INTERNATIONAL LEGISLATION TODAY: LIMITS AND POSSIBILITIES

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I. INTRODUCTION

In 2001, I was elected a member of the United Nations International Law Commission (ILC). During the electoral campaign, the Finnish Government arranged a visit for me at several UN agencies in Geneva: High Commissioner of Human Rights, High Commissioner for Refugees and the International Committee of the Red Cross (ICRC). At each, I met with legal officials whom I asked, "What can the Commission do for you?" At each, the response, given after some friendly conversation about the Commission's recent activities was crystal-clear – "nothing." "Keep out of this field, please." Apparently, public international law could give nothing to human rights, refugees, or victims of armed conflict. The implicit message was that it was much better that those three organisations dealt with the relevant problems. Of course, my interlocutors were not wrong. It is hard to see how the thirty-four seasoned lawyer-diplomats at the Commission could improve upon the performance of those specialised organisations. After all, the organizations had been committed for decades to the cause of human rights or relieving the plight of refugees or the victims of armed conflict and having developed a finely tuned sensibility of what was possible and desirable to attain by way of standard-setting in these areas. Had I walked over to the World Trade Organisation (WTO), the response would have been the same, of course, but I already knew that would have been pointless.

So what was the problem? Assessments of the achievement of the ILC, established in 1947 to carry out "codification and development of international law" under Article 13 of the UN Charter, differ.[1] Jennings and Watts refer to the conventions and

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[1] According to Article 13(1)(a) of the Charter, the UN General Assembly is to promote "the progressive development of international law and its codification." U.N. Charter art. 13, para.1(a). The main bodies established by the General Assembly for "codification and development" are the International Law Commission (ILC) and the Commission for International Trade law (UNCITRAL). In practice, a very large part of "codification and development" has taken place in

other texts produced by the Commission as "a major contribution to the development of a significant portion of international law" and note that "[f]or that alone, the work of the Commission can be regarded as successful."[2] Fleischhauer views the Commission's fifteen conventions as an "impressive" output.[3] These are insider views by former UN officials, judges from the International Court and a legal advisor. Others might more readily join the scathing assessment made at the Commission's 50th birthday by Felipe Paolillo:

If one considers that some of the best jurists in the world have met and worked together for between 10 and 12 weeks a year for 50 years and that all that has been produced are 15 conventions, of which only 11 are in force, and that, of these 11, only two or three or, at the most, four are of anything approaching universal reach or character, then, one cannot but feel a certain sense of dissatisfaction.[4]

Special Committees, diplomatic conferences or other ad hoc bodies. For a brief overview, see Dr. Carl-August Fleischhauer, *Article 13*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 265–78 (Bruno Simma ed., 1995).

[2] 1 OPPENHEIM'S INTERNATIONAL LAW § 30 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

[3] Fleischhauer, *supra* note 1, at 270. A somewhat different nuance is given by D.M. McRae in his fortieth anniversary article where he celebrates the Commission's "remarkable and long-standing contribution to international law scholarship generally." D.M. McRae, *The International Law Commission: Codification and Progressive Development after Forty Years*, 25 CAN. Y.B. INT'L L. 355, 355 (1987). There is no doubt that the Commission's reports have been a vital source of much academic writing. As a criterion of success, this is not without its problems, however. A mixed assessment is in IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 112–19 (1987). **R**

[4] Felipe Paolillo, *An Over-View of the International Law-Making Process and the Role of the International Law Commission*, *in* MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50, 79 (1998). For David Bederman, the Commission's achievements are in the past - in diplomatic and consular law, and in the law of treaties:

> As for other doctrinal areas - including work on state recognition, succession, immunities, and responsibility as well as efforts to chart aspects of international environmental law and use of force - the results have been disappointing (as measured by the small number of states that ratify some ILC projects), destructive (because the codification fails to properly describe the experience of the international community), or embarrassing (owing to the amount of time taken in the effort).

DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 67(2002).

Such contrasting assessments not only reflect professional solidarities - though these should not be underestimated - but above all contrasting expectations on the direction and effects of law-making in the international legal world. On the one hand, it does seem true that much of the world of diplomatic interaction among governments now takes place under rules codified by the Commission and written especially into the 1961 and 1963 conventions on diplomatic and consular relations and the 1969 Vienna Convention on the Law of Treaties. The Commission's 1950's work on the Law of the Sea did fulfil an important role - though it is now overridden by the 1982 UN Convention on the Law of the Sea, negotiated outside the Commission. On the other hand, it is unclear what the role of these instruments has been in the guidance, as distinct from effect, of international politics and hard to believe that much about the world's progress today would depend on what the Commission will do with the seven items on its agenda.[5] Some of those items have been there for a long time with little substantive progress having been achieved or foreseeable – for example, under "reservations to treaties". Others, such as "liability for injurious consequences for acts not prohibited by international law," have been finalised and thrown back to the General Assembly without a clear sense of what should be done with the outcome. On yet other items, in particular "unilateral acts" but also "transboundary groundwaters," members disagree on whether they are at all suited for formal codification. Above all, a puzzle remains about the role of

[5] For the agenda of the Commission in 2004, see International Law Commission, *Provisional Agenda for the fifty-sixth session*, U.N. Doc. A/CN.4/536 (2004), *available at* http://www.un.org/law/ilc/sessions/56/56sess.htm. Seven of the substantive items were: responsibility of international organisations, diplomatic protection, international liability of States for injurious consequences of acts not prohibited by international law, unilateral acts of States, shared natural resources, reservations to treaties and fragmentation of international law. In 2004, three additional items had been included in the Commission's work programme - but no work has yet been undertaken on them. They are: the effect of armed conflict on treaties, expulsion of aliens and the obligation to extradite or prosecute (*aut dedere aut judicare*) in international law. International Law Commission *Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August 2004)*, Supp. 10, U.N. Doc. A/59/10 (2004), *available at* http://www.daccess.dds.un.org/doc/UNDOC/GEN/N04/512/80/PDF/NO451280.pdf?openElement.

the Commission in and beyond the UN system. Can a meaningful contribution to the global order be made by a group of lawyers representing nothing but a rather narrow technical expertise?

International lawyers have usually discussed these problems by reference to the need to improve the Commission's working methods. Typical suggestions have included: prolonging or shortening of the sessions of the Commission; changing the process of electing its members; intensifying the co-operation and co-ordination between the Commission and political UN bodies; especially the General Assembly and its Committees; participation of non-governmental expert organisations in the Commission's work and so on.[6]

But, the doubts my interlocutors in Geneva had about the Commission's usefulness were independent of any such technical streamlining. They were concerned with the very idea of international legislation being prepared by a body of independent lawyers, somewhat like experts in a domestic justice department for a single global legislator, the United Nations. Human rights, humanitarian law and refugee protection (like trade law, environmental law and so on) come with a political direction and a set of preferences and it was far from clear that the Commission would share those preferences - in fact, it was likely not to share them. From the perspective of those institutions (and indeed many other institutions), international legislation through the traditional method by UN lawyers and diplomats was not a key to solving the world's problems but part of those problems itself.

The idea of international legislation comes with the presumption that the international world is, in the relevant sense, like the domestic, a single people represented by the UN, exercising its sovereignty by legislating for itself. From this perspective, success or failure seems measurable in quantitative terms: more law is always better than less law because this means that more of the problem would be in the hands of the legislative representatives of the people. More international administration would thus take place in accordance with the Rule of Law. This

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[6] For all 147 suggestions, see *Ideas and suggestions for strengthening the International Law Commission and enhancing its capability to contribute to progressive development and codification of international law*, MAKING BETTER INTERNATIONAL LAW, *supra* note 4, at 31–47. **R**

is a problematic assumption. Measuring the legislative effort by the UN in quantitative terms seems to wholly miss the point. How good is that law, and for whom? Such questions are rarely posed by international law professionals - so strong is their commitment to the idea of international legislation.

