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The Rise or the Fall of International Law?

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THE ROBERT L. LEVINE DISTINGUISHED LECTURE SERIES

THE RISE OR THE FALL OF INTERNATIONAL LAW?

*Edith Brown Weiss**

INTRODUCTION

At the turn of the century, the world is integrating, globalizing and fragmenting. Some of the international norms have universal acceptance; others are increasingly under challenge. For example, as a reflection of the growing consensus on human rights, the International Criminal Tribunal for the Former Yugoslavia has indicted Milosevic, Karadzic, Mladic and others for international crimes.¹ Spain sought to extradite General Pinochet from England to prosecute him for torture and other human rights violations committed while he was President of Chile.² On the other hand, protestors disrupted the World Trade Organization Ministerial in November 1999, and the World Bank and International Monetary Fund meetings in April 2000, with complaints that they were promoting globalization and economic growth and ignoring the social and environmental costs. To some extent the latter events represent pronounced disagreements about the state of the international system and the norms it should uphold.

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1. See <http://www.un.org/icty/indictment/english/mil-ii99052Ye.htm>; <http://www.un.org/icty/indictment/english/kar-ii950724e.htm> (visited Aug. 31, 2000); Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DePaul L. Rev. 925 (2000).

2. *Regina v. Bartle (Ex Parte Pinochet) and Regina v. Evans (Ex Parte Pinochet)*, U.K. *re* House of Lords, Mar. 24, 1999, *reprinted in* 38 I.L.M. 581 (1999) (on appeal from the Divisional Court of the Queen's Bench Division and ruling in favor of extradition for a limited number of charges). See generally Ruth Wedgewood, *International Criminal Law and Augusto Pinochet*, 40 Va. J. Int'l L. 829 (2000) (describing the efforts to extradite and to prosecute Pinochet, and analyzing the potential long-term impact on international criminal justice).

The international landscape today is very different from the one of fifty, twenty, even ten, years ago. As the July 1999 United Nations Development Programme (“UNDP”) Report suggests, we are living today in a new landscape characterized by shrinking space (we are affected by events happening across the globe), and shrinking time (technology has sped up the flow of goods and information far beyond what was imaginable just a few years ago). National borders are breaking down, in part because of international trade, capital flows, culture flows, economic policies, environmental concerns, the rise of global communities and global civil society, and the spread of the internet. In the emerging international system, both the actors and the fora for making decisions and for resolving disputes are diversifying. Traditional international law, as limited to laws between sovereign States,³ is no longer the sole international legal focus. In this setting, one may ask whether international law is declining, or rising, albeit in modern garb.

This Article argues that traditional international law is healthy in the sense that there are more international agreements than ever, and States continue to serve important roles in the international system. It is falling, however, as the sole focus of international legal efforts. It is necessary to redefine international law to include actors other than States among those who make international norms and who implement and comply with them, and to include legal instruments that may not be formally binding.

These developments raise three important issues: the need for the new actors to be accountable and for the new norms to be legitimate; the need for consensus about the level or location of authority, be it international, national, subnational, or non-State, at which norms should be negotiated; and the rising need for international law to reflect commonly held values to keep the increasingly fragmented international community together.

I. THE CHANGING INTERNATIONAL LEGAL SYSTEM

The international legal system is changing, as are the characteristics and problems of international law.

A. *The Traditional System*

The Peace of Westphalia that ended the Thirty Years’ War three hundred and fifty years ago established a new international order based on sovereign, independent, territorially defined States who tried to maintain political independence and territorial integrity. Since

3. For purposes of this Article, the term “State” refers to a country or the national state. Subnational units such as provinces, Länder in Germany, or states in the U.S. will be referred to as, e.g., the “U.S. State of California.”

States could rely only on self-help if attacked, they needed new rules to constrain each other's behavior.

The international legal system was European. It centered on relations with States with defined territories, and was based on equality among the sovereign States. It reflected a *laissez faire* philosophy, in which all States were equally free to pursue their own interests, whatever their underlying economic or political differences. It was hierarchical in the sense that States controlled everything under them. As the system of sovereign States spread across the world, so did the system of international law that was based on it.⁴

The Permanent Court of International Justice articulated the classical view of international law in the 1927 S.S. *Lotus* case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.⁵

In this view, international law is instrumentalist. It alters incentives to affect the behavior and the interests of States, but does not consider that States' interests may change over time in response. It implicitly adopts the Realist School view that States are monolithic bodies, and does not assign importance to entities within States, transnational entities, or individuals.

The classical framework of international law centers exclusively on States, relies on binding legal instruments to provide solutions, and assumes that States comply with their obligations. The lines between international and domestic law and between public and private law are sharply drawn. Public international law governs intergovernmental relations, while private international law regulates the activities of individuals, corporations and private entities engaged in transborder transactions such as choice of law rules and international transaction rules.

As we enter the twenty-first century, the international political and economic system has changed. Three developments affect the role for international law generally: the simultaneous push toward integration and fragmentation; the globalization of the economy; and the rise of thousands of organizations and millions of individuals as relevant actors—the rise of global civil society.

4. See J.L. Brierly, *Law of Nations* 7-16 (Sir Humphrey Waldock ed., 6th ed 1963)

5. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

B. *Integration, Globalization and Fragmentation*

As we approach the third millennium, our world is becoming both more integrated and more fragmented. Evidence of global integration abounds: regional trading units; regional political and economic organizations such as the European Union ("EU") or the Asian Pacific Economic Community ("APEC") forum; international regimes covering issues ranging from banking and trade to human rights, environmental protection, and arms control; and the spread of financial markets. The information revolution, the rapid technological advances, global environmental problems, liberalized trade, and other economic and other interdependencies compel greater interdependency and greater integration.

Moreover, the private sector has become globalized. Production of goods takes place in facilities located across the globe: materials processed in one country, parts made in different countries, assembly in yet another country. Globalization is taking place from below (bottom up) as well as from above (top down). Information technology facilitates globalization through increased international commerce because it reaches freely across national borders. According to the UNDP, there were 143 million internet users worldwide in mid-1998, and the figure was projected to increase to more than 700 million by 2001.⁶ Thomas Friedman, in *The Lexus and The Olive Tree*, describes the globalized system as complex interactions through three sectors of actors: "[S]tates bumping up against [S]tates, [S]tates bumping up against Supermarkets, and Supermarkets bumping up against Super-empowered individuals."⁷ Future problems will require both global cooperation by governments to address them effectively and transnational cooperation in the private sector.

As integration and globalization increase, there is simultaneously a growing fragmentation within States and strong pressures for decentralization of decision-making. Ethnicity, nationalism, and the need for personal affiliations and satisfaction push toward fragmentation and decentralization. In the early 1990s, less than ten percent of the world's States were homogeneous ethnically; only about fifty percent of the States had one ethnic group that accounted for three-quarters of the population.⁸ While States are relinquishing elements of sovereignty to transnational non-State actors, the strong sense of community that bound the citizens of the State together does

6. United Nations Development Programme, Human Development Report at 58 (1999) [hereinafter HDR].

7. Thomas L. Friedman, *The Lexus and the Olive Tree* 13 (1999).

8. See Joseph S. Nye, Jr., *What New World Order?*, *Foreign Aff.*, Spring 1992, at 83, 91.

not extend to the transnational groups. New community bonds need to be forged.

New divides are fragmenting the international system. States and their non-State transnational elites are increasingly divided from the ethnic, nationalistic, orthodox religious, dispossessed and alienated communities that operate within States and across national borders. Whatever their differences with each other, the governments of States may have much in common as they try to counter common threats within their country from radical religious, ethnic and political movements. States and participants in the global private sector also have much in common as they face a divide with illicit transnational groups, such as drug, weapon, and terrorist groups.

