Commentaries on Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers,* 14 YALE J. INT'L L. 335 (1989)

Modern International Relations Theory: *A Prospectus* in Retrospect and Prospect

Kenneth W. Abbott†

It is an honor to be included in this collection of commentaries on the most-cited articles in *The Yale Journal of International Law. Modern International Relations Theory: A Prospectus for International Lawyers* was not a typical law review article. It did not address a vexing legal issue, a controversial ruling, or an important event; it offered no doctrinal analysis or normative recommendations. Rather, the article invited international law (IL) scholars to deepen their understanding of international cooperation by applying institutionalist or regime theory from the discipline of international relations (IR). As with a prospectus for a high-tech IPO, in 1989 many found the proposed investment too costly or its payoff too speculative. (The article was rejected by more journals than I care to recall). But a 1993 article by Anne-Marie Slaughter suggesting a somewhat different IR-IL research agenda provided a strong boost to the enterprise.[1] Since then, interdisciplinary scholarship has flourished.[2] This is deeply rewarding, more so than mere citation counts.

Philip M. Nichols recently explored why, as a matter of intellectual history, regime theory (along with institutional economics[3]) has influenced IL

---

† Elizabeth Froehling Horner Professor of Law and Commerce, Northwestern University School of Law.

1. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

2. For a recent review of scholarship by international lawyers, see Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998). For a symposium with participants from IR and IL focusing on the role of law in international relations, see *Special Issue: Legalization and World Politics*, 54 INT'L ORG. (forthcoming Summer 2000).

3. *See, e.g.*, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*,

more than other "institutionalist" theories.[4] He emphasizes "path dependence": If Slaughter and I had not written our articles or had discussed other theories, IL scholarship might have followed a different course. Nichols analogizes to the story of the surgeon who purchased Alan Watson's *Legal Transplants*[5] during a hurried stop at a bookstore en route to the airport. The book turned out to be about comparative law, not surgery, but the doctor was so intrigued that he funded Watson's research and promoted comparative law in his home country.[6] Intellectual developments, the anecdote suggests, can be determined by chance.

But then, Nichols asks, what explains the appearance of the *Prospectus*? The answer is remarkably similar to Watson's tale. In the early 1980s I was a beginning teacher. Surrounded by ferment over law and economics and critical legal studies, I was frustrated by how little such approaches seemed to be penetrating IL, but I had no graduate degree and no theoretical predisposition. One day, while searching for something quite different in the library, I noticed a book called *The Emergence of Norms*.[7] The title suggested it might be helpful, so I checked the volume out. *The Emergence of Norms* did not contain what I was looking for, but it proved to be a wonderful book. It explains very clearly, using basic game theory, why people establish norms and institutions to counter harmful social incentives. Here, I thought, are the seeds of a theory of international law. It took several years of work to write the *Prospectus*, but its genesis lay wholly in chance.

In retrospect, the *Prospectus* was a snapshot of a specific stage in the evolution of IR. Institutionalist theory was a reaction to the dominance of neo-realism, which emphasized international "anarchy," the likelihood of conflict among states, and the centrality of national power.[8] Institutionalism has two main strands. Cooperation theory analyzes why and how states in a highly decentralized system cooperate (or fail to cooperate) to achieve superior outcomes. Regime theory goes further, emphasizing the network of norms and institutions, formal and informal, within which states interact. In the 1980s, neither addressed law as such. Still, it seemed clear that institutionalist theory provided a sophisticated framework for analyzing the origins, functions, design, and effects of legal rules and institutions, and subsequent scholarship has confirmed that this intuition was correct.[9]

---

24 YALE J. INT'L L. 1 (1999).

4. *See* Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461 (1998).

5. ALAN WATSON, LEGAL TRANSPLANTS (1974).

6. *See* Nichols, *supra* note 4, at 495.

7. EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977).

8. For the leading text of neo-realism, see KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

9. According to one recent review, institutionalism has now "emerged as the dominant theoretic paradigm in the North American IR academy." Slaughter et al., *supra* note 2, at 372. I have tried to apply the insights of institutional theory in a number of articles, several written with Duncan Snidal, an IR scholar. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. (forthcoming Summer 2000); Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985); Kenneth W. Abbott, *"Trust But Verify": The Production of Information in Arms Control*

Yet reliance on a single theoretical approach is also the greatest weakness of the *Prospectus*. Alex Wendt, a leading constructivist scholar, highlighted this flaw early on in a personal note to me. What about constructivist IR theory, Wendt asked. Was it not "modern"? Not "international relations"? Not a "theory"? In fact, the *Prospectus* devoted little attention to the social construction of norms, their cultural roots, their subjective effects, and other elements of the normative "optic"[10] that has since become prominent in IR.[11] In addition, as Slaughter's 1993 article emphasized, the *Prospectus* focused on interactions among states, giving little weight to the role of non-state actors or domestic politics.[12] Both of these omissions reflected the desire of institutionalist scholars in the 1980s to respond to neo-realism on the basis of its own (narrow) assumptions.

Given these reactions, it should not be surprising that proposals for greater engagement between IR and IL have occasioned debate, though I for one did not anticipate its fervor. Within IR, the main disagreements have arisen between supporters of competing theoretical paradigms. The stakes in these "paradigm wars" are surprisingly high. For one thing, the leading scholarly approaches reflect divergent views of the world as it should be. Realist theory is hard-edged and rationalistic, highlighting strategic interactions among self-interested states and dismissing norms as window-dressing; in an ideal realist world, statesmen would act in just this way. Normative theories, in contrast, emphasize individuals and NGOs motivated by values, organized in non-hierarchical networks, and operating through persuasion;[13] governance in an ideal world would look much the same. In addition, theoretical understandings can influence real-world political agendas, at least over time. Realists emphasize security issues and national self-reliance; normative theorists favor action on issues like human rights and environmental protection. Institutional theory is often dismissed by passionate adherents of both extremes.

Recent years have also witnessed resistance to interdisciplinary scholarship by defenders of the autonomy and distinctiveness of law. One issue is the sheer difficulty of integrating two theoretically diverse disciplines that have traditionally adopted distinct goals, methods, and vocabularies.[14]

Treaties and Other International Agreements, 26 CORNELL INT'L L.J. 1 (1993); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); Kenneth W. Abbott & Duncan Snidal, International "Standards" and International Governance (2000) (unpublished manuscript, on file with author).

10. *See* Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997).

11. I have tried to rectify this omission in later work by integrating institutional and normative approaches, an approach particularly appropriate to the study of law. *See* Abbott & Snidal, *Hard and Soft Law*, *supra* note 9.

12. *See* Slaughter, *supra* note 1, at 225–26. In an earlier article, *The Trading Nation's Dilemma*, *supra* note 9, I did, however, emphasize interactions between international regimes and non-state actors in domestic politics. In later work I have modified the institutionalist approach to take direct account of non-state actors. *See, e.g.*, Abbott & Snidal, *Hard and Soft Law*, *supra* note 9.

13. *See, e.g.*, MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

14. *See* Kenneth W. Abbott, *International Relations Theory, International Law, and the*

Beyond these practical objections, Michael Byers argues that institutionalist analysis, at least, ignores much that is distinctive about international law, including the existence of an overarching legal system within which individual agreements are embedded.[15] Harold Hongju Koh argues that IL scholarship, too, has its own distinctive and powerful ideas, in particular the notion of "transnational legal process."[16]

Martti Koskenniemi gives Byers's critique an overtly political edge: Support for an IR-IL rapprochement amounts to "an American crusade," an academic project that—combined with enthusiasm for the spread of liberal institutions—"cannot but buttress the justification of American hegemony in the world."[17] Positing a strong link between theory and real-world outcomes, Koskenniemi argues that conceptions of international law in IR theory—that law is impotent before state power (realist), a tool for solving problems (institutionalist), or a reflection of Western democratic values (liberal)—deny the autonomous validity of positive law and undercut the role of lawyers in determining which rules are valid. As a result, he charges, IR would allow the hegemonic power, the United States, to determine the governing rules. Indeed, Koskenniemi asserts that supporters of the IR-IL agenda are part of "an academic intelligentsia that has been thoroughly committed to smoothening the paths of the hegemon."[18]

Interdisciplinary dialogue will not quickly allay these concerns. But the mutual interrogation that such dialogue promotes can still make major contributions, provoking each discipline to better define its own essential attributes and forcing the other to acknowledge them. Andrew Hurrell has noted, for example, that IR has not fully appreciated the systemic, integrated nature of the international legal system; the normative character of legal rules; or the uneasy joinder of practice and power—the "rough trade of international politics"—with normative principles and aspirations that constitutes international law.[19] Yet IL scholars have not fully plumbed these depths either, and have certainly not explained them satisfactorily to social scientists.

At the same time, Hurrell notes that IL has failed to ask many of the difficult questions, often empirical in nature, to which IR is drawn. How exactly does law affect people's behavior? How, if at all, do legal rules differ from other norms? What conditions determine the effectiveness of

---

Regime Governing Atrocities in Internal Conflicts, 93 AM. J. INT'L L. 361 (1999); Oran Young, *Remarks*, 86 PROC. AM. SOC'Y INT'L L. 172 (1992).

15. *See* Michael Byers, *Taking the Law Out of International Law: A Critique of the "Iterative Perspective,"* 38 HARV. INT'L L.J. 201 (1997).

16. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). Koh's version of legal process combines legal institutions, non-state actors, the social construction of norms, and the subjective process of norm internalization.

17. Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 17, 29–30 (Michael Byers ed., 1999).

18. *Id.* at 34. Koskenniemi's charges focus primarily on Professor Slaughter, but if he would include me in this group I strongly dissent.

19. Andrew Hurrell, *Conclusion: International Law and the Changing Constitution of International Society*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS, *supra* note 17, at 327, 332–33.

international legal rules? What explains variations in legalization and compliance? Yet IR has only begun to develop political models for these issues and to frame them in ways that elicit the interest of international lawyers.

The future of this challenging interdisciplinary conversation, then, is far from clear. The way will almost certainly not be smooth, yet the prospect remains bright. Its promise is captured in the words with which I concluded the *Prospectus*. I repeat them here, with modifications to acknowledge the contributions both sides are now making to the interdisciplinary enterprise. Dialogue between IR and IL can help scholars in *both* fields become "'students of international relations in the true sense of the term, endeavoring to shed light on the connecting points of international politics, economics, law, and organizations.'"[20]

20. Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 411 (1989) (quoting Oran Young, *International Regimes: Toward a New Theory of Institutions*, 39 WORLD POL. 104, 122 (1986)).