In this paper, I shall outline some of today's challenges to the idea of international legislation. I shall first undertake a historical overview focusing on the distinction between "codification" and "development". I will then discuss three contemporary challenges to international legislation that I call deformalisation, fragmentation and empire. The last section will suggest that thinking about international legislation today calls for setting aside the domestic analogy and re-imagining the three challenges as part of a constitutional moment for a new, pluralistic legal system.

II. Codification and Progressive Development: A Brief History

Under Article 1 of its governing Statute, the task of the International Law Commission is "the promotion of the progressive development of international law and its codification."[7] Article 15 then lists the activities that belong to both spheres under separate Chapters, but then states that these expressions are used "for convenience" only.[8] That rather odd statement reflects the almost unanimously shared view in the profession that "codification" and "progressive development" are not, despite the importance of that distinction from a conceptual or "theoretical" perspective, after all, that different and cannot, in practice, be kept separate.[9] Such a casual treatment of what appears to be a fundamental distinction illustrates the difficulty to uphold a minimally plausible description of the process or outcomes of UN diplomacy as "international legislation". To examine this, it

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[7] Statute of the International Law Commission art. 1, U.N. Doc. A.CN.4/4/Rev. 2, U.N Sales No. E.82.V.8 (1982), *available at* http://www.un.org/law/ilc/texts/statufra.htm.

[8] *Id.* at art. 15.

[9] *See, e.g.*, Helmut Steinhager, *Bemühungen zur Kodifizierung und Weiterbildung des Völkerrechts im Rahmen der Organisation der Vereinten Nationen*, 28 ZaöRV 617, 618–19 (1968).

is useful to provide a brief history of the idea of international legislation, which follows.

A. The Move to Codify

The understanding of international law as a technical profession administering the law of an international society reasonably analogous to national societies emerged towards the end of the 19th century. After the Franco-Prussian war (1870-71), European liberals began to advocate a new international law that would be responsive to the internal transformations in European societies: democracy, liberalism, and economic and political modernity. Instead of merely a vehicle for co-ordinating diplomacy, international law should express the progress of European societies. It should have a political agenda, and that should coincide with the liberal agenda. The idea of international legislation had always been part of pacifist internationalism. It was now supported by the successful codification movement within European societies at the beginning and in the middle of the 19th century. Proposals were therefore made by well-placed individuals for an analogous codification of international law, conceived as domestic codification had been, as predominantly a *scientific* task, the extraction from State practice regularities that could then be articulated in privately produced codes.[10]

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[10] One of the first important proposals for codifying international law was made in the 1860s by the liberal Swiss jurist Johann Caspar Bluntschli who produced a well-regarded Civil Code for his native Zürich and later became Professor of Political Science in Heidelberg. *See* R.P. Dhokalia, The Codification of Public International Law 49 (1970). On the basis of correspondence with the German-American Francis Lieber (who had produced the "Lieber Code" for use of the Union army in the U.S. Civil War in 1863), Bluntschli produced two books on international law that both took on the form of a prepared codification of the laws of war and general international law, respectively. *Id.* and see Johann Caspar Bluntschli, Das moderne Kriegsrecht der civilisirten staaten (Nördlingen, Beck 1866) and Das moderne Völkerrecht der civilisirten staten, als Rechtsbuch Dargestellt (Nördlingen, Beck, 1870). On the private codification proposals, see Dhokalia, *supra* at 37–75. Two private organizations were set up in 1873 for this purpose. Dhokalia, *supra* at 63, 68. The *Institut de droit international* [The Institute of International Law] was a closed society of professional lawyers drafting restatements of international public and private law. Dhokalia, *supra* at 63. The *Association for the Reform and Codification of International Law* (later *International Law Association*) was conceived more broadly and aligned itself with the period's humanitarian activism. Dhokalia, *supra* at 66–67. Today, both associations operate on relatively unchanging terms, producing reports and adopting model conventions that serve

At the same time, the lawyers also began to feel that they should finally give a response to the many critics who, throughout the century, had denied international law's character as "law". They could do this by arguing, that although there was no formal world legislature, multilateral treaties might be usefully thought of as functional equivalents to domestic laws.[11] In the centre of this debate stood the remarkable transformation of treaties in the late 19th century from bilateral alliances or trade-compacts to increasingly more "normative" instruments emerging from multilateral conferences and sometimes setting up permanent international "unions".[12] It became customary to make a distinction between regular treaties and "law-making" or "quasi-legislative" conventions. Otfried Nippold, a Swiss *Staatslehrer* summarised the position in 1894: "International treaties in their totality will be the Law-book of international law."[13] As treaty-making was taken over by governments and, increasingly after

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both as restatements and legislative proposals. DHOKALIA, *supra* at 67–68. In this regard, they are very similar to the *International Law Commission*; the only significant difference being that the latter has a position in the official diplomacy of the United Nations. *See also* Irwin Abrams, *The Emergence of the International Law Societies*, 19 REV. OF POL. 357, 362–80 (1957), and MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, 11–97 (2001).

[11] *See, e.g.*, GUSTAF ADOLF WALZ, WESEN DES VÖLKERRECHTS UND KRITIK DER VÖLKERRECHTSLEUGNER 162–67 (1930).

[12] That debate is traced in detail now in Milos Vec, Recht und Normierung in der industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaflicher Selbstnormierung (2004) (unpublished manuscript at 95–116, on file with author). *See, e.g.*, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 196–203 (rev. ed. 1954).

[13] "Die völkerrechtliche Verträge in ihrer Gesammtheit werden der Codex des internationalen Rechs sein." OTFRIED NIPPOLD, DER VÖLKERRECHTLICHE VERTRAG SEINE STELLUNG IM RECHTSSYSTEM 274 (Berne, Wyss 1894) (author's translation). German jurists were not unanimous in this regard, however. Though everyone regarded codification positively, some like the legal theorist Carl Bergbohm insisted on the difference between treaties and domestic legislation; the former were more like private law contracts that could be denounced by a further act of will. *See* CARL BERGBOHM, STAATSVERTRÄGE UND GESETZE ALS QUELLEN DES VÖLKERRECHTS (Dorpat, C. Mattiesen, 1877). The view internationalists finally took, however, was expressed in GEORG JELLINEK, DIE RECHTLICHE NATUR DER STAATENVERTRÄGE 46–66 (Vienna, Hölder, 1880). Jellinek used the idea of autolimitation to do away with the alleged difference between public law and international law and pointed to an objective principle (conditions of the international world, or *Natur der Lebensverhältnisse*) that suggested to (reasonable) will that it should remain bound.

the Hague Conferences of 1899 and 1907, also by international institutions, international lawyers began to interpret this as legislation for an international society.

B. The League of Nations

After the World War I, it seemed imperative, not least owing to the establishment of the Permanent Court of International Justice in 1922, that the League of Nations would prepare legislative treaties on various aspects of international concern.[14] The League Covenant was interpreted as not just another treaty but as a "constitution" in order to highlight the analogy between the domestic and international institutions - however odd that might have seemed to the diplomats in Versailles who negotiated it.[15] The failure of the 1930 codification conference to produce a meaningful result was therefore a source of great anxiety to the lawyers, many of whom felt that it was in fact worse than having had no conference at all. It had left uncertain even those points of law which experts had largely agreed upon.[16] The Conference had been a meeting of official State representatives, and many drew the conclusion that political negotiation was not an appropriate way to pursue international legislation. It was too important to be left to the politicians.

