁴² For current purposes, I use the term to

39. Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 25 (2009).

40. See generally John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988). Of course, the insight that more than one body of law may be applicable to a fact pattern predates these writings. See Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 455–56 (1930) (“What – more than one law . . . in a single jurisdiction, according to the whim or practice of an official, or according to the funds or temperament or political complexion of the layman affected? Just that.”).

41. Samantha Besson, *European Legal Pluralism after Kadi*, 5 EUR. CONST. L. REV. 237, 258 (2009).

42. For a sampling of pluralist approaches to diverse international legal issues, see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

highlight the simultaneous existence of numerous semi-autonomous global and regional functional legal orders.⁴³ Thus in the global context, pluralism is an approach that recognizes the coexistence of multiple official systems of law, all with their own *Grundnormen* or rules of recognition.⁴⁴

To the extent that conventional approaches understand law as a unified and hierarchically ordered system of rules, at first glance pluralism might seem to be the antithesis of law. However it is more fruitful to understand pluralism as offering a rather different vision of law. Particularly to lawyers in the United States, pluralist thinking should not seem foreign or exotic. After all, the United States is a polity that has fifty sovereign law makers in addition to the federal government and enduring issues over the allocation of power among these authorities. Moreover, the United States' legal system is marked by what one might call "interpretative pluralism," as authority to interpret the U.S. Constitution is ultimately undefined, and the various branches continuously compete over interpretative authority.⁴⁵ In the international sphere, pluralism recognizes the emergence of numerous sites and sources of transnational governance and suggests a highly decentralized approach to the management of legal diversity. As a visual matter, pluralist approaches to law suggest the image of a web instead of the more familiar pyramid of law; in a pluralist world, dialogue and accommodation replace authoritative determination as the *modus vivendi*.⁴⁶

Is one of these approaches superior to the others?⁴⁷ In a paper of

See also generally Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007). For an overview of different approaches to pluralism, see generally Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009).

43. For writings in this vein, see generally GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. LAW & SOC. SCI. 225 (2009).

44. Neil MacCormick's work has been particularly influential in this regard. *See, e.g.*, Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993); Neil MacCormick, *Risking Constitutional Collision in Europe?*, 18 OX. J. LEGAL STUD. 517 (1998).

45. Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD?, *supra* note 33, at 333.

46. *See generally* Aleinikoff, *supra* note 42.

47. This way of framing the question is potentially misleading, insofar as there

this length, it is not possible to resolve this highly contested issue. Hence for current purposes, it will suffice to highlight some of the salient strengths and weaknesses of each approach and to offer a few points of comparison and contrast. Constitutionalist approaches have the virtue of clearly delimiting the powers of regimes and their relationships with one another. The constitutionalist approach thus promises to bring hierarchy and order, or at least a set of coordinating mechanisms, into an otherwise chaotic and potentially contradictory system. Of course, many question whether a highly diverse constellation of international legal actors shares a comprehensive set of universal values that can bring order and hierarchy to the disorder associated with fragmentation.⁴⁸ Moreover, even if as a descriptive matter such a set of values existed, the desirability of a constitutionalist approach would turn, in part, on the normative attractiveness of the underlying value system.

Broad constitutionalist visions also purport to address concerns over international law's legitimacy and democratic pedigree. However, some critics suggest that constitutional advocates appropriate constitutionalism's value-laden rhetoric precisely in order to profit from its connotations of representativeness, transparency, and legitimacy and to confer dignity and power on the international order.⁴⁹

How does the constitutionalist approach compare to global administrative law? Both approaches explore the uses and limitations on the exercise of authority in transnational settings. However, unlike

can be important overlaps between approaches. For discussions of constitutional pluralism, see generally Daniel Halberstam, *Local, Global and Plural Constitutionalism: Europe Meets the World*, in *EUROPE'S CONSTITUTIONALISM AND OTHERS* (Gráinne de Búrca & Joseph H.H. Weiler eds., forthcoming); Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in *RULING THE WORLD*, *supra* note 33, at 356–80; Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MODERN L. REV.* 317 (2002).

48. For a discussion, see Dunoff & Trachtman, *supra* note 33, at 3–36; ANDREW HURRELL, *ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY* 10 (2004). See also generally Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 *IND. J. GLOBAL LEGAL STUD.* 647 (2009); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995) (noting domestic constitutionalism's difficulties in accommodating social and cultural diversity).