Pushes toward integration and toward fragmentation have occurred throughout history. In 1500, for example, Europe had about 500 independent political units; in 1900 it had about twenty.⁹ What is new is that both impulses—integration and fragmentation—are happening at the same time. This raises important issues concerning the proper level and location of authority for addressing international concerns and the role of commonly shared values.

C. The Non-Hierarchical International System: Non-State Actors and Civil Society

The emerging international system consists of networks of States, international governmental organizations, non-State actors, and individuals. While the sovereign State remains the principal actor, other actors such as corporations and nongovernmental organizations (“NGOs”) are assuming increasingly complex tasks, many of them previously performed by States.

The international system is non-hierarchical. By contrast, the community of sovereign States is more hierarchical than before. At the beginning of the twentieth century, there were only thirty-four generally recognized states, and fifty-one when the United Nations was formed in 1945.¹⁰ At the beginning of the year 2000, there were 188 member states of the United Nations and several additional recognized states.¹¹ While all States are sovereign, they are not equal in their relations with each other, despite the rhetoric. This is reflected in weighted voting systems in international organizations

9. See Charles Tilly, *Reflections On the History of European State-Making, in The Formation of National States in Western Europe* 3, 24 (Charles Tilly ed., 1975).

10. The United Nations reports 55 member states in its first yearbook, which covers the period through mid-1947. See 1947 U.N.Y.B. 863-64, U.N. Sales No. 1947.I.18.

11. See *United Nations Member States* (last modified May 1, 2000) <<http://www.un.org/overview/unmember.html>>.

and in the emerging principle in international environmental law of "common but differentiated responsibilities."¹²

There are many international actors other than States. The 1998-99 edition of the Yearbook of International Organizations records more than 6,415 intergovernmental organizations and 43,958 NGOs, for a total of more than 50,000 international organizations.¹³ Other relevant actors include subunits of national governments, corporations, domestic NGOs, ethnic minorities, illicit transnational groups, ad hoc transnational associations, and individuals.

Nongovernmental organizations play prominent roles in the negotiation and implementation of some international agreements, particularly environmental ones. For example, they attended all of the negotiations for the Framework Convention on Climate Change and the Kyoto Protocol, where they distributed information, prepared agreed positions on issues, and developed draft text of the Convention to advocate to governments.¹⁴ Nongovernmental organizations can also be assigned important roles in implementing international agreements. In the Convention on International Trade in Endangered Species ("CITES"), the World Conservation Monitoring Unit for many years computerized the national reports of countries on the trade in endangered species and prepared reports for tracking the trade, as part of implementing the Convention's control of international trade in endangered species.¹⁵

At the World Trade Organization meeting in Seattle in November 1999, NGOs and labor groups from across the globe were present in significant numbers, including more than 700 international NGOs that were accredited to the conference itself, in addition to all those who were present to demonstrate.¹⁶ The organizations are now pressing for a significant voice in trade and other economic and monetary issues. In contrast to the participation of NGOs at the 1992 UN Conference on Environment and Development in Rio de Janeiro,

12. Principle 7, Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc.A/CONF.151/26/Rev. 1 (Vol.I) at 3, *reprinted in* 31 I.L.M. 874 (1992); see Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. Envtl. L.J. 27, 30 (1999).

13. See 4 Y.B. of Int'l Org. 549 (1999).

14. See, e.g., Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 Colo. J. Int'l Envtl. L. & Pol'y 115, 126-130 (1998) (discussing several specific environmental non-governmental organizations and their roles in FCC negotiations); Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 Geo. L.J. 675, 693-94 (1993) (discussing the growing role of NGOs in the process of forming international environmental agreements).

15. See Edith Brown Weiss, *The Five International Treaties: A Living History in Engaging Countries: Strengthening Compliance with International Environmental Accords* 89, 109-11 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) [hereinafter Brown Weiss, *Engaging Countries*].

16. See James Wallace, *An 'Institution that People Love to Hate' Lets Them Sound Off*, Seattle Post-Intelligencer, Nov. 30, 1999, at A18.

these groups do not necessarily all share the same basic values as the governments represented. In Rio, all shared the stated value of sustainable development. In Seattle, some did not share the value of liberalized trade and the desirability of globalization.

II. THE EMERGING CHARACTERISTICS OF INTERNATIONAL LAW

International law reflects the evolution of the international system into a non-hierarchical network. While binding international legal instruments have greatly increased, nonbinding international legal instruments concluded by governments and international intergovernmental organizations have become very significant sources of international law. Moreover, the private sector has concluded important transnational instruments. The line between private and public international law has blurred, as has that between issues of domestic jurisdiction and international jurisdiction. There is increasing integration of domestic and international law.

A. *Increasing Legalization*

International relations have been increasingly legalized in the past century. As of April 1998, there were over 34,000 treaties registered with the UN.¹⁷ Between 1918 and 1941, only sixty-one multilateral treaties were recorded.¹⁸ The subject matter of the treaties has greatly diversified. Treaties now cover newer issues such as gender discrimination, ozone depletion, investment, and issues of private international law. Those who argue that States are withering away as relevant entities need to take notice of this increased legalization in the international community.

Moreover, international law now consists of other important legal instruments in addition to binding agreements and rules of customary international law, namely, legally nonbinding or incompletely binding norms, or what has been called "soft law."¹⁹ These instruments exist in all areas of international law, although they appear to be more

17. See *United Nations Treaty Collection*, <<http://untreaty.un.org/English/overview.asp>> (visited Aug. 9, 2000). Most are bilateral agreements or agreements among a relatively small number of States.

18. Between 1889 and 1939, the United States concluded 524 treaties and 917 executive agreements, most of which were bilateral agreements. *Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations United States Senate*, 103d Congress, 14 S. Rep. 103-53, at 14 (1993).

19. Paul C. Szasz, *International Norm-making, in Environmental Change and International Law* 41, 69-72 (Edith Brown Weiss ed., 1992); *International Compliance with Nonbinding Accords* 120 (Edith Brown Weiss ed., 1997) [hereinafter *Brown Weiss, Nonbinding Accords*]; *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 100, 100-14 (Dinah Shelton, ed. 2000) (analyzing "soft law" in environment and natural resources, trade and finance, human rights, and multilateral arms control).

abundant in human rights, environment, and financial dealings than in trade and national security. At the end of June 2000, the twenty-nine member countries of OECD adopted an important new code of conduct for multinational corporations that is intended to promote responsible business behavior in the globalized economy.²⁰ Examples of soft law in environmental law include the 1972 Stockholm Declaration on the Human Environment,²¹ the 1992 Rio Declaration on Environment and Development,²² and the 1992 Forest Principles²³ adopted at Rio. The many guidelines, principles and recommended practices adopted by the Organization for Economic Cooperation and Development ("OECD"), the United Nations Environment Programme or the United Nations Food and Agriculture Organization, while nonbinding, are sometimes influential legal instruments.

One of the most important sources of international "soft law" is the myriad of guidelines, resolutions, and recommendations that are made by parties to an international agreement in the course of implementing it. The old vision of an international agreement as an unchanging normative document binding upon the parties is obsolete. International agreements need to be viewed as living agreements, into which parties continuously breathe life and to which they give new directions by acting as informal legislatures.²⁴

The negotiation of legally nonbinding instruments is likely to increase more rapidly than the negotiation of formal international conventions, at least in certain areas of international law. This is true because agreement is usually easier to achieve, the transaction costs for governments and even NGOs are lower, the opportunity to set forth detailed strategies is greater, and the ability to respond to rapid changes in scientific understanding or economic or social conditions is better.

B. *The Blurring of Public and Private International Law*

In international law, as arguably in economics and other fields, the bright line between public and private is becoming blurred. Public

20. See *The OECD Guidelines for Multinational Enterprises* (visited July 19, 2000) <<http://www.oecd.org/daf/investment/guidelines/mnetext.htm>>.

21. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1, at 3 (1973), *reprinted in* 11 I.L.M. 1416 (1972).

22. Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc.A/CONF.151/26/Rev. 1 (Vol.I) at 3, *reprinted in* 31 I.L.M. 874 (1992).

23. Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, June 14, 1992, U.N. Doc. A/CONF.151/6, *reprinted in* 31 I.L.M. 881 (1992).

24. Brown Weiss, *Engaging Countries*, *supra* note 15, at 157-72.

international law has become increasingly concerned with areas that used to be viewed as entirely within the purview of private international law, just as private international law is more often addressing issues that used to be viewed as the primary province of governments.

Increasingly, governments are reaching international agreements to facilitate transactions in private international law. The United Nations Commission on International Trade Law (“UNCITRAL”) has often provided the forum for negotiating agreements relating to commercial activities, such as the United Nations Convention on Contracts for the International Sale of Goods, the United Nations Convention on the Carriage of Goods by Sea, or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁵ As of August 2000, countries were still engaged in negotiations for an international convention on the enforcement of judgments in civil and commercial matters.²⁶ The subject of the Draft Convention has been added to the agenda of the American Law Institute.

The private sector is also negotiating transnational arrangements that in some cases assume functions that governments could do. In international environmental law, the most important development for the next century may be the emerging interaction of intergovernmental environmental law with transnational environmental law developed primarily by the private sector and by institutions such as the International Standards Organization (“ISO”).

25. The UNCITRAL agreements include the following: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (entered into force June 7, 1959); UNCITRAL Arbitration Rules, General Assembly Resolution 31/98 (1976); *United Nations Convention on the Carriage of Goods by Sea* (1978) (Hamburg Rules); UNCITRAL Conciliation Rules, General Assembly Resolution 35/52 (1980); *United Nations Convention on Contracts for the International Sale of Goods* (New York, 1980); *United Nations Convention on International Bills of Exchange and International Promissory Notes* (General Assembly resolution 43/165, annex) (New York, 1988); *Convention on the Limitation Period in the International Sale of Goods* (1989) (Amended text. Originally signed in Vienna, 1974); *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade* (AJCONF. 152/13 Annex) (Vienna, 1992); *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, 1996. UNCITRAL has also produced model laws on the following topics: International Commercial Arbitration (1985), International Credit Transfers (1992), Procurement of Goods and Construction (1993), Procurement of Goods, Construction, and Services (1994), Electronic Commerce (1996), Cross-Border Insolvency (1997). See *UNCITRAL* <<http://www.uncitral.org/index.htm>> (visited July 11, 2000).

26. See *Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Oct. 30, 1999, as amended) <<http://www.hcch.net/e/conventions/draft36e.html>> (visited July 11, 2000); see also Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 *Ind. L.J.* 635, 638, 641 (2000) (discussing differences between the Draft Hague Convention and the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the European predecessor of the Draft Hague Convention).

There exists a large body of legally nonbinding norms developed primarily in the private sector: codes of conduct by industrial associations such as chemical manufacturers, agricultural associations, business groups, professional bodies, NGOs, or ad hoc coalitions for particular issues. Private codes of environmental management have emerged as a major force in industry.

The most prominent private sector efforts to set environmental management norms include the ISO's 14000 series,²⁷ the Chemical Manufacturer Association's Responsible Care Program, the Coalition for Environmentally Responsible Economies, and the International Chamber of Commerce's Business Charter for Sustainable Development.²⁸ The European Union has developed a parallel effort in the private sector in its Environmental Management Auditing System. Although these codes differ, they require industry to follow certain environmental management practices and provide for audits. They seek to use market, peer, and public pressure to motivate firms to undertake major changes in their management procedures and rely on procurement practices of other companies, governments, and individual consumers to enforce them. This may be characterized as a new global commerce law.

C. *Integration of International and Domestic Law*

We have become accustomed to sharply differentiating international law from national law. International law applies between States; national law governs relations within States. But there is no longer such a sharp line.

International law has always been linked with national law, for international law is implemented through national, provincial, and local laws. In other cases, national laws, independent of any treaty, provide protection to other countries or their citizens from harm that occurs within the country but injures those outside. For example, there was Canadian and United States national legislation on air pollution, which existed long before the Canada-United States acid rain agreement, provided for reciprocal access to administrative decision-making.²⁹

27. Naomi Roht-Arriaza, *Compliance with Private Voluntary Agreements: The Example of the International Organization for Standardization's ISO 14000 Environmental Management and Related Standards*, in Brown Weiss, *Nonbinding Accords*, *supra* note 19, at 205-18.

28. See Jody Freeman, *The Private Role In Public Governance*, 75 N.Y.U. L. Rev. 543, 645-57 (2000) (discussing private governance regimes); Jennifer Nash & John Ehrenfeld, *Code Green*, *Env't*, Jan.-Feb. 1996, at 16, 19; *Transnational Notions of Environmental Behavior and the Spread of the Industrial Ecology Ethic*, in *International Environmental Law and Policy 1087-90* (Edith Brown Weiss et al., eds., 1998).

29. See Clean Air Act (as amended), 42 U.S.C. § 7401 *et seq.*, 7415 (1994). Canada's Clean Air Act was amended by an Act to Amend the Clean Air Act,

In still other cases, States may apply their own national laws extraterritorially,³⁰ for example, proposals to extend the United States National Environmental Policy Act's requirement of a formal environmental impact statement to all projects abroad, and efforts to extend the reach of antitrust laws. The United States extended its ban on business ties to Cuba to give U.S. nationals having a claim for confiscated property in Cuba a right of action against any foreign company engaged in commercial activity with Cuba involving expropriated property. The action raised the ire of Canada and countries in the European Union, along with a number of other countries.³¹ Since there is no international agreement setting forth criteria for extraterritorial application, the practice of doing so generates conflict.³²

Increasingly, the sharp line between international and national law is disappearing because provinces or local units of governments are concluding legal instruments on transborder issues independently with sub-national units of governments in other countries. For example, the 1982 Agreement on Acid Precipitation between the United States state of New York and the Canadian province of Quebec provides for the monitoring and exchange of information on acid precipitation.³³

assented to Dec. 17, 1980, 29 Elizabeth II ch. 45, *reprinted in* 20 I.L.M. 762 (1980). Canada amended its Clean Air Act as the result of a reciprocal agreement. United States Canadian Negotiation on Air Quality, Pub. L. 95-426, title VI, § 612, Oct. 7, 1978, 92 Stat. 990, *reprinted in* 20 I.L.M. 676 (1980), and as amended at 30 I.L.M. 676 (1990).

30. See, e.g., Shigeo Kawagishi, *Extraterritoriality and International Law*, in *Trilateral Perspectives on International Legal Issues* 149, 149-64 (Michael K. Young & Yuji Iwasawa eds., 1996) (discussing extraterritoriality in the Japanese context).

31. See Cuban Liberty and Democratic Solidarity Act (Libertad) ("Helms-Burton Act"), 22 U.S.C. § 6021 *et seq.* (Supp. 1998). In response, the European Union passed EU Council Regulation 2271/96 on November 22, 1996. 1996 O.J. (L. 309). The U.S. and the EU produced a memorandum whereby President Clinton declared his intention that the secondary boycott measures of the Helms-Burton Act not be applied against the EU countries during the remainder of his term of office. *Reprinted in* 36 I.L.M. 529 (1996). See *Agora: The Cuban Liberty and Democratic Solidarity (Libertad Act)*, 90 Am. J. Int'l L. 419 (1996).

32. The Restatement on Foreign Relations Law Third provides that a State has jurisdiction to prescribe with respect to conduct taking place within its territory, the status of persons or interest in things within its territory, conduct taking place outside its territory but having or intended to have substantial effect with its territory, activities, interests, status or relations of its nationals outside and inside its territory, and conduct outside its territory by non-nationals directed against the security of the States or certain other State interests. See Restatement (Third) on Foreign Relations Law § 402 (1986). Section 403 bars jurisdiction to prescribe when it is "unreasonable," and sets out relevant factors to evaluate in determining whether the jurisdiction is "unreasonable." See *id.* § 403. Certain offenses, such as terrorism, are recognized to create universal jurisdiction. See *id.* § 404. States may exercise jurisdiction to prescribe for limited purposes for foreign branches of corporations and foreign subsidiaries. See *id.* § 414.