But if political negotiation could not be trusted, how should one go about legislating for the world? One answer was given by those who, like the French socialist Georges Scelle, thought formal legislation was merely declaratory and not constitutive and that international law arose spontaneously from the laws of social solidarity itself. In his 1948 textbook, Scelle discussed the international *fonction législative* by outlining the view of multilateral treaties as *traités-lois:* "*si cette appareil est plus complexe qu'en droit interne*, *la technique n'est pas fondamentalelement differente*."[17] Scelle believed legislation was an affair of science and

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[14] J. Gustave Guerrero, La Codification du Droit International 16–17 (1930).

[15] *See, e.g.*, Hersch Lauterpacht, *The Covenant as Higher Law*, 17 Brit. Y.B. Int'l L. 54 (1936).

[16] For a standard history and assessment of the Conference, see Dhokalia, *supra* note 10, at 112–33.

[17] Georges Scelle, Cours de Droit International Public 601 (1948).

not of "mere" political bargaining. If parliaments failed to articulate the intrinsic laws of social solidarity, then this could always be done by the legal scholars. Another approach was taken by those like Hersch Lauterpacht, Professor of International Law at Cambridge, an avowed federalist, who constructed the realm of international law from the practical activities of international courts and tribunals. In the absence of formal legislation, it fell upon adjudication and arbitration, by the use of general principles and domestic law analogies, to articulate the laws of the international world.[18] Yet, both saw this as a temporary solution on the way to the organisation of the international realm in the image of the domestic State, with proper legislative machinery.

C. The International Law Commission

To the dismay of lawyers such as Scelle and Lauterpacht, the proposal to give legislative powers to the UN General Assembly was defeated by a wide margin at the San Francisco Conference. There was agreement that a specialist body needed to be established to prepare "codification" and "progressive development" and the debates in the Committee set up to prepare the matter in 1947 concentrated on how to understand that differentiation.[19] Most Western lawyers remembered the experience of 1930 and favoured scientific codification while the representative of the Soviet Union led the group that understood codification and progressive development as inherently political tasks. The debate in the General Assembly in the fall of 1947 resulted in a compromise. The International Law Commission was set up with both the tasks of "codification" and "progressive development" while the report of the Committee stressed that not too fine a point

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[18] *See* Hersch Lauterpacht, Private Law Sources and Analogies of International Law (1927) and The Function of Law in the International Community (1933). Likewise see Hersch Lauterpacht, The Development of International Law by the International Court (rev. ed., Frederick A. Praeger 1958)(1934).

[19] The Committee on the Progressive Development of International Law and its Codification ("Committee of Seventeen") worked between May 12-June 17, 1947. For the debates, see Yuen-Li Liang, *The General Assembly and the Progressive Development and Codification of International Law*, 42 Am. J. Int'l L. 66, 70–77 (1948); Dhokalia, *supra* note 10, at 150–60.

should be made of this distinction. It was impossible, most held, to distinguish clearly between the two.[20]

The International Law Commission was established in November 1947.[21] In the following winter, the Secretary-General invited Lauterpacht to prepare a proposal for the Commission's first work plan. Lauterpacht had taught international legislation in Cambridge, conceiving international organisations and multilateral treaties through the domestic analogy. His outlook differed sharply from the cautious traditionalism of his Oxford colleague James Brierly, the British representative at the preparatory committee who had also functioned as its rapporteur and been a leading proponent of expert codification.[22] Lauterpacht advocated for the widest possible extension of international law, if necessary through judicial activism, and held it both undesirable and ultimately impossible to make a distinction between codification and progressive development. Indeed, he held that "codification of international law must be substantially legislative in nature" and stressed that "[i]t must consist essentially in inducing governments (or some governments) to accept new law."[23]

Consequently, Lauterpacht proposed that the ILC prepare drafts on what could be called the ground rules of international law. He was remarkably successful. Out of the 25 topics he proposed, 14 were adopted in 1949 by the Commission to its work

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[20] Herbert W. Briggs, The International Law Commission 129–41 (1965). "It was foreseen from the outset that the distinction was basically and practically unsound, but political considerations had dictated its incorporation in the Statute." *Id.* at 141.

[21] G.A. Res. 174 (II), U.N. GAOR, 2d Sess. (1947).

[22] Lauterpacht and Brierly had clashed during the war in the debates about the purpose and structure of the coming world organisation. Where Lauterpacht advocated world government and international legislation, Brierly took a more traditional position. In a pamphlet from 1944 Brierly warned against thinking of international law in domestic law terms. Its function was "to define and delimit the respective spheres within which each of the [then] sixty-odd states into which the world is divided for political purposes is entitled to exercise its authority." J.L. Brierly, The Outlook for International Law 9 (1944). For him, international law was a system of laissez-faire and not "a system of rules for the general regulation of the relations of states with one another." *Id.* at 11. For the inter-war debates, see Martti Koskenniemi, *Hersch Lauterpacht (1897-1960)*, *in* Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth-Century Britain 601 (Reinhard Zimmermann & Jack Beatson, eds., 2004).

[23] H. Lauterpacht, *Codification and Development of International Law*, 49 Am. J. Int'l L. 16, 29 (1955).

programme: the law of treaties, State responsibility, jurisdictional immunities, laws of the High Seas and of territorial waters, diplomatic and consular intercourse, extradition, right of asylum, recognition of States, and arbitration procedure.[24] The Commission's latest large project on State responsibility, completed in 2001, constituted a final chapter in the implementation of the Lauterpacht programme.

D. Multilateral Co-Operation

Alongside the ILC, many other UN bodies and international organisations were active in multilateral treaty-making in the economic, social and technological fields, in human rights, and the environment.[25] As a result of these activities, international lawyers began in the 1960's to distinguish between an "old" international law of co-ordination, alive especially in the Cold War antagonism, and the new law of "co-operation" that was being developed in the various functional institutions and problem-areas.[26] The distinction became rooted in UN parlance as one between the relatively fixed, basic framework of the international system, suitable for expert codification and the more political activities where constant clashes took place between stakeholder groups. In the 1970's institutions such as the UN Conference on Trade and Development (UNCTAD) and UNESCO emerged as forums for the hugely political confrontations between the West and the Third World focusing on the New International Economic Order (NIEO). This resembled domestic parliamentary debates and the language of "international legislation" was constantly used to discuss the outcomes. Scholars debated questions such as the law-making nature of UN General Assembly resolutions, "instant custom", the role of soft law and of *jus cogens* (as

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[24] Memorandum submitted by the U.N. Secretary-General, Survey of International Law in Relation to the Work of Codification of the International Law Commission, U.N. Doc. A/CN.4/1/Rev. 1 (1949). For the adoption of the Commission's first work plan, see G.A. Res. 373 (IV), U.N. GAOR, 4th Sess. (1949) and Briggs, *supra* note 20, at 168–76.

[25] There are many overviews of these developments. *See, e.g.*, C. Wilfried Jenks, The Common Law of Mankind (1958).

[26] The classic is Wolfgang Friedmann, The Changing Structure of International Law (1964).

well as the "threat" they posed to the basic diplomatic framework). A social-democratic and regulatory spirit flourished.