Taking Stock: A Retrospective on Abbott's *Prospectus*

Anne-Marie Slaughter†

Ken Abbott deliberately titled his 1989 article on international relations theory a "Prospectus"; he sought to "inform (and entice) potential participants" in a new enterprise.[1] A decade later it is easy to conclude that the venture has succeeded, even if the stock has not quite risen to the stratospheric heights of the dot-com world. In 1998 several colleagues and I compiled a bibliography of "IR/IL" scholarship;[2] it continues to lengthen steadily. Courses, lectures, symposia, and conferences on the subject all abound. Best of all, IR/IL is now strong and visible enough to attract critics of its own, scholars from multiple perspectives claiming that the bubble will soon burst.[3]

Writing in the late 1980s, Abbott was not alone in urging his fellow international lawyers to stop being so defensive about their subject. As Thomas Franck memorably proclaimed in the same year: We are in a "post-ontological" era.[4] But Abbott understood sooner and better than anyone else a critical difference between international lawyers and their IR equivalents, regime theorists. Whereas IR theorists simply accept anarchy as the central organizing principle of the international system and analyze international institutions as rational responses to anarchy, international law casebooks "usually present the absence of central institutions in the context of criticism of the international legal system . . . and respond to the criticism defensively."[5] The key move from formalism to functionalism, in Abbott's view, required accepting anarchy "as one parameter of an explanatory model."[6] As Hedley Bull taught us, international law is not an antidote to

---

† J. Sinclair Armstrong Professor of International, Foreign and Comparative Law, Harvard Law School.

1. Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 342 (1989).

2. *See* Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

3. *See, e.g.*, Peter Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. (forthcoming 2000).

4. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993) (quoting Thomas M. Franck, Principles of Fairness in International Law (Sept. 1992) (paper presented at the Annual Meeting of the American Political Science Association)).

5. Abbott, *supra* note 1, at 406.

6. *Id.*

anarchy, but rather one of a number of institutions that constitute the world of sovereign states as an "anarchical society."[7]

International lawyers have long been functionalists of course. Louis Henkin, Oscar Schachter, Abram Chayes, Thomas Franck, and Richard Falk—to name only a few—all wrote extensively in the 1970s explaining the relevance and value of international law in more or less functionalist terms.[8] Yet Abbott's article crisply captures the advantages of translating IL functionalism into IR terms. Modeling state interaction in terms of strategic "games" and political market failure allows for more systematic and rigorous analysis, creates a common language with other disciplines such as economics, political science, and sociology, and permits a cumulation of knowledge about institutions, both international and domestic. The explanatory focus of social science ends the need to explain "why international law matters" and instead directs international lawyers toward those issue areas and problems in which the conditions require the services that international law and lawyers can provide.

The problem, for many international lawyers (and political scientists), is that functionalism is arid and dispiriting—not simply as a mode of thought and analysis, but as an account of what we do and why. It is inconsistent with deep convictions about the ideational and normative role of law, of law as an end-in-itself rather than merely an instrument of state purposes.

Not that it's Abbott's fault. He was faithful to the dominant strand of IR theory in the late 1980s; in 1988 Robert Keohane, the author of *After Hegemony*[9] and the founder and most influential adherent of the rationalist institutionalism that Abbott chronicled, was President of the International Studies Association. Keohane recognized an emergent rival, however. In his president's address he described a dialogue between "rationalism and reflectivism."[10] A decade later, reflectivism has become "Constructivism" and Constructivism has come of age.[11] The debate between these two modes of thought and analysis now takes place within both disciplines as well as across them.

Constructivism complements the rationalism of regime theory by focusing on how social structures construct, indeed constitute, the identities and interests of the actors operating within them. Social structures, in turn,

---

7. *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 127-61 (1977).

8. *See* Slaughter, *supra* note 4, at 220.

9. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

10. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 393 (1988).

11. *See, e.g.*, Peter J. Katzenstein et al., *International Organization and the Study of World Politics*, 52 INT'L ORG. 645, 647–48 (1998) Since the late 1980s a new debate between constructivism and rationalism (including both realism and liberalism) has become more prominent as constructivists have built on epistemological challenges rooted in sociological perspectives emphasizing shared norms and values.

are constructed and can be deconstructed through ideas, normative discourse, symbolic politics, and the gradual codification of conviction. Law is not only a tool with which actors can advance their interests, but also a fundamental component of the structure that defines who those actors are and what they want. This is a world far more congenial to many international lawyers and political scientists alike.

Rationalism and Constructivism are ontologies: elemental assumptions about human identity, capacity, and motivation. These assumptions inform a wide range of more specific theories about what drives what in the international system. Abbott chronicled two of these theories: Realism and Institutionalism. A decade later most scholars would add Liberalism, a theory that argues that the sources of state behavior lie below the surface of the state. Where Realism focuses on power and Institutionalism emphasizes the role of institutions, Liberal international relations theory emphasizes the overriding importance of domestic politics. Differences in individual and group preferences, as shaped by their interactions in domestic and transnational society, and differences in the way those preferences are aggregated and represented by different kinds of governments determine the outcomes of state interactions in the international system.

In sum, a prospectus of IR theory today would attract a wider range of investors. It is a richer array of paradigms, models, and approaches that can help international lawyers map the international system conceptually and analytically, diagnose specific problems, and devise more creative and powerful legal solutions. On a more general level, different IR theories offer different accounts of how international law works and when and why it matters. What IR theory cannot do is to supply the crucial normative values and aspirations that must be coupled with any positive account to transform policy analysis into lawyering. But it can help make us better lawyers.

Abbott, as usual, is once again at the forefront. His recent essay on IR and IL for a symposium on method in the *American Journal of International Law* drew on rationalist institutionalism, Constructivism, and Liberalism. He then applied each of these approaches to the question of how best to design an international tribunal to deter the commission of mass atrocities in civil conflict. He concluded:

> [A]ssume we understood an international criminal tribunal functionally, as a means of deterring violations of agreed rules. We might then expect its evolution to depend on changing needs for deterrence, and might focus reform efforts on clarifying the rules, increasing the certainty of prosecution, and the like. If, however, we understood the tribunal in terms of its origins in the efforts of human rights organizations in countries experiencing atrocities, we might tie its evolution to the fortunes of those groups, and might focus reform on allowing them and the individuals they represent to appear before the tribunal. Finally, if we understood the tribunal subjectively, as embodying shared beliefs about appropriate conduct, we might link its future to the evolution of those beliefs, and might focus reform on facilitating dialogue between its judges and the community at large. If we treated these understandings as cumulative rather than

alternative, we would have a rich menu of institutional improvements.[12]

No laudatory adjectives I might choose could better illustrate the value both of the stream of scholarship Abbott helped launch in 1989 and his own contribution to it.

12. Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 368 (1999).

Commentaries on Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991)

Secession and Self-Determination: One Decade Later

Lea Brilmayer†

There was little reason to think in 1990 that secession might turn out to be an important topic. Since *Secession and Self-Determination* was published in *The Yale Journal of International Law*, however, the Baltic states left the Soviet Union and the rest of the Soviet Union crumbled. Yugoslavia and Czechoslovakia fractured. Eritrea asserted its independence from Ethiopia after military success and then a democratic referendum. Quebec's separatist aspirations from Canada became front page news (along with the comparable aspirations of various of the indigenous peoples of Quebec). East Timor succeeded in its drive for independence. Prior to 1990, the only successful separatist movement had been in Pakistan, where East Pakistan had left to become Bangladesh. Other separatist movements, such as Biafra's war for independence, had failed completely.

The events of the last decade have by and large borne out the analysis offered in that article. The thesis there was that what makes a separatist movement's claim to independence convincing is the possession of an historical claim that its territory was wrongfully annexed. Secession, I argued, is correctly understood as an appropriate remedy for prior illegal annexation. This analysis was vindicated by the fact that rationales for the successful separatist movements of the 1990s were all articulated in the same terms.

In this respect, the new wave of secessions can be understood as analogous to the earlier wave of decolonizations in the 1950s and 1960s. That wave of decolonizations was powered by the modern acknowledgment that earlier colonial annexations had been morally indefensible. The 1990s showed that the principle that annexation of some other group's territory is wrongful is not limited to what was known as "salt water colonialism," meaning colonial empires that stretched overseas. Whether a conquered territory is treated as a

† Howard Holtzmann Professor of International Law, Yale Law School.

colony or annexed to the central portion of an empire, its people have a right to fight for their freedom. In their fight for freedom, they are called "secessionists."[1]

The common characteristic of all strong cases for secession is a showing of illegal annexation. It was the historical record of illegal annexation that caused us to applaud the newfound independence of the Baltic states, of Eritrea, and of East Timor. Earlier theorists were incorrect in treating the key determinant to be homogeneity of the conquered people. What matters is not that it is "a people" who are seeking to be free. What matters is that this group—whether a homogeneous "people" or not—has a right to a particular parcel of land, a right that was wrongfully taken from them by a powerful neighbor.

It is important to ask how this obvious point might be overlooked. How could international lawyers and theorists have spent so many years assuming that the key point was ethnic, religious, or linguistic homogeneity rather than a history of wrongful annexation? When a group seeks to set up a new state on a particular piece of land, how could it not matter whether the group had a good territorial claim to the piece of land? In suggesting an answer to this question, I want to suggest that the failure to recognize this obvious point may be more general. The same odd blindness infects most Western discussions of "nationalism," to which similar misunderstandings pertain. It is caused by ignorance and by unwillingness to try to understand the moral claims of people with whom we do not identify—for reasons of differences of geographic location, race, religion, or culture.

In evaluating secessionist claims specifically, there are two different aspects of the claim on which one might focus. Traditionally, theorists had focused on the cohesiveness of the group asserting the claim—whether the group in question was a distinct "people" in the religious, linguistic, or ethnic sense. There is another issue at stake, however: the objective validity of the claim that the particular group espouses. Thus (as I argued ten years ago) the claim to a particular piece of territory will be more or less convincing depending on the existence (or nonexistence) of a historical claim to land.[2] Regardless of the identity of the group making the claim, the claim itself might be more or less persuasive, depending on historical fact, legal reasoning, moral argumentation, and so forth.

Similarly, but more generally, nationalist claims potentially have two different aspects to investigate. One might focus on the identity of the group

1. It is revealing that most "secessionists" reject the term. They typically claim that they are not seeking secession, but recognition of an independent state that existed all along. They argue that as the annexation of their territory was illegal, it was null and void. Thus they deny that they are trying to alter the existing territorial borders of the larger state. Instead, they claim, they are trying to preserve territorial borders as they always existed in the past.

2. In theory, there might be other bases for a claim to land. One might claim that one's group is entitled to a piece of land because it was given by God, for instance, or because one had a right to annex sufficient farm land to become food self sufficient. However, in practice, the kinds of claims to territory that we recognize are historical ones, and most groups that make territorial claims phrase these in terms of historical right.

asserting the claim and find it morally significant that the claim in question is being asserted by a distinct national group (Poles, Armenians, Serbs, or East Timorese). Instead, however, one might ask whether the claim in question is objectively justified regardless of the nature of the group that asserts it. Claims that a particular national group is entitled to something are not necessarily dependent normatively on the fact that it is a national group that is making the claim. Indeed, I would argue, they typically do not.