33. See Agreement on Acid Precipitation, July 26, 1982 (New York-Quebec), *reprinted in* 21 I.L.M. 721.

While the legal instruments may not rise to the level of an international agreement, they nonetheless shape transborder relations and, more generally, affect the structure of international law. The United States Supreme Court recently struck down the Massachusetts state law that restricted the use of taxpayer money for purchases from companies that do business with Burma (Myanmar).³⁴

But there is another sense in which the line is becoming blurred, namely, the increasing acceptance of issues formerly regarded as within "domestic jurisdiction" as issues that raise international concern. For example, the growing transnational human rights consciousness has contributed to pressure on the United Nations Security Council to authorize interventions for humanitarian purposes in cases that earlier might have been viewed as falling within "domestic jurisdiction." Large elements of the international community have endorsed strong collective action in situations of "[g]enocide, 'ethnic cleansing,' . . . [i]nterference with the delivery of humanitarian relief to endangered civilian populations, . . . [c]ollapse of civil order, . . . and [i]rregular interruption of democratic governance."³⁵

In the United States, as in other countries, domestic law is important in determining the United States' position in international negotiations. While it may influence negotiators to press for obligations that conform to domestic law, it may also provide an excuse for negotiators' refusals to accept obligations not already codified in United States law. Several examples illustrate the interplay between the negotiations and U.S. law. First, in the negotiations for the UNECE Convention on Environmental Impact Assessment in a Transboundary Context,³⁶ U.S. legislation requiring environmental impact statements ("EIAs") only for major federal actions significantly affecting the quality of the human environment³⁷ made it difficult to accept an obligation to prepare EIAs for any activity creating a risk of significant harm to the environment across national borders. In the UNECE Convention on Transboundary

34. See Mass. Ann. Laws ch. 7, § 22G-J (Law. Co-op. 1998); see also *infra* notes 82-89 and accompanying text (discussing the United States Supreme Court's decision to invalidate the Massachusetts Burma Law).

35. See *Enforcing Restraint: Collective Intervention in Internal Conflicts* 12 (Lori Fisher Damrosch ed., 1993). In her introduction, Damrosch notes that the case studies establish the international community's willingness to endorse strong collective action in certain internal conflicts. See *id.* at 12; see also Thomas M. Franck, *The Democratic Entitlement*, 29 U. Rich. L. Rev. 7, 24 (1994) (examining a burgeoning "right to democracy," which was used partly to justify international intervention in Haiti).

36. See *Convention on Environmental Impact Assessment in a Transboundary Context*, Feb. 25, 1991, E/ECE/1250, reprinted in 30 I.L.M. 800. The Convention was not yet in effect as of August 2000.

37. See *National Environmental Policy Act of 1969*, 42 U.S.C.A. § 4332 (West 1994).

Effects of Industrial Accidents,³⁸ the pressure from European countries to incorporate fully the Seveso Directive,³⁹ which differs from U.S. laws governing industrial accidents, created difficult negotiating issues.

The need to implement international law has always linked national with international law. Most international agreements are not self-executing and need national implementing legislation. But the implementing legislation may not exist or may be fragmentary. Even after the Senate gave its advice and consent to the Protocol on Environmental Protection to the Antarctic Treaty⁴⁰ and the Genocide Convention,⁴¹ the United States withheld ratification until Congress adopted the necessary implementing legislation or the required regulations were issued. A survey of national implementing legislation in countries party to the Convention on International Trade in Endangered Species revealed that sometimes implementing legislation does not exist and when it does, there are often significant deficiencies. An empirical study of five environmental agreements indicated that the status of national implementing legislation cannot be captured through a one-shot photograph. Rather, it changes over time, normally coming into greater conformity with international obligations.⁴²

III. NEW CHALLENGES IN THE INTERNATIONAL LEGAL SYSTEM

The emerging international system raises two important issues: accountability by non-State actors and by the private sector, and the legitimacy of the norms created by them. Both deserve the attention of the international community.

A. *Accountability and Legitimacy*

Traditionally, States have been accountable to each other as independent sovereigns for assuring compliance with international law. This is still true. But the communications revolution has made governance more transparent and hence public involvement greater. Meetings of the parties to the Convention on International Trade in Endangered Species and to the World Heritage Convention are

38. Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, UN/E/ECE/1268 (1992), *reprinted in* 31 I.L.M. 330.

39. Council Directive 82/501/EEC of 24 June 1982 on the Major Accident Hazards of Certain Industrial Activities (as amended), 1982 O.J. (L 230) 25, at 1; Documents in European Community Environmental Law 624-42 (Phillipe Sands & Richard G. Tarasofsky eds., 1995) (providing amended Directive).

40. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, Doc. XI ATSCM/2 (June 21, 1991), *reprinted in* 30 I.L.M. 1455 (1991).

41. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

42. *See* Weiss, Engaging Countries, *supra* note 15, at 90-92.

promptly available on the Internet.⁴³ Televised images of civilians suffering in internal conflicts have generated pressure from NGOs and domestic public opinion for governments to take collective action in response. While States are accountable to their citizens in democratic governments, non-State actors are not subject to direct public accountability. Participation by non-State actors in the international legal system greatly enhances accountability, because it can give a voice to citizens who would otherwise be unrepresented, ensure that actions taken meet local needs, counter effects of high-level governmental corruption, and therefore produce outcomes that maximize human welfare efficiently. Information technology makes information readily accessible to groups and individuals across the world and empowers them. It makes governments and international organizations more transparent.

While most NGOs are constructive, however, they need not be. And it may be difficult for the public to know much about the organizations. Some NGOs are membership-based and accountable to their members, while others are loosely accountable to their funders, who may be dispersed.

While international organizations, such as the UN Economic and Social Council, have developed processes for determining NGO representation at international meetings, even these need to be reconsidered in light of the increasing number of NGOs. Moreover, it would be appropriate to consider additional processes that legitimate NGO participation in the international legal system. International aid is increasingly channeled through NGOs, including five percent of OECD aid in 1993-94, up from 0.7% in 1975. As of 1996, Sweden channeled thirty percent of its foreign aid through NGOs.⁴⁴ Donor countries often support NGOs because of a belief that this will strengthen democracy.⁴⁵ However, NGOs, especially in countries that are not democratic or only weakly democratized, may not be built on democratic structures themselves. Consequently, it is difficult for donor countries or individuals affected by the NGOs to hold them accountable for their political behavior.

Nongovernmental organizations need to be held accountable for their actions. Information that cannot be verified, pressures for special interest pleading outside the intergovernmental forum, unlimited demands for transparency, and similar concerns mean that

43. Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, *reprinted in* 11 I.L.M. 1088 (1973), <http://www.wcmc.org.uk/CITES/eng/index_side.shtml (visited July 26, 2000); Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, U.N. Doc. ST/LEG/SER. C/10, *reprinted in* 11 I.L.M. 1348 (1972), <<http://www.unesco.org/whc/nwhc/pages/news/main2.htm>> (visited July 26, 2000).

44. Michael Edwards and David Hulme, *Too Close for Comfort? The Impact of Official Aid on Nongovernmental Organizations*, 24 *World Dev.* 961, 962 (1996).

45. *See id.* at 965.

pressures will likely build for at least an informal code of conduct.⁴⁶ It would be appropriate for leading NGOs, who have contributed so importantly to developing and implementing international law in fields such as human rights and the environment, to consider developing a set of accountability principles, perhaps similar to the Sullivan Principles⁴⁷ for investment in South Africa during the apartheid era,⁴⁸ to which companies wishing to invest in South Africa could subscribe. Government regulation could only increase the burden on NGOs, many of whom are already understaffed or lack adequate funding.