Meanwhile, the International Law Commission continued fulfilling the Lauterpacht programme of codifying the "basic framework." Although some well-placed Third World lawyers such as Taslim Elias believed the Commission could be used for progressive change,[27] they failed to persuade their governments. The "Friendly Relations Declaration" that re-stated the main legal principles of the UN Charter was drafted directly under the General Assembly and the form of setting up a Special Committee or a multilateral conference to prepare multilateral treaties became the basic pattern of UN law-making.[28] Despite the increase of the Commission's membership, the NIEO, including its most visible law-related aspect, the reform of the Law of the Sea (1974-1982), were pursued outside the Commission. Also the results of the Commission's work began to disappoint. Its work on State succession or the law of international organisations in the 1970's and 1980's failed to secure large approval by the majority of the UN members.[29] In his otherwise positive assessment of the Commission's work, Sinclair notes of this period that "most of the topics it was called upon to study . . . did not lend themselves to codification through the medium of codification conventions."[30] A 1981 Study by the UNITAR concluded that the Commission lacked a sense of innovation and stayed too close to state practice to incite the enthusiasm of the majority of governments.

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[27] *See, e.g.*, T.O. Elias, *New Trends in Contemporary International Law: The Josephine Onoh Memorial Lecture 1985*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL LAW: A COLLECTION OF THE JOSEPHINE ONOH MEMORIAL LECTURES 1 (David Freestone et al. eds., 2002).

[28] *See* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (1970).

[29] For instance, the Vienna Convention on the Representation of States in International Organisations (1975) has been ratified only by a handful of States. Very few States have also ratified the Vienna Convention on Succession of States in respect of Treaties (1978) and the Vienna Convention on Succession to State Property, Archives and Debts (1983). For a thorough analysis of the effect of the latter two instruments, see LA SUCCESSION D'ETATS: LA CODIFICATION À L'ÉPREUVE DES FAITS [STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS] (Pierre Michel Eisemann & Martti Koskenniemi eds., 2000).

[30] SINCLAIR, *supra* note 3, at 94.

The suggestion to turn the work of the Commission more into legal research was opposed from all sides, however.[31]

E. Into a New World?

In the 1990's an atmospheric change began in the UN. The Soviet Union made high-level proposals for the development of the "Rule of Law" in the international world. After 1989, the Security Council suddenly woke up. Action — sometimes quite dramatic action — was taken in regard to the crises in Iraq, Somalia, Libya, Angola, Haiti, the former Yugoslavia, and so on. International lawyers saw the Council finally working as it was supposed to under the Charter. At a euphoric moment in 1992, the Council declared it had competence to deal also with economic, humanitarian and even ecological crises.[32] Sanctions were applied against many countries. This was something many saw – wrongly, but understandably – as a kind of enforcement against law-breakers. The Council set up permanent international jurisdictions and began to legislate on matters such as mass destruction weapons and international terrorism.[33]

Many other things started to happen. The UN organised an unprecedented series of World Conferences on the environment (1992), Human Rights (1993), Women (1995), World Social Summit (1996), and Human Settlements (1997) – each exceeding the prior in the number of delegations, especially NGO delegations, and in the number of pages for documents produced. This surely seemed like world government by world conferences adopting universal standards.[34] It was topped by the establishment of the WTO in 1995 with, above all, a unified dispute-settlement mechanism.

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[31] *See, e.g.*, McRae, *supra* note 3, at 358–59.

[32] Note by the President of the Security Council, U.N. SCOR, U.N. Doc. S/23500 (1992), *available at* http://projects.sipri.se/cbw/docs/cbw-unsc23500.html.

[33] For incisive comments on the Council's expanded role, see Vera Gowland-Debbas, *The Role of the United Nations Security Council in the International Legal System*, *in* The Role of Law in International Politics: Essays in International Relations and International Law 277–314 (Michael Byers ed., 2000).

[34] For a useful analysis, see José Augusto Lindgren Alves, *The U.N. Social Agenda Against 'Postmodern' Unreason*, *in* Might and Right in International Relations, 28 Thesaurus Acroasium 56 (1999).

But the Security Council did not enact the rule of law. It remained as selective as always while its own practices now raise significant rule of law problems.[35] No doubt, it is not possible to conceive the Security Council as a legitimate global law-maker.[36] Nor did the World Conferences create law: their wish-lists remain largely unfulfilled, as the UN's Millennium declaration of 2000 made clear and as international priorities have moved elsewhere. Instead of international legislation, commentators today speak of global "governance" indicating that the idea of a formal international government under law may have become unworkable, pointless or perhaps old-fashioned. The way of normative development in the international world is perhaps best illustrated by reference to the fate of sustainable development, the attempt to reach a global bargain between Northern environmental objectives and the economic development concerns of the South. This compromise was articulated in the two 1992 Rio Conventions - the International Convention on Climate Change and the Convention on the Protection of Biodiversity. What could not be formalized was inserted in a Plan of Action to be implemented by the UN Commission on Sustainable Development (CSS).

By the Johannesburg World Summit on Sustainable Development in 2002, two trends had emerged that characterise the turn from formal international legislation to what is usually called global "governance." One is the increase in soft law. The Johannesburg declaration was formulated in political terms so as not to encroach on the principles adopted at Rio, and its Plan of Action only sought to implement earlier engagements.[37] Where Rio struck a deal between the environmental and development concerns, Johannesburg complicated the setting by bringing social development on the agenda and opening the negotiating table for a wide range of domestic and transnational private actors. As a result, it became impossible to agree on universal standards. Instead, the commitments are formulated as "selective incentives, differential obligations [that] are regionalized to become

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[35] *See* Oil-for-fraud, The Economist Global Agenda (Apr. 22, 2004), *at* http://www.economist.com/agenda/displayStory.cfm?story_ID=2618260.

[36] *See* Martti Koskenniemi, *The Police in the Temple. Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995).

[37] For the Johannesburg Summit Declaration and Action Plan, *see Report of the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/20* (2002).

more open and flexible."[38] Legislation, as it were, only identifies the authoritative concerns and actors, while material regulation will be decided contextually, often by setting up an informal "regime" to manage the problem.[39]

A second development has been the transnational pooling of functional and technical interests in informal networks beyond public law regulation. The need of specialization leads into informal co-operation between governmental authorities and bureaucrats whose transnational caucuses have interests and preferences independent of and sometimes contradicting those of national representatives.[40] Simultaneously, influential private actors assume a role not only as stakeholders but as sources of new types of regulation. Legislation for special interests develops outside public law, from those interests themselves and in response to purely economic and technical imperatives, accompanied by privatized dispute-settlement, informal sanctioning mechanisms and codes of conduct whose point is to pre-empt public law regulation.[41]

In other words, the idea of international legislation originally linked with federalist public law schemes has been taken over by more fluid and uncoordinated forms of normative specification at different levels of international or transnational activity.[42] Unable to identify stakeholder interests or regulatory objectives, old law-making bodies such as the International Law

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[38] Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 89 (Dinah Shelton ed., 2000).

[39] The turn to thinking of sustainable development as technical *management* problems – the bureaucratisation of international environmental law – has been analysed usefully in TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME 235–48 (2002).

[40] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[41] Underneath the voluntarist facade of the *lex mercatoria*, the global practices of a few influential (usually American) commercial operators turn into law. *See* Eric Loquin & Laurence Ravillion, *La volonté des opérateurs vecteur d'un droit mondialisé*, *in* LA MONDIALISATION DU DROIT 91 (Eric Loquin & Catherine Kessedjian eds., 2000).