The standard interpretation of nationalist claims is that they are saying: "My nation, right or wrong." The assumption is that nationalist claims are not based on anything more intelligent than a desire that one's nation prevail. But nationalists typically do not mean to be making such a claim. Instead, they are typically saying: "My nation, because it is in the right." Of course, there is always the chance that the person is wrong because his or her nation is actually not in the right. But this is no more true for claims made by nations than for claims made by individual people. The fact that a person is claiming something that he or she is not entitled to means that he or she is making an unwarranted claim. It does not mean that he or she is not attempting to rely on arguments about right and wrong.

The fact that a claim is being asserted on behalf of one's nation is not thought, in and of itself, to give one a justification for advancing the claim. The nationalist essentially admits that it is theoretically possible that the claim might be unjustified, even while he or she believes sincerely and deeply that the facts and argument on which the claim is based are in fact correct. The nationalist is not claiming that so long as he or she acts on behalf of his or her nation, no justification is needed. The nationalist simply feels that an adequate justification exists.

The erroneous interpretation of nationalist claims as being all of the sort "my nation, right or wrong" has two consequences. First, this misunderstanding obscures whatever real justification might exist (or be thought to exist by the national group) for the claim in question. The outside observer has no reason, or need, to take seriously the moral or legal argument that the nationalist wishes to advance. This misunderstanding thereby relieves the outside observer of any need to become acquainted with the facts or arguments of the parties to the dispute. Discussion in the outside world becomes a highly relativistic account of "what the Serbs want" or "what the Croats think they stand to gain." Once argument is reduced to this level, there can be no right and wrong. One nationalistic argument is as good or bad as any other.

Second, this misunderstanding gives nationalistic claims a pervasively negative connotation. Nationalist claims are bad because the essence of the claim is exclusionary. One wants something for one's own group, regardless of whether that group has any entitlement, and one's own group is defined in intrinsically ascriptive and illiberal terms. Nationalism smacks of racism, xenophobia, and bigotry.

With no genuine moral issue in sight—and with the atavistic reputation that "nationalism" has come to possess—the rest of the world dismisses real

disputes, over serious matters, as "tribal" (if such disputes arise between black people) or "ethnic" (if they arise between whites). Regardless of where they arise, there is no need to take them seriously. They are bloody, primitive, and childlike. The West watches smugly.

Dismissing a position as "nationalistic" is essentially an ad hominem form of argument. The characterization distracts attention from the merits or demerits of the underlying claim. Dismissing claims to independence as "secessionist" is a particular application of this false and condescending logic. There truly are rights and wrongs in international relations, and the linguistic, ethnic, or religious homogeneity of the group asserting a claim has little, if anything, to do with whether a particular claim is right or wrong. The West takes seriously its own claims to what is right and what is wrong. It should take the claims of the rest of the world, and in particular the developing world, just as seriously.

Secession, Territorial Claims, and the Indeterminacy of Self-Determination

David Wippman†

Almost ten years ago, Professor Lea Brilmayer published an important and provocative essay on secession and the law of self-determination.[1] Her timing could not have been better. The essay largely coincided with the breakup of the former Yugoslavia and the collapse of the former Soviet Union. Issues of state formation and disintegration, then viewed by international lawyers as more or less dormant, reawakened with a vengeance, moving from relative obscurity to front-page news.

Brilmayer's essay filled an urgent need for a fresh look at a persistent problem. It suggested an imaginative resolution to a long-standing tension between two fundamental legal norms of doubtful compatibility: the right of states to preserve their territorial integrity and the right of peoples to self-determination. More importantly, Brilmayer proposed a new framework, focused on the relative legitimacy of competing territorial claims, as the best way to analyze and resolve secessionist disputes.

The significance of Brilmayer's approach can only be understood in context. For better or for worse, the legal instruments establishing the right to self-determination do not identify with any precision the peoples entitled to exercise the right. The historical evolution of self-determination suggests, however, that politically self-conscious, geographically concentrated ethnic groups that differ significantly from the rest of the population in the states in which they reside might reasonably claim (and in significant numbers do claim) to constitute the peoples at issue. The normative basis for their claim to self-determination rests in part on notions of democratic self-governance and in part on a romantic conception of nations as the only "authentic" political and cultural communities.

As Brilmayer recognized, positive law has never accepted this understanding of self-determination. Carried through it would suggest that all sufficiently cohesive and distinct sub-state ethnic groups could form their own states. In the aftermath of World War I, the "ethnic" conception of self-determination did play a significant role in Allied efforts to redraw the map of Europe. But self-determination was then viewed as a political principle, to be

---

† Associate Professor of Law, Cornell Law School.

1. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

applied where feasible and consistent with the Allies' strategic interests, not as a legal right.

When self-determination metamorphosed into a legal right in the 1960s and 1970s, it was as the legal vehicle to achieve decolonization. At least until the 1990s, self-determination has been largely confined to that context. Although the relevant legal instruments are not free from ambiguity, they generally emphasize the right of states to preserve their territorial integrity in situations that do not involve the "alien domination or subjugation" associated with colonialism.

Nonetheless, as Brilmayer noted in her essay, arguments about self-determination often focus principally on whether the group at issue is genuinely a distinct people, with the assumption that an affirmative answer will yield a right to secede, in conflict with the state's right to maintain its territorial integrity. In her essay, Brilmayer argued forcefully that these arguments are misconceived and that, properly understood, "[t]he two supposedly competing principles of people and territory actually work in tandem."[2]

Applying insights from political theory, Brilmayer correctly rejected the notion that democratic principles support a right of ethnically distinct peoples to secede. Instead, she maintained, the critical question is whether such peoples have a legitimate historical claim to the land on which they seek to establish their new state. As she put it, "[m]y thesis is that every separatist movement is built upon a claim to territory, usually based on an historical grievance, and that without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession."[3] This approach, Brilmayer argued, resolves the tension between self-determination and territorial integrity because it permits secession only when a state's sovereignty over the territory at issue is illegitimate, that is, only in situations in which territorial integrity properly understood is not at issue.

Brilmayer provided two principal examples that illustrate her point, but which may also suggest why her thesis has not been widely adopted. As examples of historical grievances that may justify secession, she cited the Soviet Union's forcible annexation of the Baltic states and European states' forcible acquisition of colonies in Africa and Asia. In each case, she noted that independence provided a remedy for a clear historical wrong, and a wrong of a particular kind: one that deprived the occupying and colonial states of a legitimate claim to sovereignty over the territory.

In most cases, however, an assessment of historical wrongs does not provide much practical help in resolving separatist claims. Only a few situations involve historical territorial grievances as clear-cut as those involved in colonialism or the annexation of the Baltics. Those cases may generally be resolved without reference to self-determination or secession.

2. *Id.* at 178.
3. *Id.* at 192.

When Iraq purported to annex Kuwait, its claim to territorial sovereignty over its new "province" was widely rejected, not on self-determination grounds but because Iraqi control over Kuwait was achieved by use of force in obvious violation of the U.N. Charter. For that matter, even the Baltic states assert, with some justification, that their recent independence was not an example of secession, but rather the end of an unlawful Soviet occupation.

In many secessionist disputes, most notably in the Balkans, historical territorial grievances are so ancient and so plentiful on all sides that they cannot be disentangled in any meaningful way. While secessionists routinely and passionately invoke battles fought hundreds of years ago, international law treats any claims associated with such distant events as time-barred. Brilmayer recognized these and related difficulties with the historical territorial framework, but nonetheless argued that historical inquiry provides at least the right starting point.

Yet a focus on the legitimacy of past territorial grievances may sometimes obscure other important issues. While territorial disputes invariably accompany separatist claims, the driving force behind such claims usually combines the opportunism of political leaders with the genuine fears of social, political, and economic marginalization of vulnerable groups. Any attempt to resolve such problems by redrawing borders to fit a particular critical date reflecting a particular historical grievance is unlikely to succeed.

The predominant contemporary response to this problem has been to expand the rights available to minorities, in the hope that by doing so their legitimate concerns can be met within the confines of existing states. As set out in various recent treaties and declarations, such rights may include local autonomy for geographically concentrated minorities, counter-majoritarian political participation rights, and cultural subsidies.

Unfortunately, the minority rights approach has its own difficulties. The extent of the rights at issue, and the groups entitled to claim them, remain matters of continuing uncertainty and debate, rendering self-determination a highly indeterminate and variable principle. Moreover, as Brilmayer's essay suggests, separatists want to be majorities in their own state, not minorities in someone else's state. In addition, enhanced rights for members of minorities may strengthen the barriers between groups within a state, generate majority resentment of perceived special treatment for minorities, and impede efforts to overcome the political salience of ethnic identity.

The frustrating truth is that there is no easy or uniform approach to resolving secessionist disputes. If there were, we would have found it by now. But even though analysis of historical grievances may not in the end deliver as much as Brilmayer's essay suggested it might, the essay is required reading for anyone interested in secession and self-determination. Its incisive analysis of the importance of taking territorial claims seriously forces everyone who reads it to think carefully and rigorously about what is really at stake in cases of secession.

Commentaries on Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991)

Revisiting the Emerging International Norm on Indigenous Rights: Autonomy As an Option

Raidza Torres Wick†

Born and raised in Puerto Rico, I grew up living an experiment in political autonomy. My first "political" memory was that of neighbors arguing over the status of the island and the meaning of self-determination. Years later, they are still arguing over the merits of statehood, commonwealth, and independence. Having spent my formative years in an American "free associated state," I developed an interest in the concept of autonomy and its history, viability, and applicability to peoples throughout the world, including indigenous peoples. In law school, I focused this interest on a study of whether international law provided any remedies to the problems faced by indigenous peoples.

Most of the challenges faced by indigenous populations, such as loss of land and self-rule, result mainly from their collective and unique history of colonization or invasion and their struggle to preserve their identity and culture as a separate and distinct people. Starting in the 1980s, states and international organizations slowly but systematically began to recognize that the special needs and history of indigenous groups required a new paradigm capable of addressing collective rights. As discussed in *The Rights of Indigenous Populations: The Emerging International Norm*, this recognition led to "a pattern of authorized communications and acts on the part of international organizations and states"[1] vis-à-vis indigenous peoples.

---

† Chief Legal Counsel, America One Communications, Inc./Associate General Counsel, Capital One; J.D. Yale Law School, 1991. I am grateful to Maureen Harrigan for her research assistance and to David Tyler and my husband Robert D. Wick for their helpful editorial comments.

1. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 145 (1991).

The emerging norm identified in 1991 consisted of a combination of collective and individual rights regarding cultural protections, individual welfare, land, and self-determination. These standards remain the norm's core, but in the decade that has elapsed since 1991, the norm has gained strength. The debate has moved from whether indigenous peoples' rights exist to determining with greater clarity what these rights are. The discussion now focuses on the meaning of "indigenous peoples" and the scope of their self-determination rights—a debate that harkens back to my early years in Puerto Rico and the continuing quest there for a consensus on the practical and political implications of self-rule.

I. SOLIDIFICATION OF THE NORM, 1991–1999

In the 1980s, indigenous rights under international law could be discussed only in terms of an emerging norm. A decade later it is no longer appropriate to describe these rules as "emerging." In May 1991, the International Labour Organization (ILO)'s Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)[2] became effective when it was ratified by Mexico and Norway.[3] This convention creates a binding obligation on ratifying states and requires governments to develop "co-ordinated and systematic action to protect the rights of these [indigenous] peoples and to guarantee respect for their integrity."[4] Further, it recognizes four aspects of the indigenous rights norm: cultural protections, rights to land, economic and social welfare rights, and a limited degree of self-determination with respect to economic, cultural, and social development.[5]

The ILO, however, is not the main forum for the development of indigenous rights.[6] Most of the recent activity on indigenous rights has

2. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169].

3. As of 1997, ten countries had ratified the convention, including countries with significant indigenous populations such as Bolivia, Peru, Guatemala, and Honduras. *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 100 (1999).

4. ILO Convention No. 169, *supra* note 2, pt. I, art. 2.

5. *See id.* pt. I, arts. 5, 23, 28 (cultural protections and preservation of handicrafts and subsistence economies); pt. I, arts. 13–19 (ownership of land and resources); pt. I, arts. 24–27 (social security and health; education). ILO Convention No. 169 does not address indigenous peoples' right to full-scale self-determination; however, it does provide that "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development." *Id.* pt. I, art. 7; *see also id.* pt. I, art. 8 (due regard shall be given to the customs and customary practices of indigenous peoples when applying national laws).

6. ILO Convention No. 169 has not been a resounding success: Few states have ratified it and advocates of indigenous rights are generally dissatisfied with the convention's failure to recognize a broad right to self-determination. *See* Ingrid Washinawatok, *International Emergence: Twenty Years at the United Nations*, NATIVE AM.-AKWE-KON'S J. INDIGENOUS ISSUES, June 30, 1997, at 13, *available in* 1997 WL 15895063. Yet the convention represents the first step towards the establishment of "basic precepts" and potentially binding documents that articulate the indigenous rights norm—a step upon which other international organizations, advocacy groups and domestic governments can build. Various

occurred at the U.N. headquarters. On December 10, 1992, the United Nations inaugurated 1993 as the International Year of the World's Indigenous People, with then-Secretary-General Boutros Boutros-Ghali stressing the need to address the "special situation of indigenous people."[7] The "year" became a "decade" when the General Assembly passed a resolution declaring 1994–2004 the International Decade of the World's Indigenous Populations.[8] In its fifty-fourth session, the Commission on Human Rights agreed to create a working group for the development of a permanent forum for indigenous peoples at the United Nations.[9]

One of the main objectives of the International Decade of the World's Indigenous Populations is adoption of a declaration on indigenous rights.[10] There has been progress at the United Nations and the Organization of American States (OAS). In 1993, the U.N. Working Group on Indigenous Populations[11] agreed on a draft declaration on indigenous rights (U.N. Draft Declaration),[12] which the Sub-Commission on Prevention of Discrimination and Protection of Minorities submitted to the U.N. Commission on Human Rights in 1994. This declaration addresses cultural, economic and social, and land rights[13] and, unlike ILO Convention No. 169, establishes a comprehensive right to self-determination that, if read broadly, allows for independence.[14] Further, the declaration calls upon states to take effective and

---

indigenous groups such as the Sami Council and the World Council on Indigenous Peoples have pressed for ratification of ILO Convention No. 169, notwithstanding its failure to grant a broad right to self-determination. *See* S. James Anaya, *Indigenous Peoples in International Law*, CULTURAL SURVIVAL Q., July 31, 1997, at 58, *available in* 1997 WL 15427069.

7. Washinawatok, *supra* note 6 (quoting Boutros Boutros-Ghali).

8. *Id.*

9. *See Commission on Human Rights Concludes Fifty-Fourth Session*, Press Release, at 2, U.N. Doc. HR/CN/875 (1998). Indigenous delegations recommended that the permanent forum be on the same institutional level as the Commission on Human Rights. *See Human Rights: Indigenous Peoples at the United Nations... How Much Influence Do We Have?*, ABYA YALA NEWS, Oct. 31, 1997, at 32, *available in* 1997 WL 17800512. On April 27, 2000, the U.N. Human Rights Commission adopted a proposal for a permanent forum that will act as an advisory body to the U.N. Economic and Social Council. *See* Lisa Schlein, *U.N. Debate Leads to Permanent Forum for Indigenous Peoples*, Canadian Press, Apr. 28, 2000. The permanent forum has the potential to play a key role in monitoring compliance with the norm and further entrenching it in state practice.

10. *See Secretary-General Notes "Centuries Of Adversity" Suffered By World's Indigenous Peoples, Seeks Global Pledge That Future Will Be Different*, Press Release, at 1, U.N. Doc. SG/SM/7081 OBV/107 (1999).

11. The Working Group on Indigenous Populations was established by the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities and was the first U.N. group created to focus solely on indigenous issues. *See* Torres, *supra* note 1, at 158.

12. Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, Agenda Item 14, at 50–51, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993), *reprinted in* 9 ST. THOMAS L. REV. 212 (1996) [hereinafter U.N. Draft Declaration].

13. On cultural rights, see *id.* pt. III, arts. 12–14, and *id.* pt. IV, arts. 15–17; on economic and social rights, see *id.* pt. V, art. 22; and on rights to land and resources, see *id.* pt. VI, arts. 25–28, 30.

14. Article 3 provides that: "Indigenous peoples have the right of self-determination." *Id.* pt. I, art. 3. While article 31 suggests limits on the right to self-determination by specifically noting the "right to autonomy or self-government in matters relating to... internal and local affairs," *id.* pt. VII, art. 31, the broad language in article 3 would allow for secession claims.

appropriate measures to enforce it and asks the United Nations to take the necessary steps to facilitate its implementation.[15]

In 1995, the U.N. Commission on Human Rights established an open-ended, intersessional working group to finalize the U.N. Draft Declaration. Indigenous advocacy groups and states participate in the working group sessions, which have been heated at times.[16] The main point of disagreement remains the scope of self-determination rights.[17] The OAS's efforts to adopt a declaration on indigenous rights have met with similar difficulties on the issue of self-determination, and indigenous groups have opposed aspects of the declaration adopted by the OAS's Inter-American Commission on Human Rights (the "OAS Draft Declaration").[18] Until this issue is resolved, it is unlikely that a final declaration will be issued.

The challenges in finalizing a declaration on indigenous rights—whether at the United Nations or the OAS—should not obscure the significant progress made towards the codification of a norm on indigenous rights.[19] The fact that draft declarations are making their way through two top international organizations, and that the United Nations has made passage of such declaration a priority of the International Decade of the World's Indigenous

---

15. *Id.* pt. VIII, arts. 37, 41.

16. At the second meeting of the intersessional working group in 1996, indigenous peoples walked out over concerns that member state governments would dictate the declaration's language and fail to address indigenous peoples' main issues properly. *See* Washinawatok, *supra* note 6. Indigenous groups have themselves been accused of inflexibility. Jose Urrutia, president of the intersessional working group, said that "several indigenous delegates have taken an inflexible stance, refusing to accept any amendment whatsoever and demanding approval of the original text." *U.N.-Rights: U.N. Still at Odds over Indigenous Rights*, Inter Press Service, Dec. 14, 1998, *available in* 1998 WL 19901971.

17. "The governments that have serious problems with the draft declaration argue that the position of indigenous peoples with respect to self-determination represents a secessionist threat." *U.N. Still at Odds*, *supra* note 16. Mexico, Brazil, Japan, and the United States, in particular, have concerns over the draft's current language on "peoples" and self-determination. *Id.* In 1997, a U.S. representative at the United Nations noted that "[t]he United States had recognized the significance that indigenous people attached to the term 'peoples' in the declaration [and] was willing to accept the use of the term provided the document clarified that its use was not construed to include rights of self-determination." *Progress Needed on Indigenous People's Draft Declaration, Say Third Committee Speakers*, Press Release, at 1, U.N. Doc. GA/SHC/3442 (1997).

18. In 1997, the Inter-American Commission on Human Rights submitted the Proposed American Declaration on the Rights of Indigenous Peoples to the OAS General Assembly. *See* Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d Sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997), *reprinted in* 6 INT'L J. CULTURAL PROP. 364 (1997) [hereinafter OAS Draft Declaration]. This declaration addresses the four basic categories of the indigenous norm—land, culture, economic and social issues, and self-determination—but, like ILO Convention No. 169, it recognizes a qualified right to self-determination that entitles indigenous peoples "to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers." *Id.* sec. 4, art. XV, para. 1. Some indigenous peoples' advocacy groups argue that self-determination itself should be recognized as a right in the draft declaration. *See, e.g.*, Danielle Knight, *LatAm Rights: Indigenous Leaders Call OAS Rights Declaration Weak*, Inter Press Service, Feb. 15, 1999, *available in* 1999 WL 5947032.

19. Other international developments on indigenous rights include the Earth Summit 1992, where "nation-states acknowledged the need to recognize indigenous peoples' values, territories, traditional knowledge and subsistence rights," Washinawatok, *supra* note 6, and the 1994 European Parliament Resolution on Measures Required Internationally To Provide Effective Protection for Indigenous Peoples, *see* Anaya, *supra* note 6.

Populations, underscores this progress. Further, states are modifying their behavior vis-à-vis indigenous populations in response to the norm.