The private sector must also be seen as accountable to the public for its actions that affect the environment. In the West, at least, industries and corporations are accountable through the market system. Consumer preferences both drive and limit what they can do. But accountability through the market place is tenuous and works imperfectly. Consumers may be able to act through boycotts to affect the behavior of corporations, but the consumers are frequently not the individuals most affected by those activities. The affected individuals may live in countries in which they are not free to oppose the corporations or, if they work for the corporation, they may not have the right to organize and protect their interests in that way. Few governments are powerful enough to compel behavior from large multinational corporations because most countries rely on the revenue generated by their business activity and are highly susceptible to threats by companies to leave the country.

Even if the actors are accountable, the norms developed in the private sector must be regarded as legitimate if people are going to comply with them. Political scientist Stuart Kaufman notes that “[o]ne reason why Persia’s hegemony lasted twice as long as Assyria’s was that the Persians were more sensitive to . . . issues of legitimacy.”⁴⁹ Democratic procedures are a central component of legitimacy in most

46. See Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 Brook. J. Int’l L. 113, 114-15 (1999) (questioning the commonly held view that the inclusion of NGOs in international politics in any way cures the democratic deficit).

47. Statement of the (Sullivan) Principles (Fourth Application), Nov. 8, 1984, reprinted in 24 I.L.M. 1496 (1985). The United States adopted the principles in 1985. Executive Order 12532, Sept. 9, 1985, 27 U.S. Weekly Compilation of Presidential Documents, 1048-1055 Sept. 16, 1985, reprinted in 24 I.L.M. 1485 (1985).

48. See Heidi S. Bloomfield, “Sweating” the International Garment Industry: A Critique of the Presidential Task Force’s Workplace Codes of Conduct and Monitoring System, 22 Hastings Int’l & Comp. L. Rev. 567, 587 (1999) (presenting the Sullivan Principles as an example for comparison with guidelines regarding sweatshop labor).

49. Stuart J. Kaufman, *The Fragmentation and Consolidation of International Systems*, 51 Int’l Org. 173, 195 (1997). Robert Keohane and Joseph Nye, writing in *Foreign Affairs*, observed that the “[r]ules require authority, whether in the form of public government or private or community governance.” Robert O. Keohane & Joseph S. Nye Jr., *Power and Interdependence in the Information Age*, Foreign Aff., Sept.-Oct. 1998, at 82.

systems. In *Legitimation Crisis*, Jürgen Habermas argues that a fundamental part of legitimacy and democratic acceptance stems from the process of reasoning together through democratic speech to reach a conclusion whose origins are knowable.⁵⁰ This may present a problem for international rules and standards that are generated away from public view.

It is essential to build processes for legitimating the norms developed by transnational actors, whether industrial, commercial, human rights, environment, or otherwise. Otherwise the norms will not be acceptable in the long run. When the industrial and commercial sectors address environmental issues, for example, this may mean giving a voice to governments and to the public in developing the norms, whether they be so-called “green” management practices, eco-labels or other practices. The private sector may resist because conditions change quickly, precluding meaningful consultation, or because other actors who may be insufficiently informed could corrode or delay the process. While information technology should assist in overcoming these problems, the process would still be less efficient, at least in the short run. But unless the process for developing the norms is viewed as legitimate, the norms will not be accepted by the broader community.

B. Appropriate Level of Authority for Governance

There is a growing and genuine lack of consensus about whether the appropriate level of authority for governments to address many political and cultural issues is local, regional, national, or international, or even whether the public or the private sector is the more appropriate body. In traditional international law, it was assumed that States were the appropriate level of authority, except for occasional invocations of international organizations to address issues. But with the nonhierarchical international system that has emerged, the appropriate level of authority has become a divisive issue. Highly educated and mobile transnational elites may feel comfortable with decision-making at the international level, but this may evoke a visceral reaction from local communities who may be hostile to international institutions. Ethnic groups within individual countries may also turn to the international community to support their claims for autonomy. Individuals in this new order want both to ensure that they have a piece of the economic pie and, most importantly, to control their own fate. Frequently, the international system is seen as a detriment to both of those desires.

The problem has several different but related dimensions. The first is the relationship between different levels of government in issues of

50. See Jürgen Habermas, *Legitimation Crisis* 95-143 (Thomas McCarthy trans., Beacon Press 1975).

governance. These levels include States, subnational actors, such as states, provinces or municipalities, regional organizations of member States, or international organizations. The second dimension is the allocation of governing authority as between the transnational networks of private actors or quasi-public actors and the governmental authorities. Most of the literature has addressed the former, which presumes hierarchical relationships.⁵¹ The principle of subsidiarity, which is embodied in the European Community for example, operates in the hierarchical context.⁵² The other problem, the appropriate allocation between public and private sector networks, is part of the nonhierarchical system and thus may call for analysis separate from that applicable to the former. The previous sections of this Article address some of the relevant issues.⁵³

A central feature of the allocation issue is that the allocations of authority for governance on specific sets of issues are always changing. Issues that once were the province of States may become primarily the province of international organizations, may shift downward to the local level, or may be shared with the local or international level. Other issues that were solely or primarily the province of local or national public authorities, such as the conservation of biological diversity or the protection of human rights, may become subject to international competence. Still other problems, such as climate change, ozone depletion, and global liberalized trade, may be inherently international because of their characteristics. The stratospheric ozone layer and the world's climate know no political boundaries.

The controversy over the appropriate level and allocation of governance authority is poignantly represented in the efforts to hold General Pinochet accountable for human rights violations that occurred during his tenure as President of Chile. Spain and Chile both vied for jurisdiction.⁵⁴ Others argued that an International Criminal Court was needed, and that such cases should be heard by an international tribunal.⁵⁵ The House of Lords ultimately decided that

51. See *supra* notes 5-7 and accompanying text.

52. See Ingolf Pernice, *The Framework Revisited: Constitutional, Federal and Subsidiarity Issues*, 2 Colum. J. Eur. L. 403, 404 (1996).

53. See *supra* part I.

54. When Pinochet stepped down in 1990, he was granted immunity by the incoming government. However, once the extradition proceedings began in earnest, the argument coming from Santiago changed from claims that Spain's decision to prosecute Pinochet violated Chile's sovereign decision to grant him immunity to claims that only Chile had the right to prosecute Pinochet. See generally Wedgwood, *supra* note 2 (discussing extradition hearings). The Santiago Court of Appeals voted on May 23, 2000 to strip General Pinochet of his immunity. See Virginia Hamill, *World in Brief: Chilean Court Strips Pinochet of Immunity*, Wash. Post, June 6, 2000, at A22.

55. Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2130 (1999) (referring to the debate).

Pinochet could be extradited because the Convention Against Torture and Other Forms of Cruel and Inhuman Punishment,⁵⁶ which Chile had ratified, created universal jurisdiction for the prosecution of torturers.⁵⁷ However, the General's ill-health ultimately persuaded British authorities to send him back to Chile rather than extradite him to Spain for trial, side-stepping the issue for the present.

The principle of subsidiarity has served as the primary international legal principle addressing governance allocation among different levels of government.⁵⁸ The Treaty on the European Union (the "Maastricht Treaty") enshrined the doctrine in the European Community.⁵⁹ Article 5 of the European Community Treaty provides that the Community shall take actions in areas outside of its exclusive competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."⁶⁰ It was intended as a way to refine the Community's authority in relation to Member States.⁶¹ The 1992 Rio Declaration on Environment and Development included a version of the subsidiarity principle in Principle 10: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level."⁶² The problem is how to define the relevant

56. United Nations Convention Against Torture and Other Forms of Cruel and Inhuman Punishment, Feb. 4, 1985, *reprinted in* 26 I.L.M. 1490.