[42] *See, e.g.*, Günther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 ZaöRV 1 (2003); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003).

Commission find themselves increasingly useless. This is the optic from which the concern of my interlocutors in Geneva in 2001 should be analysed. If human rights interests can be best advanced in human rights bodies, environmental interests in environmental bodies and trade interests in trade bodies, while transnational activities create de facto practices that are as good as (or even better than) formal law in regulatory efficiency, why bother with "the codification and progressive development of international law." The analysis by Don McRae, made at the 40th anniversary of the Commission in 1987 seems unobjectionable:

> The Commission . . . is engaged primarily in progressive development, and the task of putting agreed customary practices and rules into treaty form is a small if not negligible part of that process. In most of the areas before it the Commission is confronted with conflicting practices, often reflecting different ideologies or political or economic philosophies.[43]

Any intervention in environmental, humanitarian, or human rights law, or indeed an attempt to fix the law in *any* field that has to do with the distribution of spiritual or material values will seem eminently political. Why would a body of technical experts be entrusted with it?

It is common to regard the first 20 years of the Commission's activity as a success because the Commission was then elaborating the background rules of the international system - rules that took for granted the basic actors and the basic forms of their interaction. Work on the background was seen as neutral or unpolitical, even scientific, sharply distinguished from the substantive bargaining that took place in the foreground in order to advance particular interests or values. When international lawyers admitted that the distinction between codification and progressive development could not be maintained in a clear-cut way, they still almost automatically reproduced that distinction. They were grasping more towards the intuitive differentiation between the background and the foreground than any methodological difference.[44]

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[43] McRae, supra note 3, at 362.

[44] The discussion of the distinction between "background" and "foreground" draws inspiration from DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*fin de siècle*) 240–42 (1997).

Now the distinction between background and foreground refers to aspects of the world that are not the object of day-to-day contestation and those that are, aspects that seem firmly settled, and aspects on which there is wide disagreement and everything is open for challenge. If the Commission seemed to have its hands full of useful work in the 1950's and 1960's, this reflected the way it was understood to be merely codifying the basic structure of the Cold War political order. The foreground may have occasionally switched from arms control to economics or between human rights and natural resources but it remained subject to intergovernmental bargaining. This was based on taking the stability of the background order for granted. However, in the 1990's, the background collapsed and everything began to seem eminently revisable. At that point, even an effort to codify past practices started to seem either irrelevant (the Commission's project on State immunities was largely affected by this) or a conservative intervention to buttress an obsolete status quo (such as, aspects of the Commission's most recent project on Diplomatic protection).[45] As the Commission finalised its draft Articles on State responsibility in 2001, many felt that those articles emanated from a background order that there was today little reason to take for granted.[46] 'The debates over the notion of "State crimes," the use countermeasures, the regime of *jus cogens* or *erga omnes* norms already put the background into question: Was there a normative constitution and if so, what kind of constitution was it? If the effort to imagine a new world order in the 1990's was to take place by laying down the contours of a novel *pouvoir constitué* - then who would be able to take the position of the *pouvoir constituant*? It was this question my interlocutors at the High Commission for Human rights, UNCHR and the ICRC had in mind in the autumn of 2001. And, they were not prepared to give up their own ambitions lightly.

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[45] The degree to which diplomatic protection was to be thought of in terms of States exercising their rights on a discretionary basis or a (however inadequate) system of human rights protection reflected disagreements about the nature of the background itself.

[46] The criticism about the anachronistic nature of the Commission's approach to State responsibility was stated already in an early article by Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1 (1988).

III. The Demise of Internaitonal Legislation: Empire, Fragmentation and Deformalisation

The 1990's undermined the stability of an old international order affecting not only the International Law Commission but also the very idea of international legislation. This idea presumes the existence of some kind of constitutional arrangement in which the division of powers between different institutions, the identity and capacity of basic actors, as well as some distinction between private and public, legal and political, activities, are fixed with some firmness. The collapse of the Cold War political order, however, made every aspect of the international realm subject to political contestation. The place of a uniform international legislation was taken by a hegemonic struggle between different actors, each representing particular interests and perspectives but claiming authority for the institutions in which they had a dominant position.[47] I will distinguish three such developments: deformalisation, fragmentation and empire.

A. Deformalisation

Ideally, international legislation should be at least minimally clear so as to enable control of those in administrative positions by the legal subjects at large. This is the gist of the idea of an international rule of law: a society that legislates for itself also thereby governs itself, instead of being governed by particular individuals or groups in a position to impose their preferences over others.

However, most international law today emerges not as clear rules but as open-ended and increasingly procedural standards. In the field of international security, the competence of the UN Security Council is determined by a broad notion about whether there exists a "threat to the peace, breach of the peace or an act of aggression."[48] Whether and how the Council will act is, under Article 39 of Charter, up to its discretion.[49] It is the same with individual States. Despite the formal strictness of the condition

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[47] *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Rev. Int'l Aff. 197 (2004).

[48] U.N. Charter art. 39.

[49] The question of whether there are justiciable limits to the Council's discretion emerged as one key theme in UN law in the 1990's. For an overview, see Inger

of "armed attack" under Article 51, an individual State must be entitled to react if there is a credible threat because of the familiar (instrumentalist) argument that the Charter is not a suicide pact. If Article 51 was enacted to protect the State, surely it cannot be so interpreted as to bring about the destruction of the State, with the result that normative assessment will always be conditioned by the deformalized criterion of what constitutes a threat.[50]

Most multilateral treaties - and almost all of those regarded as "law-making" - lay down broad standards and procedures instead of clear behavioral directives, enabling the pursuit of negotiations well into the time after the formal entry into force of the treaty. Such standards transfer decision-making power from the legislators ("States") to the bodies and actors in dominant position in the relevant law-applying institutions. For example, the 1997 *International Convention on the Non-Navigational Uses of International Watercourses*, was prepared by the International Law Commission on the basis of an initiative made in the General Assembly as early as 1972.[51] The purpose of the Convention is to regulate the uses of international waterways, especially from an economic and environmental point of view. The only substantive standard the Convention lays down is that of "equitable and sustainable use," defined in terms of a (non-exhaustive) listing of "factors" that should be taken into account in deciding the rights and duties of States in regard to a particular river. This standard is supplemented by procedures for information exchange, co-operation and negotiation that encourage parties to set up local, regional or issue-specific co-operation frameworks.[52] Deference to contextual deal-striking in this and other similar ("framework") conventions emphasises the role of stakeholder organisations and technical experts, lifting functional and economic

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Österdahl, Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter (1998).

[50] *See, e.g.*, Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (2002).

[51] *Convention on the law of the non-navigational uses of international watercourses*, G.A. Res. 51/229, U.N. GAOR, 51st Sess., Supp. No. 49, at 7, U.N. Doc. A/51/869 (1997).

[52] For commentary, see Eyal Benvenisti, Sharing Transboundary Resources: International Law and Optimal Resource Use (2002).

arguments to decisive position. Further examples of deformalisation in the field of the environment or the use of resources are the 1998 ILC draft articles on Prevention of transboundary damage from hazardous activities,[53] as well as, more generally, the system of emission permits under the Kyoto Protocol to the 1992 Rio Treaty and the role of the World Bank's Global Environment Facility (GEF) in the administration of multilateral environmental treaties.[54] The use of technical "non-compliance procedures" instead of legal dispute-settlement to deal with breaches highlights the "soft," anti-formal nature of the engagements. No question of formal State responsibility arises. To become a party is to agree to a continued negotiation.