49. See generally Jeffrey L. Dunoff, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in *RULING THE WORLD*, *supra* note 33, at 178–205.

constitutionalism, which tends to be state-centric, GAL takes a broader view of international law's processes and actors. In particular, GAL properly directs attention to the role of nonstate actors and of various public-private and private processes of norm making and norm application. In many other ways, however, the GAL project is much less ambitious than the constitutionalists'.⁵⁰ For example, while GAL writings focus largely on administrative exercises of power, constitutionalists also examine legislative and judicial practices. Moreover, constitutionalism addresses a much richer array of normative and institutional issues than GAL does. GAL focuses on specific dimensions of global governance, specifically the accountability and legitimacy of global administrative practices. While accountability and legitimacy are central constitutional values, constitutionalists address a wider range of normative concerns that are associated with contemporary global governance. GAL's relatively reduced ambit arguably makes it more practical and achievable in the medium term than the more ambitious constitutionalist vision.

GAL is less ambitious than constitutionalism in yet another way as well. GAL largely takes the existing order as is and proposes incremental changes to existing institutions.⁵¹ However, by failing to engage with larger structural and normative issues, GAL runs the risk of seeming to legitimate particular narrow practices that are themselves embedded in a larger system that is itself largely illegitimate.⁵² Finally, insofar as GAL focuses on administrative practices within specific regimes, it has little to say about the issues raised by fragmentation, which center on the institutional and normative relationships among regimes. To the extent international constitutionalization defines the scope and limits of authority within regimes and allocates authority among regimes, this approach responds to fragmentation.

Pluralism presents a different set of strengths and weaknesses. Like GAL, pluralism does not purport to resolve the puzzles arising out of regime interaction through the introduction of order and hierarchy. Indeed, many pluralists emphasize that there is no meta-rationality

50. See Dunoff & Trachtman, *supra* note 33, at 33–34; Nico Krisch, *Global Administrative Law and the Constitutional Ambition* (London Sch. of Econ., Working Paper No. 10/2009).

51. Krisch, *supra* note 50, at 14.

52. *Id.* at 18.

that can be invoked to order a proliferating number of international institutions and norms.⁵³ However, from a pluralist perspective, it is not clear whether the resulting (dis)order should be understood as problematic. Jurisdictional overlap can “provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and nonstate communities.”⁵⁴ Relatedly, by keeping the relationships between legal orders undetermined, global legal pluralism keeps them open to political redefinition over time. This flexibility can be desirable in a highly diverse and rapidly changing international society.⁵⁵ On the other hand, as Nico Krisch notes, adaptability can be a double-edged sword. Adapting to benign changes is desirable; but adapting to harmful developments is less so. Thus this supposed virtue may be desirable only in limited circumstances.⁵⁶

Pluralism’s advocates sometimes claim that their approach opens up contestatory space in ways that the other approaches do not.⁵⁷ Multiple and overlapping legal authorities provide opportunity for individuals and groups to select from among coexisting institutions to promote their aims. On the other hand, even accepting that pluralism in fact opens up multiple sites of contestation, the sheer multiplicity of legal orders means that political successes in one order do not necessarily translate into successes elsewhere. So it is not clear that, as compared with competing approaches, a pluralist structure, in and of itself, will necessarily produce greater opportunities for political change.

To be sure, these brief observations only begin to explore some of the strengths and limits of each approach. While complete discussion would consume all of this volume and more, an example might help

53. See generally Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004). For a contrasting account of why international tribunals are unable to resolve the jurisprudential and conceptual puzzles associated with regime interaction, see Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, in REGIME INTERACTION, *supra* note 26.

54. Berman, *supra* note 43, at 238.

55. Nico Krisch, *The Case for Pluralism in Postnational Law* 21 (London Sch. of Econ., Working Paper No. 12/2009).

56. *Id.* at 22.