For example, Ecuador's 1998 constitution specifically addresses the collective rights of indigenous populations and recognizes, inter alia, rights to their ancestral communal lands, cultural development, and economic and social development.[20] Mexico has ratified the ILO Convention No. 169, and despite the government's concerns over the impact of indigenous claims on the unity of the Mexican state and sporadic armed confrontation, some indigenous villages in Chiapas have already organized themselves as autonomous communities.[21] In 1992, the High Court in Australia issued its *Mabo v. Queensland* (No. 2) decision recognizing indigenous peoples' land rights and rejecting the concept of *terra nullius*.[22] In New Zealand, the Waitangi Tribunal continues to review and adjudicate claims under the 1840 Treaty of Waitangi.[23] Adoption of a final declaration on the rights of indigenous peoples by the United Nations should propel states to take further steps to incorporate indigenous rights into domestic laws and to provide for their implementation.[24]

---

20. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR tit. III, ch. 5, arts. 83–84. In recent years, Ecuador's indigenous peoples have become more politically active and influential. In 1996, indigenous leaders created a political party called Pachakutik, which now holds six seats in Ecuador's 121-member Congress. *See* Stephen Buckley, *Upheaval in Ecuador Shows Clout of Indians; Protests Ended in President's Ouster*, WASH. POST, Jan. 27, 2000, at A21. Indigenous people in Ecuador used a mixture of politics and protests to include a provision on their collective rights in Ecuador's 1998 constitution and played a key role in ousting President Jamil Mahuad in January 2000. Mahuad's exit led to a short-lived three-man junta that included Antonio Vargas, from the Confederation of Indigenous Nationalities of Ecuador. Under U.S. pressure, the three-man junta was dissolved and Vice-President Noboa was named president. *See Fates of Indians' Leader and Movement in Limbo*, SEATTLE TIMES, Jan. 29, 2000, at A3.

21. In Mexico, the *Ejercito Zapatista de Liberacion Nacional* (EZLN), which is mainly but not exclusively composed of Mayan Indians and is most active in the Chiapas region, gained control of various villages, where they created their own system of laws. After initially opposing the movement militarily, the Mexican government in 1996 agreed to the San Andres Accords on Indigenous Rights and Culture, which provide for the recognition of the indigenous peoples' land, cultural, and self-determination rights, including the right to autonomy and control over natural resources. Mexico has since "rejected" this accord, but the Zapatistas began "implementing" it on their own by setting up autonomous municipalities. *See generally* Patrick Cuninghame & Carolina Ballesteros Corona, *A Rainbow at Midnight: Zapatistas and Autonomy*, CAPITAL & CLASS, Oct. 1, 1998, at 1222, *available in* 1998 WL 29897911; Laurence Iliff, *Rebels Engaging Mexican Army in War of Words*, DALLAS MORNING NEWS, July 24, 1998, at 12A. In these municipalities, "local indigenous officials issue public documents which are recognized only within the community, justice is administered under customary law, decisions in assemblies are made by consensus and Mexican government officials must ask for permission before they are allowed into indigenous areas." Diego Cevallos, *Mexico-Rights: Chiapas Provides Test Case for Indigenous Autonomy*, Inter Press Service, Jan. 26, 1998, *available in* 1998 WL 5985522.

22. Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1. For a discussion of the *terra nullius* doctrine and its application in Australia, see Wiessner, *supra* note 3, at 72.

23. *See* David Marr, *A Green Lawn at Waitangi—Where Our Histories Diverged*, SYDNEY MORNING HERALD, Aug. 3, 1998, at 15. For the Treaty of Waitangi texts, see <http://www.govt.nz/aboutnz/treaty.php3> (visited Mar. 7, 2000).

24. Despite the progress in the last ten years on indigenous rights, these rights are violated even in states that have recognized the indigenous norm. For example, there are still sporadic armed encounters between paramilitary groups and indigenous peoples in the Chiapas region of Mexico. *See, e.g.*, Pilar Franco, *Rights—Mexico: Indigenous People in Hiding from Army Harassment*, Inter Press Service, June 7, 1999, *available in* 1999 WL 5949042. However, violation of a norm does not negate its

II. LOOKING AHEAD: BALANCING DEFINITIONS OF SELF-DETERMINATION AND INDIGENOUS POPULATIONS

In 1991, the emerging norm on indigenous peoples' rights consisted of four principal categories: cultural protections, land rights, economic and social welfare, and self-determination.[25] These categories continue to form the core of the international norm on indigenous rights.[26] There is general agreement among indigenous groups, international organizations, and states on the main aspects of the cultural and welfare rights of indigenous peoples.[27] Similarly, many states recognize indigenous peoples' rights to develop their designated lands, although indigenous groups may express dissatisfaction with the land set aside for them by the state.[28] Major disagreements between states and indigenous groups involve the scope of indigenous groups' right to self-determination and their potential to fracture a state's boundaries.

Self-determination claims may take different forms, ranging from independence to the power to determine local laws within a reservation.[29] States are increasingly willing to grant limited self-rule to their indigenous peoples but have been reluctant to grant broad self-determination rights that, if fully exercised, would undermine the state's territorial integrity.[30] The

---

existence. *See* Torres, *supra* note 1, at 146. These violations are often reported by the media and international organizations, in part because they constitute breaches of an accepted norm.

25. *See* Torres, *supra* note 1, at 158–63.

26. *See, e.g.*, Wiessner, *supra* note 3, at 98–99. Professor Wiessner identifies a fifth prong under the norm requiring states to respect treaties with indigenous peoples. To the extent these treaties are used to support claims for lands and cultural protections, this fifth prong is covered under other aspects of the norm dealing with land and cultural rights.

27. One emerging area of disagreement between states and indigenous groups is that of intellectual property rights. Indigenous groups are increasingly asking for rights in the development of medicines, science, and technology derived from their traditional knowledge and uses of flora and fauna. These rights have been recognized in the U.N. Draft Declaration, *supra* note 12, pt. VI, art. 29, and in the OAS Draft Declaration, *supra* note 18, sec. 5, art. XX. Under these claims, indigenous peoples may be entitled to compensation from companies that have developed technologies incorporating indigenous groups' resources, knowledge of plants, or traditions.

But most states' intellectual property laws do not recognize the claims of indigenous groups. Further, states are under pressure from corporations that are vulnerable to the intellectual property claims of indigenous peoples, but do not want to pay "royalties" to indigenous groups. Unsurprisingly, domestic governments have not been eager to implement these claims. Ecuador recognizes an intellectual property right in its 1998 constitution but does not provide a process for its implementation. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR tit. 3, ch. 5, art. 84, para. 9.

28. Now states are seriously considering and granting indigenous claims to land, as is the case in Australia, New Zealand, and Argentina, where the Constitution provides for restoring lands to the Mapuche Indians. *See* CONSTITUCIÓN DE LA NACIÓN ARGENTINA pt. II, tit. 1, ch. IV, art. 75, para. 17.

Further cooperation between states and indigenous groups in this area may be strained if land claims seeking control over the state-apportioned air spectrum for radio and satellite communications proliferate. For example, an auction of electromagnetic spectrum in New Zealand was delayed because of Maori claims to these airwaves. *See* Kim Griggs, *A Cautionary Tale on Spectrum*, WIRELESS WK., Mar. 6, 2000, at 52; Rob Hosking, *Mr Swain Hopes To Clear Way for Auction*, NAT'L BUS. REV. (N.Z.), Feb. 11, 2000, *available in* 2000 WL 14495023; Adrienne Perry, *Maori Council To Meet over Spectrum*, INFOTECH WKLY. (N.Z.), Nov. 8, 1999, *available in* 1999 WL 11800111.

29. *See* Torres, *supra* note 1, at 161–63.

30. "The question of 'free determination' triggers the sharpest objections from the governments that criticize the draft declaration as a risk to sovereignty and a promoter of secession and disintegration." Gustavo Capdevila, *Rights-Americas: Unfazed, Indigenous Group Takes Fight to U.S.*, Inter Press Service, Jan. 15, 1999, *available in* 1999 WL 5946463.

fragmentation of the Soviet Union and Yugoslavia has reminded states of their vulnerability to minority groups' self-determination claims and ethnic strife. Reflecting states' concerns, the OAS Draft Declaration recognizes indigenous peoples' right only to determine their political status (including autonomy and self-government),[31] while the ILO Convention No. 169 is largely silent on this subject. Although some indigenous groups note that they do not seek independence,[32] indigenous peoples' advocates have often insisted on a broad right to self-determination[33] similar to that contained in the U.N. Draft Declaration.[34]

There tends to be an inverse relationship between the definition of "indigenous peoples" and the scope of self-determination. A broader definition of the term "indigenous peoples" [35] will bring more groups under the protection of a norm that recognizes a variety of individual and collective rights. Some of these rights—such as the right to land and self-determination—require that the state cede or share power, land and resources. If the right to self-determination in the U.N. Declaration (presently Draft Article 3) is left open-ended, or defined broadly to include the right of secession, states will perceive it as a threat to their territorial integrity.[36] This perception will increase as the number of groups that qualify as indigenous peoples multiplies. There will be a growing concern that, at their most extreme, claims of indigenous rights will lead to political instability throughout the world by contributing to the balkanization of states, the proliferation of microstates lacking sufficient land or resources to support themselves adequately, and additional (non-indigenous) secessionist claims and armed conflict.[37] In response to these concerns, states may seek to define self-determination narrowly in terms of limited control over specific "local" issues like resources and education,[38] or worse yet, reject the indigenous norm altogether.

---

31. *See* OAS Draft Declaration, *supra* note 18, sec. 4, art. XV.

32. See Cuninghame & Ballesteros Corona, *supra* note 21, for the example of the Zapatistas.

33. "Indigenous leaders . . . say free determination can take on a variety of forms. They argue that denial of free determination amounts to racism and discrimination, because the U.N. Charter proclaims the right to self-determination for all people without distinctions." Capdevila, *supra* note 30.

34. The U.N. Draft Declaration provides that: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." U.N. Draft Declaration, *supra* note 12, pt. I, art. 3.

35. There is controversy between states and indigenous peoples on the use of the term "peoples" as opposed to "populations." Some states perceive the term "peoples" to imply a right to self-determination, including secession. *See supra* note 17.

36. *Id.*; *see also* Capdevila, *supra* note 30 ("The main bone of contention is Article 3.").

37. For a discussion of why proliferation of microstates may not be desirable, see Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 592 (1996).

38. For example, a state could grant indigenous groups rights over development of the lands they inhabit, and allow them to establish "local" laws in matters of education within the territories set aside for them. Or the states may grant more comprehensive self-rule rights by giving indigenous peoples broad autonomy comparable to that of municipalities, commonwealths, and states that are allowed to adopt local laws, subject to the broader laws of the state's national government. Under this system, indigenous peoples could enact their own laws within their territory.