The positive story about this is that negotiation will socialize initially selfish participants into understanding each other's interests; this makes it possible for technical experts - envisaged as "epistemic communities" - to agree where politicians failed. The negative story tells about how such bureaucratisation erodes the treaty's legitimacy basis and turns those interests into winners that usually prevail in the relevant functional context.[55] As problems are contextualised, possibilities for strategic action increase so that not only the substantive problem visible in the foreground but also the background arrangement of the identity and power of the various actors is affected. Private actors, stakeholder groups and experts will receive a position alongside public actors in a decision-making process geared towards rapidity and effect. The counterpart does not come from public diplomacy but from amorphous political groups, anti-globalisation lobbies and social movements with a strategy that no longer geared towards a public law governed liberal federation.[56]

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[53] See the draft articles on the Prevention of Damage from Hazardous Activities, International Law Commission, *Report on the work of its fiftieth session 20 April-12 June 1998, 27 July-14 August 1998*, at 18, para. 55, U.N. Doc. A/53/10 (1998).

[54] Kyoto Protocol to the United Nations Framework Convention On Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (1998).

[55] This is, of course, an incident of the Weberian thesis of deformalisation as a prologue for bureaucratisation and the transfer of power from the legislator to the law-applier.

[56] *See* Balakrishnan Rajagopal, International Law from Below: Development, Social Movements, and Third World Resistance (2003).

B. Fragmentation

A second development that undermines the idea of international government under international law is constituted by fragmentation. Functional differentiation in the international society creates more or less autonomous rationalities - law, politics, morality, economics, science, culture, and so on – each expressing a particular preference but expressing itself as universal.[57] Alongside general law, today we have human rights law, international trade law, international criminal law, international environmental law and so on, with the general law breaking into particular principles and institutions with conflicting procedures and preferences. There is no end to the fragmentation of the international world into such instrumental rationalities.[58] Treating it as a technical problem of inter-institutional co-ordination (as it often is) underestimates the degree to which it manifests a deliberate challenge and attempt by one instrumental idea to impose itself on others.

The framework of analysis set up by the International Law Commission in 2002 differentiates between three forms of fragmentation: (i) the emergence of deviating interpretations of general law; (ii) the emergence of institutionalised exceptions to general law; and (iii) the clash of particular laws.[59] First, new institutions often interpret general law in new ways, seeking to give effect to the (new) preferences prevalent in those institutions. Thus, in the *Tadič* case in 1999 the Appeals Chamber of the International Criminal tribunal for Former Yugoslavia (ICTY) replaced the standard of "effective control," as the rule governing the accountability of foreign States over acts of parties in civil war laid down by the ICJ in the *Nicaragua* case in 1986, with the

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[57] This phenomenon has been studied with particular acuity by followers of the sociology of Niklas Luhmann. *See* Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, *in* Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995, 149–76 (Richard Rawlings ed., 1997) and, for international law, especially 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).

[58] *See* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 553 (2002).

[59] *See* International Law Commission, Report of its fifty-sixth Session, at 283-303, Supp. No. 10, U.N. Doc. A/59/10 (2004).

wider standard of "overall control." The effect was a significant increase of such accountability in pursuit of the struggle against impunity for which the ICTY has been one institutional representative.[60]

Second, functional differentiation has institutionalised firm exceptions into the general law.[61] For instance, human rights treaties, are interpreted by human rights organisations differently from the way "regular" treaties have been interpreted under the Vienna Convention on the Law of Treaties. The departures have been justified by the object and purpose of the treaties or their *effet utile* over the strict formalism of traditional law. If a human rights body understands its powers extensively,[62] or if the Court of Justice of the European Community develops a "fundamental rights jurisprudence" in response to the challenges from certain member states,[63] then these developments should be seen as moves to support the special preferences represented in those bodies against those preferences represented by the International Court of Justice or a national constitutional court.

A third fragmentation pits particular rationalities against each other: trade against environment, human rights against humanitarian law, Law of the Sea against European community law. Whether some issue is qualified as a trade or health problem,[64] or whether its dominant concerns are those of human rights or security, involves struggle for competence to decide. A fisheries issue may be seen in terms of the protection of natural resources or freedom of trade and contextualised either as part of a universal (WTO or Law of the Sea) or regional (European

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[60] Prosecutor v. Duško Tadič, Case No. IT-94-1-A, para. 122 (I.C.T.Y. App. Chamber July 15, 1999).

[61] *See generally* Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT'L L. 111 and the overviews in DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (L.A.N.M. Barnhoorn & K.C. Wellens eds., 1995).

[62] *See, e.g., Human Rights Committee General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

[63] *See, e.g.*, Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS 859, 863–66 (Philip Alston ed., 1999).

[64] *See European Community - Measures concerning Asbestos and Asbestos Products,* WT/DS135/AB/R, at 61, para. 168 (Mar. 12, 2001).

Union) regime. Each classification points to a different authority that will decide, with preferences and practices deviating from those of competing bodies.[65]

These three forms of fragmentation focus away from the law to the *institution* charged to apply it and ask: Who is entitled to project a legal rule with a meaning? What preference does that meaning sustain? European lawyers today are increasingly worried about the "unity of international law."[66] However, if this worry is understood - as it should be - as a concern about the loss of influence with the institutions representing old general law (especially the International Court of Justice), then the constitutionalization of the international system, advocated by those same lawyers, will hardly be forthcoming. At the lest, confusing as written] there is no reason to believe that it would buttress the positions of precisely those (European-dominated) institutions. Fragmentation emerges, not as a technical problem but as a conscious challenge to what seem like unacceptable features of the old law. The debate on the constitutionalization of international law will not resemble domestic constitution-making since, not only does the international realm lack a *pouvoir constituant* but even if such presented itself, it would be empire This should be clear for any public law expert: a constitution relies always on some power (*pouvoir constituant*, or constituting power), and the constitution it would enact would not be international but rather an imperial realm.

C. Empire

The third challenge to formal legislation is visible precisely in the increasing predominance of arguments from "empire," in other words, arguments that assume that international law has the objective of bringing about or "reflecting" some substantive hierarchy of values. 'For instance, States obey international law

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[65] The *MOX Plant* case, for instance, having to do with an Irish complaint about the operations of the Sellafield nuclear facility in the United Kingdom, involves the competing jurisdiction of the Law of the Sea Tribunal, the Permanent Court of Arbitration and the European Court of Justice. For a brief overview, see 106 Revue Générale de Droit International Public 196 (2002).