57. General Augusto Pinochet was arrested on an extradition warrant in London in October 1998. Ultimately the House of Lords ruled in favor of extradition for a limited number of charges relating to torture and conspiracy to commit torture. *Regina v. Bartle (Ex parte Pinochet) and Regina v. Evans (Ex parte Pinochet)*, U.K. *reHouse of Lords*, Mar. 24, 1999, *reprinted in* 38 I.L.M. 581 (1999) (on appeal from the Divisional Court of the Queen's Bench Division); *see also* Wedgewood, *supra* note 2, at 832 (discussing Chile's demand to have General Pinochet returned to Chile and claiming that Chilean legal process could address the issue).

58. The principle of subsidiarity is arguably rooted in Catholic social theory, where it was first articulated by Pope Pius XI in the 1931 encyclical *Quadregesimo Anno*. The encyclical suggested that government decisions should be made as close to the affected people as possible. *See* Pernice, *supra* note 52, at 405-07. The encyclical envisioned a world characterized by interlocking networks of community, family, church and government. The principle of subsidiarity subsequently became enshrined in German constitutionalism and then introduced into the European Community. The Community accepted such a principle because it arguably suffered from a democratic deficit. *See generally* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 Colum. L. Rev. 628 (1999) (discussing the insertion of the subsidiarity principle into the European Community Treaty).

59. *See, e.g.*, Treaty on European Union and Final Act, Feb. 7, 1992, Title II, ¶ 36, *reprinted in* 31 I.L.M. 247, 278 (1992) (authorizing EU action in the area of education only where necessary to assist the responsibilities of the member states).

60. Treaty Establishing the European Community, Oct. 2, 1997, *reprinted in* 37 I.L.M. 56, 80 (1998).

61. *See* Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 Fordham Int'l L.J. 616, 617 (1994).

62. Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc.

level. Some issues such as noise pollution are local; others such as climate change and ozone depletion are global. Many can be addressed at different levels, and even simultaneously. The subsidiarity principle does not provide definitive answers, nor does it apply to the horizontal allocation of authority among public and private sectors, or between States.

This Article addresses only two aspects of the proper competence for governance: transborder agreements of subnational units, and the unilateral actions of subnational units that affect other countries. These raise vertical issues of the appropriate level of authority for addressing transborder issues or issues of international concern to States.

Increasingly, the sharp line between international and national is disappearing as sub-national units of governments are becoming important actors. In the United States, for example, states conclude transboundary legal instruments without the consent of Congress and take unilateral actions that have important international effects. These actions raise issues of federalism, defined as a constitutional arrangement that distributes governing authority between a national government and sub-national units, which are usually demarcated by territory.⁶³ Federalism can be distinguished from the subsidiarity principle in that subsidiarity merely asserts that governing programs should be carried out at the level on which it is most efficient, while federalism presumes permanent institutional arrangements that determine the proper level of governance with the requirement of efficiency.⁶⁴

1. Transborder Agreements by States or Provinces within Countries

The United States Constitution provides that “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power.”⁶⁵ The Constitution’s Framers, however, did not elaborate on what they intended by the words “Agreement or Compact.” There are increasing numbers of instruments concluded between U.S. states and foreign provinces or sub-national units that apparently do not rise to the level of an agreement. Most of the instruments provide for information sharing or planning coordination, which arguably do not affect the federal government’s powers. A review of earlier judicial cases that focused on new transborder instruments suggests the erosion of clear criteria as to what constitutes an “agreement” or

A/CONF.151/26/Rev.1 (Vol. I) at 3-8, *reprinted in* 31 I.L.M. 874, 878 (1992).

63. See Mark Tushnet, *Federalism and Liberalism*, 4 *Cardozo J. Int’l & Comp. L.* 329, 330-32 (1996).

64. See *id.* at 331.

65. U.S. Const. art. I, § 10.

“compact.” One of the earliest examples is the instrument concluded between two counties in North Dakota and the town of Arthur in the Canadian province of Manitoba, which the court found constitutional.⁶⁶

There are many more recent examples of particularized environmental arrangements made across international borders without congressional consideration. In 1989, the governors of Washington, Alaska, Oregon, and California and the Premier of British Columbia signed an Oil Spill Memorandum, which provides for an oil spill task force and joint response drills and training.⁶⁷ In 1992, the state of Washington and the province of British Columbia concluded an Environmental Cooperation Agreement, which established a joint environmental initiative and an agreement to create additional arrangements necessary for addressing specific environmental problems.⁶⁸ Subsequently, a Memorandum of Understanding was signed to provide for consultation between agencies of the two governments before either may issue a permit for a large air pollution source within one hundred kilometers of the border.⁶⁹ The 1993 New York-Quebec Memorandum of Understanding on Environment Cooperation required that each party give “prior notice and . . . consult” before beginning any “major action or project . . . likely to adversely affect” the other party’s environment.⁷⁰ Also in 1993, New York, Quebec, and Vermont concluded a Water Quality Agreement on In-Lake Phosphorous Criteria, through which the parties agreed to limit eutrophication of Lake Champlain from sources in each jurisdiction.⁷¹ On the U.S.-Mexican border, the governors of California, Baja California Norte and Baja California Sur agreed in 1994 to create “a California Border

66. The instrument permitted the North Dakota parties to deepen and widen the channel of the Mouse River at a location fourteen miles into Canada in order to drain and reclaim land in North Dakota and provided for project costs to be shared. When litigated, the Supreme Court of North Dakota said in 1917 that it was analogous to a commercial contract and did not infringe upon a sole power of the federal government. See *McHenry County v. Brady*, 163 N.W. 540, 547 (1917); Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 *Geo. Int'l Envtl. L. Rev.* 141, 168-69 (1995).

67. See Jennetten, *supra* note 66, at 169.

68. See *Environmental Cooperation Agreement*, May 7, 1992, U.S.-Ukraine, T.I.A.S. No. 11466; see also Jennetten, *supra* note 66, at 170 (citing several other agreements between British Columbia and the U.S. state of Washington).

69. See *British Columbia/Washington Environmental Cooperation Council Annual Report*, § 2.2.1 (July 1994). The Memorandum provides for exchanging draft permits and permit applications 30 days prior to decision-making. See Jennetten, *supra* note 66, at 170.

70. *Memorandum of Understanding on Environmental Cooperation*, May 10, 1993 Quebec-New York; Jennetten, *supra* note 66, at 156, 171.

71. *Water Quality Agreement: In-Lake Phosphorus Criteria*, 1993. New-York-Quebec-Vermont. See *id.* at 171.

Environmental Cooperation Committee to address environmental infrastructure needs . . . of the border area.”⁷² The local governments of North Slope Borough in Alaska and the Inuvialuit Game Council in Canada established a bilateral management plan for the Beaufort Sea polar bear population.⁷³ While these legal instruments may not rise to the level of an international agreement for constitutional purposes, they nonetheless shape transborder relations and evidence the growing use of subnational authorities to address transnational problems.

Similar developments have occurred within Europe, especially in countries such as Germany.⁷⁴ Economic cooperation in Europe generally takes place through transborder regional groups rather than national governments. The EU has recognized the importance of Europe’s regions by creating a Committee on the Regions⁷⁵ that produces official comments on EU actions and by allowing numerous regions, notably the German *Länder*, to set up their own missions in Brussels.⁷⁶ Provincial governors and mayors are also taking on unprecedented importance as Europe integrates.⁷⁷

2. Unilateral Transborder Actions by Subnational Actors within Countries

A second category of activities in which states within the United States have tried to influence international affairs is through unilateral measures directed at transboundary activity or foreign actors. In *Barclays Bank PLC v. Franchise Tax Board*⁷⁸ in 1994, the United States Supreme Court upheld California’s method of taxing foreign and domestic multinationals, which differed from the federal

72. *California, Mexico to Build Plant to Treat Waste, Lab to Test Pesticide Residues*, 17 (18) Int’l Env’t Rep. 729 (BNA) (Sept. 7, 1994).