57. See Berman, *supra* note 43, at 238. See also generally Krisch, *supra* note 55; BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* (1995).

concretize some of the differences among these three conceptual approaches. Consider the debate over United Nations' sanctions against suspected terrorists. As part of the UN's response to several high-profile terrorist acts, the Security Council adopted a series of resolutions establishing a complex sanctions regime against individuals and firms suspected of supporting international terrorism.⁵⁸ Specifically, in 1999, the Security Council adopted Resolution 1267 requiring all states to impose financial sanctions and an arms embargo against the Taliban. To monitor the sanctions, the resolution also created a so-called "sanctions committee." Later resolutions, particularly those adopted after the September 11, 2001 attacks, widened the target of sanctions and require UN member states to impose economic sanctions against any person or entity included on a "consolidated list" of names maintained by the sanctions committee. The consolidated list consists of names forwarded by UN member states, as well as regional and international organizations, to the sanctions committee. Under the committee's "no objection" process, unless an objection or hold is placed upon a proposed addition to the list, all states must freeze the assets of the suspect and ban his travel. Despite the adoption of a series of procedural reforms over time,⁵⁹ substantial concerns remain over the procedural fairness and lack of transparency of the UN sanctions regime.⁶⁰

58. See, e.g., S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

59. See, e.g., S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); Security Council, *Letter dated 8 March 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, delivered to Security Council members*, U.N. Doc. S/2006/154 (Mar. 10, 2006).

60. See, e.g., THOMAS J. BIERSTEKER & SUE E. ECKERT, WATSON INST. FOR INT'L STUD., *STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES* (2006), http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf; IAIN CAMERON, COMM. OF LEGAL ADVISERS ON PUB. INT'L L., *THE EUROPEAN CONVENTION ON HUMAN RIGHTS, DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS* (2006), http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/public_international_law/Texts_%20Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf (report commissioned by the Council of Europe); BARDO FASSBENDER, *TARGETED SANCTIONS AND DUE PROCESS 29-30* (2006), http://www.un.org/law/counsel/Fassbender_study.pdf (study commissioned

The European Community implemented the sanctions regime through a number of EC regulations. As a matter of EC law, these regulations have direct legal affect in the domestic legal systems of all EU member states.⁶¹ Moreover, under EC law, community legislation trumps national law, even domestic constitutional law.

In 2001, the UN sanctions committee added the names of Kadi, a Saudi Arabian national with significant assets in Europe, and Al Barakaat, a Swedish entity, to the consolidated list for alleged associations with Al-Qaeda. As a result, the EC member states imposed sanctions against them, including a freezing of their assets. Kadi and Al Barakaat denied any involvement in terrorist activities and filed petitions in the Court of First Instance (CFI) seeking an annulment of the relevant Council regulations. Petitioners claimed that the regulations infringed their fundamental rights, including the right to property, the rights to be heard before a court of law, and the right to effective judicial review. In response, the EU Council and Commission argued that the Community, like member states, was obliged to give effect to legally binding Security Council resolutions.

At first glance, *Kadi* might appear to be just another example of the type of regime interaction that this paper highlights. Indeed, despite its prominence, it is important to note that *Kadi* is just one of a slew of recent cases that involves overlaps and potential conflicts among various international legal orders.⁶² Examples within the European Union legal system include high-profile disputes involving interactions between EU law and jurisprudence from the European Court of Human Rights,⁶³ between EU and WTO law,⁶⁴ and between

by the UN Office of Legal Affairs).

61. Case C-6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

62. R (on the application of Al-Jedda) v. Secretary of State for Defence [2007] UKHL 58 (2007) (appeal taken from EWCA Civ 327); *Behrami v. Fr. & Saramati v. Fr., F.R.G., and Nor.*, Nos. 71412/01 & 78116/01 (Eur. Ct. H.R. May 2, 2007); Hum. Rts. Comm., *Views of the Human Rights Committee of 22 Oct. in Communication No. 1472/2006*, U.N. Doc. CCPR/C/94/D/1472/2006 (Oct. 22, 2008).

63. *See, e.g.*, Case 36/75, *Rutili v. Ministre de l'intérieur*, 1975 E.C.R. 1219; Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications*, 1996 E.C.R. I-3953; Case C-450/06, *Varec SA v. Belgium*, 2008 E.C.R. I-581.