[66] Out of a large contemporary literature, see Pierre Marie Dupuy, L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public 207(2003).

as it provides them security and well-being. They conclude treaties and participate in international institutions to advance their interests. Under such a view, the relevant values that the law is intended to advance would be those of State "security" and "well-being". However, this argument goes, there is no magic about the law or legal institutions. If they fail to provide the security they promise, or do not bring about their promised well being, then there is no point in regarding them as binding. Law is valuable only to the extent that it furthers the values or interests that it stands for. For such an instrumentalist perspective, legalization, for instance, is just a policy-choice among others, not an a priori moral commitment.[67]

Instrumentalist arguments about international law are of course made by every international actor. The specifically "imperial" character of these arguments lies in that they are made either without consciousness of disagreement about the values or preferences that law is understood to advance, or in full consciousness of such disagreements but simply dismissing the opposing views. For example, imperial complaints about international law being insufficiently complied with often overlook the fact that there exists a political disagreement about what there is to comply with – a disagreement often fuelled by the effects of fragmentation and deformalisation. An imperial argument, position or attitude starts from the uncontested validity or primacy of the preferences that the speaker has projected on law and a refusal even to consider it as merely one among several contesting positions. Where political opponents speak of double standards, the empire sees the "right standards."[68] When the political stalemate of the Cold war prevented open recourse to such

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[67] This view is clearly stated in LEGALIZATION AND WORLD POLITICS (Judith Goldstein et al. eds., 2001). For a sharply stated contrast between the instrumentalist attitude and the European sense of (moral) commitment to legalism, see Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145 (2003). Likewise, Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

[68] It is thus pointless to insist that the empire, too, should join the same treaties or international mechanisms as the others. This commonplace criticism is expressed, for example, in Hanspeter Neuhold, *Law and Force in International Relations – European and American Positions*, 64 ZaöRV 264, 264–65 (2004). An empire can never, in its own eyes, be treated as the same as those others because *it is not the same, but different.*

imperial attitudes since then, the situation has, of course, completely changed.

One version of the imperial position was expressed in the argument that justified military intervention in Kosovo and Iraq in view of an instrumentalist reading of State sovereignty. Why would intervention not be allowed? It is not allowed because it violates sovereignty And why would formal sovereignty have such power? Because it enables de facto communities to decide their own affairs, providing a protective shell around their right of self-determination. But, if the community has been hijacked by a tyrant, or is otherwise governed in a non-democratic way, then there is no self-determination. And if there is no self-determination then sovereignty has failed and there is no longer any duty of non-intervention. Even more: if self-determination is the law's objective, then advocating non-intervention might seem at least cynical (because it would accept the law's form independently of its substance), or possibly illegal (because law cannot be distinguished from its purpose).[69] The imperial reduction may also be illustrated by the debate on pre-emption under Article 51 of the Charter in the aftermath of the WTC attack in September, 2001. The principle of non-use of force cannot be separated from its purpose, the protection of the State. If refraining from pre-emptive use of force will appear to cause the destruction of the State, then such refraining is not called for. The war that ensues will be a war justified by its goal, peace. Here is Professor Michael Glennon, one of the Bush regime's international lawyers:

With the dramatic rupture of the UN Security Council, it became clear that the grand attempt to subject the use of force to the rule of law had failed. "Lawful" and "unlawful" have ceased to be meaningful terms as applied to the use of force.[70]

Although the most striking "imperial" developments have pertained to sovereignty and the use of force, there is reason to think they are applicable to all international law. Article 2 of the 1987 Montreal protocol on the protection of the ozone layer lays

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[69] I have analyzed the force and limits of the instrumentalist reduction in detail in my *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

[70] Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May/June 2003, at 16.

out a very detailed scheme for the reduction of emissions of chlorofluorocarbons (CFCs) by States parties.[71] One of the objectives of the Protocol is to prevent the depletion of the ozone layer and the incidence of skin cancer. But what if it were shown that CFCs are not a significant element in either? Or that both could be treated by cheaper or more effective techniques? Would a State still be bound to close its refrigerator factories - with all the resulting hardships to the workers and the affected communities? Few politicians or diplomats would be inclined to think so. The European Union is not likely to permit the importation of hormone meat whatever a WTO panel might decide.

Or, take human rights. For every right to freedom, there is a counter-right of somebody to security. If every social conflict can be described as a conflict between the rights of the contestants, then the "balancing" necessary to reach a decision can only be carried out by assuming a standpoint beyond rights. A standpoint that allows setting contestants hierarchical order and determining their extent and normative limits. Under the instrumentalist perspective, rights do not trump over political decision; political decision is needed to give rights meaning and applicability.[72]

Reduction of the law to its objectives is a commonplace aspect of law-making in the domestic sphere. But once the law has been enacted, it receives relative autonomy from its legislative base. A rule of domestic criminal or constitutional law is not followed if it fulfils a valuable objective. It is followed because it is a rule. Things appear otherwise in the international sphere where few rules create compliance pull by their formal validity.[73] During the Cold War, however, there prevailed a more or less general understanding that the formal equality produced under international law its neutrality in regard to the East-West antagonism - contributed in a general way to the relative stability of the Cold War politico-military order, providing peaceful channels for

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[71] *See* Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 26, 1987, 26 I.L.M. 1550.

[72] I have discussed this in much more length in *The Effect of Rights on Political Culture*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 99 (Philip Alston ed., 1999).

[73] See also, however, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

political détenteand for economic and social development. In the new constellation, however, international law has lost such a function. Analysed with a cold eye, as did my conversation partners in Geneva in 2001, it is far from certain what role it plays in the international world, or whose values or preferences it supports. For a State such as the United States, that has no doubt about what the right values or preferences of the international world are, and that has sufficient resources to realise them, insisting on the binding nature of a law merely because its there, must seem altogether pointless.

This is the point of view of empire. Everyone knows that the Bush doctrine of pre-emptive self-defence threatens to do to collective security.[74] If doing things internationally has no intrinsic value, then there is no reason to refrain from acting unilaterally when unilateral action seems more efficient. A simple cost-benefit calculation has persuaded the US not to join significant multilateral environmental, human rights and disarmament treaties and to keep out of all of their supervisory mechanisms. Even its commitment to the GATT/WTO system may have become doubtful.[75] Many aspects of this disengagement are well known.

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[74] For one traditionalist critique, see Marcelo G. Kohen, *The Use of Force by the United States after the End of the Cold War and its Impact on International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 197–231 (Michael Byers & Georg Nolte eds., 2003).

[75] For some of the facts, see Nico Krisch, *Weak as Constraint, Strong as Tool: The Place of International Law in US Foreign Policy*, *in* UNILATERALISM & US FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 41 (David M. Malone & Yuen Foong Khong eds., 2003). The US declined to join the Anti-Personnel Mines Convention (Ottawa Convention) and the Comprehensive Nuclear Test Ban Treaty (CTBT) - despite having been an initiator in both. It rejected the Biological and Toxin Weapons Convention (BWC) in 2001 as well as the inspections regime of the Chemical Weapons Convention (CWC) as too intrusive for American industries. The disarmament conference in Geneva has become what it was seventy years ago. For a discussion, see Pierre Klein, *The Effects of US Predominance on the Elaboration of Treaty regimes and on the Evolution of the Law of Treaties*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 74, at 363–91. The US did not sign the Kyoto Protocol, and did not become a party to the 1992 Convention on Biological Diversity, its related Protocol on Biosafety, or the Basel Convention on Hazardous Waste. The US never joined the UN Convention on the Law of the Sea which took eight years to negotiate - not even after the provisions on distribution of revenues from seabed activities were amended after the adoption of the Convention in 1994 to appease Americans. It also has rejected most human rights treaties and all of their supervisory mechanisms, including the 1989 Convention on the Rights of the Child (ratified by 189 States). **R**

These include the American aloofness towards the International Criminal Court (ICC) - the sense that the US has more to fear than to gain from the Court - as well as the setting aside international humanitarian law as obstructive to its war against terror in Guantánamo and the Abu Ghraib prison.

The future US Permanent Representative to the United Nations, , John Bolton, asked his audience a few years ago: "Should we take global governance seriously?" Bolton went through the usual suspects - ICC, ICJ, TBT, Land Mines, NGO activity in human rights, trade and the environment - and responded: "Sadly. . . yes," namely to fight against it. For him, globalism "represents a kind of worldwide cartelization of governments and interest groups,"[76] something the US needed to combat with all its energy. "It is well past the point when the uncritical acceptance of Globalist slogans . . . can be allowed to proceed. The costs to the United States . . . are far too great, and the current understanding of these costs far too limited to be acceptable."[77] The conservatives are not alone here. Michael Ignatieff recently called the US to face its responsibilities and to move to a full-fledged imperial management of the world's affairs.[78] If legislation is needed, why could it not come from Washington?