73. See Oran R. Young, *North American Resource Regimes: Institutionalized Cooperation in Canadian-American Relations*, 15 Ariz. J. Int’l & Comp. L. 47, 52 (1998).

74. See generally Juliane Kokott, *Federal States in Federal Europe: The German Länder and Problems of European Integration*, 3 Eur. Pub. L. 607 (1997) (discussing the interaction between EU-level federalism and German-level federalism).

75. The Committee is staffed by ministers or representatives appointed by the regional governors, in an attempt to bring at least some EU decision-making closer to the people. See Naomi Roht-Arriaza, *The Committee On the Regions and the Role of Regional Governments in the European Union*, 20 Hastings Int’l & Comp. L. Rev. 413, 449-51 (1997) (discussing the development and politics of regions in the EU, including case studies of several EU countries).

76. “Since 1985, the *Länder* have maintained their own offices or missions in Brussels.” Kokott, *supra* note 74, at 621. The German federal government, however, maintains in its constitution the right to transfer sovereign rights of the *Länder* to the European Union. See *id.* at 617; David P. Currie, *The Constitution of the Federal Republic of Germany* 352-54 (1994) (providing text of Articles 23 and 24).

77. See John Newhouse, *Europe Adrift* 23-72 (1997).

78. 512 U.S. 298 (1994).

accounting method.⁷⁹ In the environment, controversies have arisen over state restrictions on the export of unprocessed timber.⁸⁰ In 1990, Congress enacted the Forest Resources Conservation and Shortage Relief Act, which prohibited exports of unprocessed state timber from lands west of the 100th meridian, which runs roughly from North Dakota to Texas.⁸¹ Although then Senator Packwood claimed the measure satisfied the General Agreement on Tariffs and Trade, others were doubtful.

The Supreme Court has since rejected an exercise of subnational (state) authority in foreign relations in its recent decision in *Crosby v. National Foreign Trade Council*.⁸² In protest against human rights violations in Burma (Myanmar), Massachusetts adopted on June 25, 1996, an Act Regulating State Contracts with Companies Doing Business with Burma, which restricted public purchases from such companies. The law required adding ten percent to the bids on purchasing contracts of firms doing business with Burma and rejecting those bids if another company offered a lower bid.⁸³ At least nineteen municipalities have enacted similar laws.⁸⁴ Massachusetts's Burma Law was struck down in accordance with the Supremacy Clause of the United States Constitution, which gives federal laws primacy over state laws in areas where Congress has been granted authority, and where it has exercised that authority.⁸⁵ Congress passed legislation that set certain limits on sanctions against Burma (Myanmar), which were less severe than those imposed by Massachusetts, and authorized the President both to set and to repeal further sanctions and to coordinate a multilateral strategy toward achieving democracy in Burma (Myanmar).⁸⁶

79. See *id.* at 331.

80. Such controversies have occurred in Alaska, California, Idaho, and Oregon. The courts have not been sympathetic. The Supreme Court's 1984 decision in *South-Central Timber Development Inc.* indicated that in the absence of congressional consent, bans on in-state manufacturing requirements violated the Commerce Clause. See *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 84 (1984) (holding that Alaska's requirement that timber from state lands be processed in the state prior to export was not authorized by congressional policy regarding timber taken from federal land, though application of that policy to state lands was not expressly stated).

81. See Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. § 620 (1994). This section was declared unconstitutional by the Ninth Circuit in *Board of Natural Resources of Washington v. Brown*, 992 F.2d 937, 949 (9th Cir. 1993), and Congress amended the statute in 1993 to require the Secretary of Commerce to prohibit the export of unprocessed timber from state lands to meet domestic shortfalls, unless a state had exempted itself by submitting a state plan for prohibiting timber exports from state lands. See 16 U.S.C. § 620(c), 620(d) (1993).

82. 120 S. Ct. 2288 (2000).

83. See *id.* at 2291.

84. See *id.* at 2293 n.5.

85. See *id.* at 2302.

86. See *id.* at 2291-92.

While Congress had several times declined to prohibit sanctions by states, the Court found that the Massachusetts law substantially interfered with accomplishing the objectives under the Congressional Act.⁸⁷ Numerous international actors, including Japan, ASEAN, and the European Union lodged formal complaints regarding the Massachusetts law. The European Communities and Japan initiated dispute settlement proceedings under the World Trade Organization (WTO),⁸⁸ and sent a formal letter to the United States Department of State indicating that its relationship with the United States would be harmed if the Massachusetts law were allowed to stand.⁸⁹ The Court determined that the Massachusetts law posed a significant impediment to the President's pursuit of multilateral actions regarding Burma (Myanmar).⁹⁰

This dispute invoked several levels of actors' asserted authority. On the local level, the Commonwealth of Massachusetts argued that it was responding to the will of its voters that tax money not be used to support the military regime in Burma (Myanmar). On the national level, Congress had already enacted applicable legislation, and the Supreme Court found the state act to be unconstitutional. At the international level, foreign countries successfully exerted pressure in more than one way to eliminate a law that harmed their national corporations. Moreover, while the WTO did not have the opportunity to decide the dispute, the authority of the WTO to rule on decisions made by local governments was not questioned during these events. While the Supreme Court averted a direct conflict between supranational and local jurisdiction, the spread of globalization – and individual mistrust of globalization – makes it likely that similar conflicts will arise in the future.

87. *See id.* at 2289-90.

88. United States-Measures Affecting Government Procurement, complaint by the European Communities (WT/DS88/1) and United States-Measures Affecting Government Procurement, complaint by Japan (WT/DS95/1). The European Communities and Japan complained that the Massachusetts law violated United States commitments under the WTO Agreement on Government Procurement, a plurilateral agreement under which Massachusetts agreed to be covered. In February 1999, the complainants requested that the panel proceedings be suspended. Since the panel was not requested to resume its work, the authority for establishing the panel lapsed as of February 11, 2000.

89. The European countries, arguing as amici, complained of the harm done to their citizen corporations by individuals who have gained access, through the internet, to the Commonwealth's list of companies who do business with Burma and have used that list to organize individual or organizational boycotts. *See* Brief for the European Communities and Their Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom as *Amici Curiae* in Support of Respondent, *Natsios v. National Foreign Trade Council*, (No. 99-474), available in 2000 WL 177175, at *7.

90. *Crosby*, 120 S. Ct. at 2296.

C. International Law as Reflecting Commonly Held Values

Traditional international law rested on a common set of values, namely the acceptance of sovereign, independent and equal States, who consented to rules that would regulate the relationships between them. Within a State's jurisdiction, the State and its inhabitants could pursue their own values. But the simultaneous integration and fragmentation of States has made it more important than ever that global civil society share certain common values. There is both a growing global emergence of certain common values, and a growing lack of consensus about certain values.

International law will face an unusually heavy challenge in the decades ahead—to provide the norms that connect the many parts of our global society. Political theory tells us that viable communities need shared values, either globally or locally. Communities need to feel that they are linked to each other.⁹¹ The new transnational elites need to share common values with each other and with the fragmented communities who are not directly part of the elites. The disenchanting need to feel that processes are available to them to redress their grievances and need to have an underlying sense of commonly held values with others in the community.

On the one hand, some common values are emerging globally. These are reflected, for example, in the delineation of war crimes and the negotiation of the International Criminal Court to hold those in power accountable, the adoption of environmental protection measures, the increased invocation of transparency, the transitions to democracy, the reliance on markets as a useful economic instrument, and perhaps in the legal constraints on political corruption. The common environmental values of intergenerational equity to protect future generations, sustainable development, common but differentiated treatment, public participation, and access to information link many people together. Viewed against the backdrop of five decades, the emergence of these commonly held values is striking—even if not all of them are universally accepted.