Definitions of indigenous peoples focus on their shared history of colonization and their distinct identity that reflects their "historical continuity with pre-invasion and pre-colonial societies."[39] Self-identification plays a key role in whether a group is deemed an indigenous population.[40] Geopolitical changes in the last decade, however, may sweep under this definition additional groups that had not previously gained media and international attention. For example, prior to the disintegration of Yugoslavia, Albanians in Kosovo were not generally mentioned in conjunction with indigenous peoples and their rights. Yet there are persuasive arguments that Albanians in Kosovo have a "historical continuity with pre-invasion" societies, and that, under Serbian rule, they represented a politically subordinate sector of society "determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity."[41]

Are the Albanians in Kosovo "indigenous peoples"? Neither the U.N. Draft Declaration nor the OAS Draft Declaration provides a definition of the term "indigenous peoples," although the OAS declaration considers self-identification a key element in determining whether a group is indigenous.[42] This lack of specificity would allow different states and advocacy groups to have differing views on what constitutes an indigenous group, resulting in conflict as to the scope of the indigenous norm. If a declaration on indigenous rights is to have practical meaning, it is essential that it contain a definition of the term "indigenous" that sufficiently limits the universe of groups that fall within its scope, and does not rely mainly on self-identification.

A clear definition of the term "indigenous people" should give states a greater level of comfort in recognizing indigenous groups' collective rights because the number of groups entitled to these rights will be narrowed. Further, this should create a more favorable environment for reaching a compromise on self-determination. If indigenous peoples are not seeking independence, states and indigenous groups should be able to reach a consensus on self-rule. States are already granting significant autonomy to

---

39. STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986); *see also* Wiessner, *supra* note 3, at 115 ("Indigenous communities are thus best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond.").

40. "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." ILO Convention No. 169, *supra* note 2, pt. I, art. 1, para. 3.

41. STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, *supra* note 39, ¶ 379. There are two rival theories regarding Albanians in Kosovo, identifying them as either Illyrians or Thracians. Illyrians lived in the western part of the Balkans and, if Kosovar Albanians are Illyrians, they would have inhabited areas of modern-day Kosovo prior to the first appearance of the Serbs in the 600s. *See* NOEL MALCOLM, KOSOVO: A SHORT HISTORY 22–40 (1998).

42. *See* OAS Draft Declaration, *supra* note 18, sec. 1, art. I, para. 2 ("Self-identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this Declaration apply."). The ILO Convention No. 169 provides greater specificity by describing the tribal and indigenous groups subject to the convention, but it does not provide an exact definition of "indigenous peoples." Instead, it provides a tautological description that refers to "peoples in independent countries who are regarded as indigenous." ILO Convention No. 169, *supra* note 2, pt. I, art. 1, para. 1(b).

indigenous groups. The goal should be to encourage rather than inhibit this behavior. Pressuring states to recognize an open-ended right to self-determination that could be used to justify secession will result in greater opposition to all indigenous rights and in the loss of important gains obtained in the past decade.

There ought to be a renewed focus on defining self-determination in terms of the broadest possible self-rule within the boundaries of a state.[43] Autonomous communities such as Puerto Rico provide a model that can serve as a starting point for defining indigenous peoples' self-government. Limiting self-determination to internal self-rule for purposes of a declaration on indigenous rights need not mean that indigenous groups can never possess a right of secession. The U.N. Charter contains various references to the "principle of equal rights and self-determination of peoples."[44] Similarly, the Universal Declaration of Human Rights notes that "[t]he will of the people shall be the basis of the authority of government."[45] Failure to restate these rights in the proposed declaration on indigenous rights will not extinguish them. The final U.N. declaration should simply note that any rights that indigenous peoples might have under other international instruments or in domestic law are not impaired or limited by the provisions of the declaration.[46] This course of action should improve the likelihood that a declaration on indigenous rights will be adopted by the United Nations before the International Decade of the World's Indigenous Populations comes to an end.

---

43. It has been argued that the option of political independence should be granted "if, in the aggregate, it promotes the values of a public order of human dignity." Wiessner, *supra* note 3, at 119. The challenge is how we define these values of human dignity. Who will be the ultimate judge? States are unlikely to agree to a declaration that specifically contemplates independence under a "human dignity" assessment because this principle is subject to multiple valid interpretations and thus highly indeterminate and possibly overbroad.

44. U.N. CHARTER arts. 1, 55.

45. UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 21.

46. Some declarations on indigenous rights have already incorporated this language. *See, e.g.*, ILO Convention No. 169, *supra* note 2, pt. IX, art. 35 ("The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.").

Joining Control to Authority: The Hardened "Indigenous Norm"

Siegfried Wiessner†

To write a seminal article is quite a feat. In her first production,[1] Raidza Torres came a long way toward reaching a goal that eludes many during lifetimes of scholarship. Articles of this kind do not emerge miraculously. They owe debts of gratitude to those who walked the path before; in particular, those who created the intellectual framework enabling comprehensive analysis of societal problems and the formulation of proper responses.

The strength and richness of Ms. Torres's article derives from skillful usage of Yale's unique gift to legal scholarship and humankind: Myres S. McDougal's, Harold D. Lasswell's, and W. Michael Reisman's integrative theory about law, variously called the "New Haven School," "policy-oriented jurisprudence," or "law, science and policy."[2] This theory properly conceives of law as a process of authoritative and controlling decision,[3] and it suggests organizing scholarly inquiry around five discrete intellectual tasks: (1) a comprehensive empirical delimitation of the problem; (2) the presentation of conflicting claims, claimants, their identifications, bases of power, etc.; (3) the analysis of past trends in decision in light of their conditioning factors; (4) the prediction of future decisions in light of changed conditioning factors; and (5) the recommendation of future decision guided by the vision of a world public order of human dignity.

The global societal problem Ms. Torres engaged is the plight of indigenous peoples—who, despite their distressing and pervasive history of suffering, actual and cultural genocide, conquest, penetration, and marginalization, have not vanished from the face of the Earth. Of remarkable resilience, indigenous communities have come back to claim their rightful place in the arenas of decision making, both domestic and international. Ms.

---

† Professor of Law, St. Thomas University School of Law.

1. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991).

2. The principal statement and delineation of policy-oriented jurisprudence is presented in Lasswell & McDougal's two volume treatise, HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992). With respect to international law, see Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

3. *See* W. Michael Reisman, *The View from the New Haven School of International Law*, 86 PROC. AM. SOC'Y INT'L L. 118 (1992); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 26 THESAURUS ACROASIUM 129 (1997).

Torres's discerning contribution is her in-depth analysis of the claims that are uniquely their own—that make indigenous peoples different from individuals or other vulnerable groups such as racial and ethnic minorities and women. She focuses, in particular, on the need to protect their cultural heritage, to maintain and restore their essential relationship to land, to enjoy individual and welfare rights, and to ensure their self-determination. The urgent need to live on their land is a feature that essentially sets indigenous peoples apart from other societal groups or individuals that advance claims to overcome discrimination. Ms. Torres documents this distinguishing claim eloquently and with a wealth of references. In her important, cross-cultural analysis, only one point would trouble me now, ten years after this piece was written—and this point comes with the knowledge of hindsight. The term "indigenous populations" used throughout the paper strikes the present-day reader as strangely inappropriate. It probably derives from the designation of the U.N. Working Group on Indigenous Populations. The term "population" evokes the clinical detachment of the anthropologist who created it—colonies of ants are labeled the same way. Persons of indigenous heritage prefer to see themselves, rightly so, as members of a "people" in full recognition of their common humanity. The ILO, in 1989, had already recognized this preference by adopting its Convention No. 169 Concerning Indigenous and Tribal "Peoples" in Independent Countries.[4] The Working Group's own work products, especially the Draft Declaration on the Rights of Indigenous Peoples,[5] as well as many other international organizations and conventions now use the term "indigenous peoples" consistently.

In her impressive analysis of "the norm" protecting indigenous peoples, Ms. Torres analyzes past trends in decision and conditioning factors, focusing on four rather diverse domestic legal systems: Canada, Guatemala, Nicaragua, and Scandinavia (as it reacts to the claims of the Sami).[6] Representing different public orders, geographical contexts, and methodologies of legal reasoning of the dominant elites, these country reports confirm that, despite all cultural and legal differences, the claims of the respective indigenous communities remain essentially the same. Often, the elite responses to indigenous claims are the same as well. But one never gets the feeling that the author's intention was to ascertain, empirically, whether in traditional

---

4. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (1989).

5. Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, Agenda Item 14, at 50–51, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993), *reprinted in* 9 ST. THOMAS L. REV. 212 (1996); *see also* Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d Sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997), *reprinted in* 6 INT'L J. CULTURAL PROP. 364 (1997). On the Draft Declaration, see generally Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493 (1995); and Keith D. Nunes, *"We Can Do . . . Better": Rights of Singular Peoples and the United Nations Draft Declaration on the "Rights of Indigenous Peoples,"* 7 ST. THOMAS L. REV. 521 (1995).

6. *See* Torres, *supra* note 1, at 129.

parlance, "customary international law" had been formed that concretely spelled out obligations of nation-states and other actors toward indigenous peoples. After all, Ms. Torres did not set out to review the actual practice of all the countries in which significant numbers of indigenous people reside with a view toward elucidating common legal standards applied with respect to them. Her aim was not to discern widespread state practice of specially affected states and pertinent *opinio juris*. In a much more limited way, she posited as her goal to prove that an "international norm" protecting indigenous peoples was emerging or had emerged. She defined an "international norm" as "a pattern of authorized communications and acts on the part of international organizations and states."[7] This norm, as she defined it, is non-binding and essentially voluntary. She concluded that the "proliferation of domestic and international declarations, the publication of various studies, the creation of international bodies dealing exclusively with indigenous issues, and the attention given by states to indigenous concerns are all evidence of the crystallization of a norm protecting indigenous rights."[8] This norm, however, means only a "recognition of indigenous issues in the abstract, without specifying a program of action through which these needs can be met."[9]

Ms. Torres undertook this quest for a "non-binding"—essentially moral, not legal?—norm because of her apparent conviction that this characterization would induce states to be more inclined to adhere to such a norm. If states are not legally obligated, or, at the least, if the methods of concretization and implementation are left to the *domaine réservé* of relevant nation-states, the claims of indigenous peoples would more likely be met with a positive response. She may also have felt that the argument for concrete customary international rights of indigenous peoples could not credibly have been made at the time, while she was still hoping, and predicting, that this norm would be "increasingly self-enforcing and its prescriptions increasingly hard to violate."[10]

Both of these arguments can be subject to serious debate. Ms. Torres's attempt at presenting this non-binding norm is arguably better situated in the New Haven School's breakdown of the sequences of the decision process, rather than in redefining relevant "norms" or decisions themselves. Policy-oriented jurisprudence conceives of decision processes in terms of the functions they perform, including the gathering of intelligence on any given problem; the promotion of preferences; the prescribing of authoritative policy or lawmaking; the invocation, application, and termination of prescriptions; and the appraisal of the aggregate performance of a community's decision processes in the light of community goals.[11] Here, the roles scholars, indigenous peoples, NGOs, the media, and even international fora had been

7. *Id.* at 145–46.
8. *Id.* at 156.
9. *Id.* at 163.
10. *Id.* at 175.
11. *See* Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1 & 2), 19 J. LEGAL EDUC. 253, 403 (1967).

playing, up to the time of the writing of Ms. Torres's article, were largely confined to the gathering of intelligence and the promotion of preferences—the advocacy of claims of indigenous peoples so well laid out in Ms. Torres's piece.