IV. International Legislation Today: Concluding Reflections

The three developments surveyed above – deformalisation, fragmentation and empire – challenge the hypothesis that the world is slowly developing into a single political unit, a federation whose administration will increasingly resemble that of the liberal state. In particular, they seem to contradict the view that a world legislature might be emerging from the entrails of UN diplomacy that would, in some relevant regard, be analogous to the national parliament. Instead, the developments seem to underwrite the traditional realist view that denies any such analogy, pointing to the fact that national laws rely on the routine nature

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[76] John R. Bolton, *Should We Take Global Governance Seriously?*, 1 Chi. J. Int'l L. 205, 221 (2000).

[77] *Id.*

[78] *See* Michael Ignatieff, Empire Light: Nation-Building in Bosnia, Kosovo and Afghanistan 109-127 (2003).

of the activities being regulated by them. Law works as it is embedded in the social normality of the state and irrespective of whether it might sometimes create unjust consequences. The benefits of abstract obedience so clearly outweigh countervailing considerations. By contrast, in the international realm, situations are not routine but singular and intensely felt; every unjust application of the law will appear as a scandal, and will put to question its binding force. Deformalisation is about trying to avoid situations in which the law's application might seem unjust. As law only compels the parties to further negotiate"," no important interest need feel threatened. Fragmentation, also, seeks to respond to the diversity of outlooks and preferences in the international world. Even "empire" seeks to protect the law by integrating the concerns of the powerful into a culture of formalism within which the law might still be able to carry out its civilising mission and, in some future moment, reach its federal *telos*.

In other words, the three developments could be understood as moves to give up the law's generality by increasing its contextual responsiveness, its sensitivity to the way international situations are felt as singular, idiosyncratic and best dealt with on their merits instead of by recourse to the condensations of past practices that rules are. The (well-known) problem with this is that if the law just reflects what is to be decided in context, then it cannot be used as a standard of criticism of official behaviour. That fails to give expression to the claims of legal subjects as more than articulations of private preference, queuing up for institutional recognition. If a right becomes such only after it has been recognised by an institution, then every claim of right is only a claim of (subjective) preference that has no more authority towards the decision-maker than any alternative preference. As law gives up the ambition of generality, then it may preserve (indeed enhance) its instrumental value to those in authoritative position. But it will have no usefulness to those constrained by their decisions.

A purely instrumentalist approach to international legislation fails owing to existing political disagreement about what the law is an instrument for.[79] Law needs to possess the "magic" of

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[79] See further my *What is International Law For?*, *in* INTERNATIONAL LAW 89 (Malcolm D. Evans ed., 2003).

its formal validity from the perspective of which everyone, regardless of political preference is equally bound. This result – together with those other "Fullerian" values of transparency, revisability and so on - is received only by general laws. But it is not thereby demonstrated that it would have to, or that it could, emerge from a process that resembles domestic, parliamentary law-making. First, domestic laws are understood to express the nation's self-determination: a nation is free to the extent it legislates for itself. If there is a debate about what system of representation best enables real self-determination at the national level, it seems completely pointless to examine international institutions in this way. To explain UN diplomacy or the work of the International Law Commission in terms of a theory of constitutional representation of an "international community" seems metaphoric at best and at worst an unwarranted legitimation of existing institutions merely because they happen to exist.[80]

Second, and related, domestic laws are understood to emerge as an aspect of a working public sphere of political articulation, contestation and decision. The legal system relies on the presence of a public sphere in which authorities may be politically challenged for its legitimacy. What constitutes such a working public sphere has been differently described, and it is a feature of any such working realm that its boundaries are constantly questioned. But there is little that could be called an existing international public sphere outside the very developments described by the notions of deformalisation, fragmentation and empire. Various models for what an international public sphere respectful of domestic notions of democracy, representation and right-protection might entail have been elaborated on and discussion of such models is an important part of the politics of international transformation.[81] But even as many critics have demonstrated how existing modes of international governance fail to meet any (domestic) criteria for a working public sphere, they have been less successful in showing how the UN or public diplomacy might be able to arrive at more satisfying results. The

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[80] *See* Dieter Grimm, *Ursprung und Wandel der Verfassung*, *in* 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 36–42 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2003).

[81] *See, e.g.*, DAVID HELD, GLOBAL COVENANT: THE SOCIAL DEMOCRATIC ALTERNATIVE TO THE WASHINGTON CONSENSUS (2004).

"international community" remains still much more a "floating signifier" whose point it is to articulate particular (political) claims in a universal garb rather than a sociological datum. Yet, I remain unpersuaded that this would be a tragedy.

The first generation of professional international lawyers at the end of the 19th century sought to strengthen international law not because it had a high regard of public diplomacy (in fact, it was steadfastly opposed to traditional balance of power) or because it imagined treaties as akin to domestic laws, but because it looked for an instrument for the spread of liberal ideas in Europe and beyond. That generation became a victim of its own success. International law was grasped by diplomats and "realistically" inclined lawyers as not a political project but a set of principles and institutions that possessed intrinsic value. Through textbooks and professional journals, interacting with foreign ministries, national parliaments, international courts and other institutions, 20th century politics produced the taken-for-granted nature of the "background" of international law: States as the legal subjects, public diplomacy, treaties, and intergovernmental organisations as their basic forms of interaction, understood as a "primitive" version of the domestic political system. As a result, it became natural to believe that from these various forms of inter-State activity would emerge solid functional equivalents to domestic administration, adjudication and legislation.

Against this, it would now seem necessary to accept the temporary and revisable nature of present international institutions, including those of international rule-creation. It has been difficult to do this during a century of realist-idealist confrontation that has entrenched one-sided truths about the nature of the international political system as either full anarchy or a legal community. While further speculation about a democratic and well-organised international public realm today is necessary, it should not mistake any existing institution as a necessary part of that realm. Rather than reading existing institutions in a "constitutional" light, it would seem more immediately relevant to take deformalisation, fragmentation and empire as aspects of an existing political contestation in a situation where the background has collapsed and opportunities have arisen for even radical institutional innovation.

The fact that the global public realm is uninstitutionalised and "weak" should not be seen as overly problematic. The absence of a single legislature does not mean that there can be no rule of law nor a live sphere of political contestation.[82] Roberto Ago once put forward a theory of positive international law as spontaneous law. There is no reason to refrain from interpreting the deformalized, fragmented and imperial processes as forms of spontaneous political interaction and rule-making in an international society undergoing the process of collapse of an old background regime.[83] For bureaucratic spirits, spontaneity may seem to undermine the effort towards a novel constitutionalization of international law. For others, it opens opportunities for political intervention that may point beyond the structures of public diplomacy and keep alive the utopian spirit in which international law has its traditional home.

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[82] For a useful elaboration of the "weakness" of the international public realm, see Hauke Brunkhorst, *Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism*, 31 MILLENNIUM: J. INT'L STUD. 675 (2002). Similarly, see also JÜRGEN HABERMAS, DER GESPALTENE WESTEN 131–42 (2004).

[83] *See* Roberto Ago, *Positive Law and International Law*, 51 AMER. J. INT'L L. 691 (1957).