On the other hand, there may also be a breakdown of a consensus on some universal values, or a failure of a consensus to emerge. For example, some protesters in Seattle rejected the value of globalization. Citizens in countries often reject immigration or the introduction of “foreigners” into the society. These are economic statements as well as political statements. People may feel either that they do not have access to the relevant decision-making procedures or that they are not getting an appropriate economic slice of the pie and feel threatened by forces beyond their control. On the other hand, there may also be a disagreement about values. Some demonstrators

91. See David Held, *Democracy and the Global Order* 3-27 (1995).

oppose globalization or immigration because these forces are perceived to threaten non-economic values.

These developments mean that if international law is to rise, and not fall, it will be essential to have a consensus on an increasingly larger number of shared values and to work toward a consensus on the appropriate levels of authority for addressing different issues, so that people can satisfy their desire to have a measure of control over their own lives. Some of the shared values may well empower people at the local level to govern locally and to pursue different cultural values. The pursuit of shared values does not preclude the existence of special values at the community level.

One fundamental norm that has emerged is that concerning our relationship with present, past and future generations. Until recently, international law has addressed intertemporal issues mainly by relating the present to the past. Increasingly, intertemporal issues relate the present to the future, as in economic development, environmental and natural resource protection, and cultural heritage issues. The mandate for sustainable development is inherently intergenerational. Elsewhere I have articulated a theory of intergenerational equity, which argues that we are part of the natural system and that we hold the global environment in common with past, present, and future generations of the human species. We have both rights to use it for our own benefit and obligations to care for it for our generation and for future generations.⁹² This in turn gives rise to principles of intergenerational equity, which must be articulated and can provide the normative link between the present generation and future generations.

It also leads to a set of intergenerational equity principles of options, quality, and access, and to a principle of intragenerational equity among peoples living today. The latter provides rights of nondiscriminatory access to the benefits of environment and nondiscriminatory bearing of environmental burdens.

While intergenerational equity as a principle seemed remote from the daily practice of international law when first articulated, there has now been considerable scholarly, policy, and judicial attention, both in national and international courts, devoted to fairness to future generations. In particular, Judge Weeramantry, the former Vice President of the International Court of Justice, recognized in his separate dissenting opinions since the mid 1990s the principle of intergenerational equity as an established part of international law.⁹³

92. Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989).

93. Judge Weeramantry noted that "the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations."

In the Philippines, the Supreme Court recognized intergenerational equity by granting constitutional standing to a group of children to represent the interests of future generations in their effort to stop the leasing of biologically diverse forested lands.⁹⁴

Principles of intergenerational equity offer an example of potentially unifying norms to counter alienation associated with fragmentation. To be effective, they must be articulated and implemented at all levels—international, national, and local.

D. *Equity as Essential to Norm Consensus and Compliance*

Notions of equity or fairness are a source of conflict in negotiating and implementing international agreements and other international legal instruments. Thomas Franck and others have observed that for countries, or peoples, to comply with international legal norms, they must be perceived as equitable.⁹⁵ The concern with equity today is even broader: namely, that there are growing inequities in the world—among and within countries—and that this could thwart agreement with common international norms and obedience to international law. Habermas has suggested that “a liberal political culture can hold together multi-cultural societies only if democratic citizenship can deliver in terms not only of liberal and political rights, but of social and cultural rights as well.”⁹⁶ Gross economic inequities thwart this realization.

While the world is more prosperous than it was fifty years ago, the inequities are also greater. According to the UNDP, the difference between Gross Domestic Product (“GDP”) for industrial countries and for developing countries has increased dramatically in the past century, with the rate of inequality growing substantially in the past twenty years.⁹⁷ In 1980, the average GDP for industrialized countries was \$14,206 and the average GDP for developing countries was only

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 445 (July 8) (separate opinion of Judge Weeramantry), *reprinted in* 35 I.L.M. 809, 888 (1996); *see, e.g.*, UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Nov. 12, 1997, UNESCO General Conference, 29th Sess., available at <<http://www.unesco.org>>.

94. Judgment of June 30, 1993 (Juan Antonio Oposa et. al. v. the Honorable Fulgencio Factoran, Secretary of the Department of the Environment and Natural Resources, et. al.), Supreme Court of the Philippines, G.R. No. 101083, *reprinted in* 33 I.L.M. 123 (1994); *see* Ted Allen, *The Philippine Children's Case: Recognizing Standing for Future Generations*, 6 Geo. Int'l Envtl. L. Rev. 713, 713 (1994).

95. *See generally* Thomas Franck, *Fairness in International Law and Institutions* (1995) (discussing fairness in various contexts of international law); Howard K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, in Weiss, *Engaging Countries*, *supra* note 15, at 511-23.

96. Jürgen Habermas, *The European Nation State: Its Achievements and Its Limitations On the Past and Future of Sovereignty and Citizenship*, 9 Ratio Juris 125, 134 (1996).

97. *See* HDR, *supra* note 6, at 38.

\$686, a gap of \$13,520.⁹⁸ By 1997, the average GDP for industrialized countries had grown to \$19,283, while the average GDP for developing countries had only grown to \$908.⁹⁹ The gap in 1997 was \$18,375, an increase in inequality of \$4,855. The associated differences in human development are also striking. The average human development index score¹⁰⁰ for industrialized countries in 1997 was 0.919, while the average score for developing countries was 0.637, and the score for the least developed countries only 0.430.¹⁰¹

There are also significant differences in access to technology and the benefits of globalization. In mid-1998, 26.3% of the U.S. population were internet users, compared to 0.8% in Latin America, 0.4% in East Asia, and 0.1% in Sub-Saharan Africa.¹⁰² Average internet access fees reached \$100 per month in several African countries, as compared with only \$10 per month in the United States.¹⁰³ Fully one quarter of the world's countries did not have even one telephone per one hundred people, a standard measure UNDP uses to identify minimally basic access to telecommunications.¹⁰⁴ Intellectual property was similarly unequally distributed: ten countries controlled 95% of U.S. patents and 84% of global research and development in 1993, while 80% of patents from developing countries were awarded to residents of industrialized countries.¹⁰⁵ The traditional knowledge of local and indigenous groups was generally inadequately protected by intellectual property regimes.¹⁰⁶

Unless the international community pays attention to issues of equity, it will be difficult to develop and maintain an international legal system in which all participants, public and private, have confidence.

CONCLUSION — THE FUTURE

If we were to gather together again in ten years, would we say that international law is on the rise or on the decline now? If international

98. *See id.* at 154.

99. *See id.*

100. The human development index is a measure on a scale of 0 to 1 produced by UNDP to account for life expectancy, literacy rate, enrollment in school, and per capita income. *See id.* at 127-28.

101. *See id.* at 154.

102. *See id.* at 63.

103. *See id.* at 62.

104. *See id.*

105. *See id.* at 68.

106. *See id.* at 70-71. Some national governments have attempted to protect the knowledge, but these efforts are experimental. *See, e.g.,* Fundación Sabiduría Indígena (FSI) and Brij Kothari, *Rights to the Benefits of Research: Compensating Indigenous Peoples for Their Intellectual Contribution*, 56 Hum. Org. 127, 127-37 (1997) (discussing an effort in Ecuador to develop a method of compensating indigenous groups for the profits generated by research based on their traditional knowledge).

law is restricted to States and consists only of binding rules generated by States, international law may be declining relative to other international normative instruments. But even here, the absolute number of binding instruments concluded by States is increasing. If we redefine international law to include norms developed by actors in addition to States, and if we include norms that are formally nonbinding as well as those that are binding, the answer is surely that international law is rising in this new century. International law is permeating ever broader and more local aspects of life worldwide. But there are dangers in the emerging legal system: the inadequate accountability of the non-State actors that develop legal instruments and the legitimacy of the processes for doing so; the controversies over the proper level and/or location of authority for governance decisions; and the threat that inequities worldwide and within countries pose for acceptance of international legal norms and of the international legal system. These issues need to be addressed. Yes, international law is rising, but it is dressed in newer garb and faces new challenges.