64. *See, e.g.*, Case C-122/95, *Germany v. Council*, 1998 E.C.R. I-973; Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395; Case C-93/02 P, *Biret Int'l SA v. Council*, 2003 E.C.R. I-10497; Case C-377/02, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, 2005 E.C.R. I-1465; Joined Cases C-120/06 P &

EU law and the law of the sea.⁶⁵ But *Kadi* has attracted substantial attention because the case raises the dilemmas of regime interaction in a particularly stark and dramatic manner. The UN Charter provides that Charter obligations “shall prevail” whenever they conflict with obligations under any other treaty, and states have agreed that Security Council decisions in the area of international peace and security are binding upon all UN member states.⁶⁶ On the other hand, governmental seizure of property without notice, a formal hearing, or meaningful review provisions are in deep tension with the most elemental notions of due process, not to mention legality itself. Hence the *Kadi* case involves a pointed conflict between the world’s most important international organization pursuing its mandate of promoting international peace and security and foundational concepts of fundamental rights and due process.⁶⁷

The CFI rejected *Kadi*’s petition.⁶⁸ The court reasoned that the challenged regulation implemented a UN Security Council resolution and hence fell outside the ambit of its power of judicial review. Citing Article 103 of the UN Charter, the court found that member states’ obligations under the Charter prevail over potentially inconsistent obligations arising from other sources of international law, including EU law. The court stated that the only exception to the hierarchical superiority of Charter law would be when a UN action violates an international *jus cogens* norm; however the court determined that the measure at issue did not violate a *jus cogens* norm.

On appeal, the European Court of Justice (ECJ) reversed and annulled the challenged regulation. The court found that the EC regulations at issue were inconsistent with fundamental rights guaranteed within the European legal order. At several points in its opinion, the court highlighted the “internal and autonomous legal

121/06 P, FIAMM and FIAMM Technologies, Giorgio Fedon & Figli Spa and Fedon America v. Council and Comm’n, 2008 E.C.R. I-6513.

65. See, e.g., Case C-459/03, Comm’n v. Ireland (MOx Plant), 2006 E.C.R. I-4635; Case C-308/06, Int’l Ass’n of Indep. Tanker Owners (Intertanko) v. Sec’y of State for Transp., 2008 E.C.R. I-4057.

66. U.N. Charter arts. 103, 25.

67. Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. INT’L L.J. 1 (2010) [hereinafter, de Búrca, *Kadi*].

68. See Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf and Al Barakaat*, 2005 E.C.R. II-3533.

order of the Community”⁶⁹ and, by implication, the independence of the EU legal order from the international legal order. The court similarly took great pains to emphasize that it was reviewing the legality of the EC regulation and hence that it was not exercising judicial review over a Security Council resolution.

For current purposes, I am less interested in the details of the differing rationales found in these opinions than in how the *Kadi* fact pattern and the questions it raises about the relationships of different bodies of international law might be interpreted through the lenses of international constitutionalism, global administrative law, and global legal pluralism.

As noted above, constitutionalist approaches often focus on the systemic unity of the international legal order and on a hierarchical ordering of legal authority within this system. Hence as de Búrca notes, the CFI judgment in *Kadi* can be understood in constitutionalist terms.⁷⁰ The court presents a vision of the international legal order as “a vertical, integrated one in which the EU is below the UN, but in which ever lower courts like the CFI are nonetheless empowered or even required by international law itself to apply peremptory norms of international law to the organs of the UN.”⁷¹ Thus the CFI’s constitutionalist orientation produces a vision of a single, integrated legal system with strongly hierarchical elements. In this approach to the international legal order, norms emanating from the hierarchically superior UN system trump inconsistent norms found in EU or domestic legal orders.

A global administrative law perspective, in contrast, would not foreground the complexities of the hierarchical relations among UN norms, EU law, and national legal orders. Rather, a GAL perspective would direct attention to the lack of accountability in the processes that the Security Council uses when deciding whether to add a name to the sanctions list. Indeed, significant international attention has focused on whether these procedures are sufficiently transparent and accountable. For example, at the 2005 World Summit, states called

69. Case T-315/01, *Kadi v. Council and Comm’n.*, 2005 E.C.R. II-3649, para. 317.

70. de Búrca, *Kadi*, *supra* note 67, at 4.

71. Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, at 33, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313 (earlier version of de Búrca, *Kadi*, *supra* note 67).

upon the Council to ensure that “fair and clear” procedures be applied in listing decisions,⁷² and in 2006 the UN Secretary General argued that the perceived legitimacy of sanctions would turn on the procedural fairness of the listing system.⁷³ These and other similar statements, along with *Kadi* and similar judgments, have created significant political pressure for the Security Council to revise its procedures. But how might it do so in a way consistent with GAL insights?

Adopting a GAL approach would not necessarily compel any particular reforms to the sanctioning process; rather, it might suggest a variety of possible approaches to improve the fairness and functioning of the system. For example, a GAL perspective would highlight various ways to ensure that listing decisions are made more fair and more transparent, such as having the Council provide a precise definition of the objectives of sanctions and criteria listing, establishing consistent norms and general standards for the type of information to be provided in a listing request, and providing procedures for notification of individuals of the rationale for the measures being imposed.⁷⁴ A GAL approach would also highlight the desirability of providing a formal and independent review mechanism whereby targets may appeal decisions to impose sanctions against them to a body empowered to provide appropriate relief. Again, such a mechanism could take one of several forms, such as an ombudsman, a panel of experts, an independent arbitral panel, or some form of judicial review.⁷⁵

Pluralists would offer yet a third perspective on the issues presented by *Kadi*. They would emphasize the multiplicity and the autonomy of legal orders—precisely the approach taken by the ECJ and even more clearly by Advocate General Maduro in his opinion.⁷⁶ Through its repeated emphasis on the autonomy of the European legal order and by explicitly denying that it was reviewing the legality of a Security Council resolution, the Court presented a “horizontal and segregated” vision of the international legal order,

72. G.A. Res. 60/1, para. 109, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

73. See U.N. SCOR 61st Sess., 5474th mtg. at 7–8, U.N. Doc. S/PV.5474 (June 22, 2006).

74. See, e.g., BIERSTEKER & ECKERT, *supra* note 60.

75. See generally *id.*

76. For a pluralist reading of the Advocate General’s opinion, see generally Besson, *supra* note 41.

“with the EU existing alongside other constitutional systems as an independent and separate municipal legal order.”⁷⁷ Interestingly, the ECJ’s version of pluralism does not view the *Kadi* fact pattern as requiring, or even hoping to prompt, inter-systemic dialogue over the relationship among various international legal regimes.⁷⁸

IV

Where does this analysis leave us? I began by noting the tension between the forward-looking conference theme and the backward-looking functional organization of the conference panels and used this tension as a springboard to outline three conceptual approaches to understanding current and future trajectories in international law.

One could surely critique my treatment of international law’s past and future as strongly influenced by current disciplinary preoccupations. I accept that my thumbnail history retrojects current concerns into the past and suspect that we can hardly help but project contemporary concerns into the future. That said, I think that historical inquiry is useful here, as in other areas of intellectual inquiry. A historical perspective is useful, not because we should expect the discipline’s history to provide answers to today’s challenges, but because it is the repository of the international community’s shared struggles—its victories, its disappointments, and its common commitments. International law’s history thus offers invaluable resources as we debate the most important questions of political life and as we construct our common future.

Which of the three approaches is most likely to gain ascendancy? In the aftermath of WWII, the French poet and writer Rene Char wrote: “Notre heritage n’est precede daucun testament.”⁷⁹ I take this aphorism to suggest that no testament, no historical tradition, compels any particular future. International law is not a natural feature of our physical world, like the sun or the moon. Rather, it is a social construct. And international legal doctrine is not the product of abstract ideals but of contingent and often problematic social and political processes. So, international law’s future will be one that we decide collectively; the emerging legal order will be created, not

77. de Búrca, *Kadi*, *supra* note 67, at 29.

78. *See generally id.*

79. HANNAH ARENDT, BETWEEN PAST AND FUTURE 3 (1961).

discovered.⁸⁰

Precisely because our heritage is left to us by no testament, it is important to be clear about what is at stake in debates over international law's future. This paper has focused upon the fragmentation of the international legal order and rule conflicts among regimes. But the choice among competing visions of the international legal order is not merely a matter of legal doctrine. Nor is it simply a question of abstract theorizing, of interest only to academics. The emerging international legal order concerns nothing less than the structure—the means and the ends—of global political life. The international community's ability to productively address any pressing international issue—one billion hungry people, the spread of nuclear weapons, genocide, world poverty, climate change, global justice—will be powerfully affected by the structure of this emerging order. That is why this debate and the topic of this volume are so very critical.

I recognize that this paper leaves open more questions than it answers. But for current purposes I have little interest in predicting outcomes which I think are unpredictable and historically contingent in any event. Rather, my goals are, first, to provide a *tour d'horizon* of contemporary issues in international law and, second, to identify some of the central debates that will arise as we work through the perplexities of global governance.

80. See generally David Kennedy, *The Mystery of Global Governance*, in *RULING THE WORLD?*, *supra* note 33, at 37–68.