The prescription or lawmaking phase relates back to the view of law as a process of authoritative and controlling decision. By focusing exclusively on the element of authority, Ms. Torres leaves out the essential element of control intent, the signal of decision makers to members of the community that they would back up their authoritative message with serious deprivations of values in the case of violation and/or high indulgences in the case of observation.[12] Power is an indispensable element of the law, and it is needed not only to maintain a system of injustice, but also to overcome it. By analyzing almost exclusively the work of the media, scholarly studies, and international non-binding declarations, one can easily overlook, as happened here, actual prescriptions, authoritative and controlling responses to the claims of indigenous peoples such as the 1989 ILO Convention No. 169 mentioned above. Also, the role of the World Bank in outlining procedures for protecting the rights of indigenous peoples in development projects, dating back to 1982, can be left out of the equation.

Ms. Torres relates what scant evidence there was in 1991 in the countries she analyzed of state practice responding affirmatively to the claims of indigenous peoples. There was not much in the way of international legal prescription present at that time either. Both of these factors have changed, and they have changed dramatically. A global survey can now be taken of all domestic systems and their response to indigenous claims. It had to go beyond "a few selected countries."[13] The results of this global comparative and international legal analysis are encouraging.[14] Whether from genuine insight, or under more or less pressure, ruling elites have modified their laws throughout the Americas and beyond. They decided that indigenous peoples have a right to their distinct identity and dignity and the governing of their own affairs—be they the "tribal sovereigns" in the United States, the Sami in Lappland, the *resguardos* in Colombia, or Canada's Inuit in the new territory of Nunavut. This move toward recognition of indigenous self-government is accompanied by an affirmation of Native communities' title to the territories they traditionally used or occupied. Unthinkable only a few years ago, now by virtue of a peace treaty in Guatemala, via a change of the constitution, as in Brazil, or by modification of the common law, as in Australia, domestic law now mandates in many countries the demarcation and registration of First Nations' title to the lands of their ancestors. Indigenous culture, language and

12. *See* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 319 (1999) (providing references).

13. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 665 n.118 (1992).

14. For details, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999). *Cf.* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).

tradition, to the extent it survived, is increasingly inculcated and celebrated. Treaties of the distant past are being honored and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites.

International law expectations build on this consolidated state practice. ILO Convention No. 169 with its emancipatory policy already covers a great number of indigenous peoples around the globe. Both on the regional and universal levels, declarations on the rights and status of indigenous peoples are being finalized. They can, and should, be structured in such a way as to maximize for the intended beneficiaries access to shaping and sharing of all the values humans desire. Coupled with the widespread practice of states specially affected by the issue, these efforts at international standard-setting provide the requisite *opinio juris* for the identification of specific rules of a customary international law of indigenous peoples. They relate to the following areas:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic, and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own systems of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control, and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.

Ms. Torres's "indigenous norm," in essence "soft law," has hardened, as she had hoped, and in this sense, her article has proved seminal. Certainly this author was able to forge ahead on the way she paved for him.

Commentaries on Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright? 13 YALE J. INT'L L. 5 (1988)

The Failed Equilibrium

Michael J. Glennon†

My 1988 article, and the book that elaborates it—*Constitutional Diplomacy*, published in 1990—view the law as architectonic. Overly architectonic, I have now come to think. The article and the book presuppose that the cultural, political, and economic dimensions of a society are shaped by its legal institutions. I have since come to regard the law differently. I do not doubt that law is a factor in shaping conduct. But law is not the only factor, and often not even the prime factor. I am reminded of Braudel's image: Law has more to do with froth on the surface than with deeper currents. Private persons as well as public officials behave as they do for myriad reasons; law is one reason, but not the only one. I am therefore less dismayed when executive officials exploit the law's vagueness and gaps in a manner at odds with the design of the Constitution, or when members of Congress opt for political gain over constitutional principle. Law is more effect than cause. Law's influence is limited.

Executive exploitation continues. For two-thirds of the years since the article appeared, the Executive Branch was headed by a Democratic President. Many of us had hoped that a Democratic Chief Executive would be more respectful of the constitutional role of Congress in war-making. We were wrong. The invasion of Haiti and the bombing of Yugoslavia and Iraq all were carried out without constitutionally required congressional approval.

Few in Congress objected. In fact, many Democratic members who had loudly insisted that President Bush needed congressional approval to fight the Gulf War fell strangely silent when it came to Haiti, Yugoslavia, and Iraq. It turned out that the nation was lucky. Haiti and Yugoslavia could have gone dramatically wrong. Had that happened, Congress would have been as much to blame as the Executive.

---

† Professor of Law, University of California, Davis, School of Law.

The safeguard was process—a constitutionally ordained system of separated power. But in the realm of war power, that process was traduced. The system that was supposed to maintain its own equilibrium collapsed. Why?

It would be easy, and not altogether inaccurate, to think that Presidents from both parties are captives, at turns, of polls, bureaucracies, and inertia. Neither party has a monopoly upon political expediency. It would be equally accurate to think that some members of Congress are simply unprincipled—eager to insist upon adherence to constitutional principle by a President of the other political party, but not one of their own. And it would be accurate, too, to recognize that other members of Congress are essentially spineless and have little interest in preserving the constitutional prerogatives of the Congress regardless of who sits in the White House. But again, why? Where is Corwin's "struggle for the privilege of directing American foreign policy"?[1]

Though it seems like a lifetime ago, it was only recently that Congress was filled with prominent members who took their constitutional role seriously. Opposition to the Vietnam War was initiated by congressional Democrats critical of a President of their own party. The war's Democratic opponents won, ultimately. But for years afterwards the Democratic Party was beset with divisions that undercut its candidates' electability and its officials' ability to govern. The Democratic Party was once willing to pay a high price for constitutional principle. But no longer. The occasional counter-example notwithstanding, timidity and opportunism have replaced whatever far-sightedness and courage once graced Capitol Hill in decisions to use force.

This is, alas, true today in both parties, though congressional Republicans have in a sense been more principled. Congressional Republicans have long doubted the constitutional validity of legislative checks on presidential foreign policy-making. Consistent with that view, most have chosen to forego opportunities to restrain various executive initiatives that they considered ill-advised. By my lights, their premise has been wrong: Members of Congress did have the constitutional power to limit the use of force, in Haiti and elsewhere. But at least the Republicans have been consistent. Wrong, but consistent.

I have come to believe that, at least in the realm of war-making, the system that Madison believed would set ambition against ambition[2] has proved dysfunctional. It has proved dysfunctional because countervailing ambitions exist within Congress that the classic model of separated powers does not adequately take into account. Members of Congress do have an ambition to control the nation's foreign policy, but they also have an ambition to get re-elected. The ambition to get re-elected can conflict with the ambition to control the nation's foreign policy. When it does conflict—and that is often—the ambition to get re-elected prevails. Counter-weights within Congress itself thus prevent Congress from acting within the broader political

1. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 171 (1957).
2. THE FEDERALIST NO. 51 (James Madison).

system as a counter-weight to the Executive. The result is large-scale systemic disequilibrium.

Political ambition, in short, triumphs over institutional ambition. The question, therefore, is no longer simply "what the law is," the issue that my article addressed. To this question my answer is unchanged. Rather, the real issue is how the system can be made to give life to the law. Parsing 1804 Supreme Court opinions in this and other law journals will not fix the system. What is needed is a constituency to drive institutional ambition. To create a constituency within Congress requires creating, or finding, a constituency outside of Congress. This would entail all the dirt-under-the-fingernails political organizing, letter-writing, soliciting, and fundraising that writers of law review articles (such as myself) have blissfully avoided. What is needed is something in the nature of a Common Cause for foreign policy-making, a non-partisan organization that would organize, lobby, and support congressional candidates and members who stand firm for Congress's constitutional prerogatives in the making of foreign policy. Use of force, international agreement-making, intelligence oversight, and other areas of institutional concern now fall between the cracks of organized advocacy efforts. There are country-specific lobbies, concerned about U.S. bilateral relations with particular nations. There are foreign policy organizations, concerned with the substantive merits of various policy options. But there is no organization concerned with the making of foreign policy, with the process from which the policy emerges, and with constitutional requirements as to how that process should be shaped. What is needed is an organized constituency that will exert sufficient political pressure to make routine the observance of constitutional principle in foreign policy-making. Until members' feet are held to the fire, I see little reason to hope for a return to constitutional principle in war-making.

The Uncertain Career of Executive Power

Ruth Wedgwood†

Essays in constitutional law are often about something more than the historical texts at hand. Professor Michael Glennon's 1988 essay—*Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*[1]—was a heartfelt effort to challenge the existence of an independent foreign affairs power in the Presidency, especially in the deployment and use of military force. Its argument was shaped around the controversy of the day—the effort by the Reagan White House in "Iran Contra" to deliver covert aid to anti-communist rebels in Nicaragua despite Congress's bar to American involvement. For any earthly observer, a well-tempered theory of separation of powers is likely to vary, at least in detail, according to the substantive values at stake. Still, it seems a little hard to blame Justice George Sutherland—as author of the famous "sole organ" theory of American presidential power in foreign affairs—for what went right or wrong with our policy in Nicaragua.

Despite the sober subject matter, it might take a Noel Coward play to capture the to-and-fro of Presidents and Congresses in foreign affairs decisions. Congressmen want final political authority over the deployment of American armed forces in areas where combat may occur,[2] until they discover that the political risks are formidable. Congress has authorized a conflict in its early stages, supporting earmarked appropriations, but then winsomely asserted that the war belongs to someone else.[3] With equal fallibility, American Presidents and their courtiers have been tempted to act alone in areas where Congress would freely offer support after proper briefing and consultation. The marriage of the Executive and the Congress is as complicated as any other.

But frequent missteps in execution at both ends of Pennsylvania Avenue are no reason to doubt the seriousness of the theory of an independent executive power in foreign affairs. John Locke spoke of a "federative" authority that has no counterpart in a narrowed account of executive powers.[4]

---

† Professor of Law, Yale Law School; Senior Fellow for International Organizations and Law, Council on Foreign Relations.

1. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5 (1988).

2. *See* War Powers Resolution of 1973, 50 U.S.C. § 1541 (1994).

3. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

4. *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, ch. 12, sec. 147 (1690)

The American Constitution was framed with the failures of the Articles of Confederation well in mind, including the difficulties of prosecuting a revolutionary war through a weak Executive. At a time when members of Congress met only in season, and were separated from the national capital by days of travel from their constituent districts, it was hardly surprising to posit some independent capability and emergency power in the Chief Executive.[5] And in two centuries since then, the conduct of diplomacy—squarely committed to the President—sometimes has required the threat or intimation of force. Military power and diplomacy are linked—whether in discouraging European nations from meddling on the North American continent in the early republic, or in cautioning Beijing against pressuring Taipei, by moving American carrier battle groups to the Taiwan Straits in 1996.

The power of Congress to declare war has been infrequently exercised. Presidents face many short-term situations that depend upon the deployment of military assets to signal commitment and deter adversaries. These are not "wars"—even if limited force is ultimately used[6]—and requiring a declaration of war would often be a dangerous escalation. Asking the President to resort to Congress for a more graduated authorization of the use of force may be politically wise, but its proponents gain no comfort from the literal text of Article I, Section 8.

In *Curtiss-Wright*,[7] Justice Sutherland rather modestly argued that Congress can choose to delegate to the President a greater discretion in foreign affairs decisions (in particular, in limiting arms exports) than might be permissible in a domestic matter. (In its fretful worry about delegation, the case also reveals itself as a period piece of the New Deal.) The justification for broad delegation is founded on the need for flexibility, action, and confidentiality—the very qualities of foreign affairs that may also justify a broad independent power in the Presidency. Sutherland argues that there is an independent foreign affairs competence in the Executive—"plenary," "exclusive," and certainly, "delicate"—based on the President's necessary role as "the sole organ of the federal government in the field of international relations."[8]

Our contemporary hard-wired American democracy highly values transparency and local voice. In the midst of a non-stop on-air national town meeting, it may indeed be "delicate" to talk about independent executive

("These two powers, executive and federative . . . are always almost united. . . . [W]hat is to be done in reference to foreigners, depending much upon their actions and the variation of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.").

5. *Cf.* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

6. *See generally* DEP'T OF STATE, HISTORICAL STUDIES DIVISION, ARMED ACTIONS TAKEN BY THE UNITED STATES WITHOUT A DECLARATION OF WAR, 1789–1967 (1967); MILTON OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES: MEMORANDUM BY THE SOLICITOR FOR THE DEPARTMENT OF STATE (3d rev. ed. 1934).

7. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

8. *Id.* at 320.

power. Yet the President is as democratically elected as the Congress. And many of the founders' warnings linger in the observed facts of real life. Members of Congress can be local in their concerns. The bluff and bargaining necessary in foreign relationships often depends on confidential sources of information that will turn to ashes if they are imprudently disclosed. And the recognized problem of "collective action" frequently hobbles a Congress, since no single member has to take responsibility for the failure to act in the face of an urgent challenge.

The shadowy life of executive constitutional power is, in part, a reflection of political discretion. At the beginning of the nineteenth century, even the English king's law officers advised that it was wiser to revert to the Parliament, where possible, than to assert infrequently used prerogative powers.[9] That is all the more true in a twenty-first-century democracy. But the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" of which George Sutherland wrote,[10] was held in high esteem by men as politic as Alexander Hamilton and John Marshall. Congressman Marshall's famous "sole organ" speech,[11] upon which Sutherland drew, concerned the power of the President to surrender a defendant to face foreign trial and execution, even without an implementing statute by Congress to regulate the terms of criminal arrest under the hated Jay Treaty.[12] John Marshall's view of presidential power was broad indeed, for he contemplated a final authority in the President to determine certain questions of treaty law, beyond the power of judicial revision.[13]

The Great Chain of Being for the "sole organ" theory leads back one step more, to the famous text upon which Marshall drew in his description of the President's powers—and this was Hamilton's celebrated *Pacificus* essay. Hamilton hails the President

> as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government—as that Power, which is charged with the Execution of the Laws, of which Treaties form a part—as that Power which is charged with the command and application of the Public Force.[14]

For Hamilton, the Constitution's vesting of "the EXECUTIVE POWER . . . in the President" is a "comprehensive grant."[15] Article II omits any exhaustive enumeration of his tasks precisely because the President's residual power

9. *See generally* LAW OFFICERS' OPINIONS TO THE FOREIGN OFFICE, 1793–1860 (Clive Parry ed., 1970–73).

10. *Curtiss-Wright*, 299 U.S. at 320.

11. *See* 10 ANNALS OF CONG. 613–14 (1800).

12. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

13. *See id.* at 348–49.

14. Alexander Hamilton, *Pacificus No. I* (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38 (Harold C. Syrett ed., 1969).

15. *Id.* at 39.

must treat the matters that are too irregular for legislation.[16] The President must serve (even if reluctantly so) as a well-spring, when other mechanisms of government have failed.

Hamilton's views were disputed in his own day by James Madison, and by Thomas (although not President) Jefferson, as well as other Republicans. (There is nothing new, under the sun, in most corners of constitutional law.) The early Republicans saw the Presidency as far more robotic, carrying out appointed ministerial duties set by Congress. Michael Glennon thus enjoys distinguished company in a preference for legislative dominance. But the constructive tension between Hamiltonian and Jeffersonian views of democratic government should not obscure the somber consequences that attach to a democratic perfectionism that depends solely on Congress.

Indeed, Justice Robert Jackson could be enlisted as an ally in this view. A close reading of his famous concurrence in the *Steel Seizure Case*[17] shows a remarkable latitude for executive power. The rule is famous as a triptych, stating in outline that the President's power is at its apex when authorized by Congress, at its nadir when opposed by Congress, and of middle strength when Congress is indifferent. Yet the opinion is really about five categories, not three, including several different varieties of Congressional silence. An American President is entitled to act upon his good-faith reading of constitutional power, and Justice Jackson allows him plenty of room to forge ahead so long as Congress has not attempted to stop him dead in his tracks. In Justice Jackson's account, the President has greatest power when he acts in accordance with the "expressed *or implied* authorization" of Congress.[18] His power ebbs to its lowest mark when he acts in opposition to the "expressed *or implied* will" of Congress.[19] And of course, a Congress that has no view is also silent. Congress is not put to much work in this model. Its wishes can be left hanging in the air, in the mysterious clouds of inchoate legislative history, without the burden of coming to an actual decision.

The real lesson of the *Steel Seizure Case* is, rather, that citizens are off-limits. The constitutionally protected entitlements of citizens, in liberty and property, may sharply limit the domain of presidential foreign affairs power. The *Steel Seizure Case* demanded clearer authorization for the war in Korea, and for the seizure of steel plants, than Harry Truman had. When citizens are burdened and gain standing, the locus of decision may switch from the Oval Office to a federal courtroom. But in the absence of such domestic effect a President retains the power of initiative, even under Justice Jackson's test, and is able to read Congress's silence as he believes is fair.

It is true, as Professor Glennon suggests, that a theory of sovereignty does not tell us which branch should exercise a nation-state's inherent powers.

---

16. One might note, here, the distinction drawn between *jurisdictio* and *gubernaculum* in English constitutional theory. *See* CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 84–85 (rev. ed. 1947).

17. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

18. *Id.* at 635 (emphasis added).

19. *Id.* at 637 (emphasis added).

Indeed, the Supreme Court has used an implicit theory of sovereignty to strengthen Congress's own legislative powers as well, permitting Congress to legislate in areas that are otherwise inadmissible, so long as it is in execution of a foreign agreement.[20] But the latitude allowed to Congress, when it acts in foreign affairs, may also be a clue to the range permitted to the President.

In the current period, the views of the Executive and the Senate have frequently diverged on proposed treaty engagements. The place of executive power, in these circumstances, may gain a kinder hearing. One observer of the Washington scene has speculated that in the future the United States will rarely be able to ratify multilateral treaties, but rather will have to seek engagement with our allies and arrangement with our adversaries through parallel understandings, gentlemen's agreements to abide by treaty norms even when the treaty cannot be sworn to. One assumes that Professor Glennon's skepticism towards executive power may well adapt to the times.

It is not obscurantism to suppose that some questions in constitutional law should never be finally answered. Competing theories of legitimate power are part of what helps to provide political balance. An unbounded sense of constitutional entitlement may tempt a beneficiary branch to act immodestly, without the chastened sense that acceptance will turn upon good judgment as well as procedure. Hence, even in disagreement, one may salute Professor Glennon's eloquence and purpose, and, of course, celebrate the role of *The Yale Journal of International Law* in continuing the debate.

20. *See* Missouri v. Holland, 252 U.S. 416 (1920).

Commentaries on Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993)

The United Nations Framework Convention on Climate Change: A Commentary on A Commentary

Daniel Bodansky†

Although only eight years have passed since the adoption of the U.N. Framework Convention on Climate Change (UNFCCC),[1] and six since its entry into force, the Convention has already fallen out of the limelight. Instead, international attention, both political and scholarly, has shifted to its progeny, the Kyoto Protocol,[2] and the Protocol's elaboration through the Buenos Aires Plan of Action.[3]

While the Framework Convention no longer represents the cutting edge, it remains the foundation of the international climate change regime, both substantively and institutionally. The Kyoto Protocol was negotiated by an ad hoc group established under the Convention's auspices and is now being elaborated by Convention institutions, including the Conference of the Parties (COP) and its subsidiary bodies on scientific advice and implementation. The objective and principles enunciated in the Convention, such as common but differentiated responsibilities, precaution, and cost-effectiveness, continue to serve as touchstones for international discussions of climate change. And, of course, pending the Kyoto Protocol's entry into force, the Convention remains the only climate change agreement currently in effect.

---

† Climate Change Coordinator, U.S. Department of State; Professor, School of Law, University of Washington (on leave, 1999–2001). The views expressed in this Commentary are personal, and do not necessarily reflect those of the Department of State or the U.S. Government.

1. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994) [hereinafter FCCC].

2. Kyoto Protocol to the FCCC, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/7/Add.1 (1998), *reprinted in* 37 I.L.M. 22 (1998).

3. *Report of the FCCC Conference of the Parties*, 4th Sess., U.N. Doc. FCCC/CP/1998/16/Add.1, at 4 (1999).

In 1993, I concluded my article by stating that: "While immediate . . . stabilization [of greenhouse gas emissions] would be desirable, establishing a dynamic international process is more important for the long-term. The U.N. Framework Convention on Climate Change makes a definite, albeit tentative, start along that road."[4] Judged by that standard, the UNFCCC has been a remarkable success. Indeed, few would have guessed in 1993 just how dynamic the international process would prove to be. Since the Convention's adoption, negotiations have continued apace, first to implement the Convention's rules, then to draft the Kyoto Protocol, and now to elaborate the Protocol's often sketchy provisions through the Buenos Aires Plan of Action. This year, in the run-up to COP-6, at which the Buenos Aires Plan of Action is scheduled for completion, workshops, informal consultations, and diplomatic meetings are taking place almost continuously.

The complexity and sophistication of the climate change regime have also increased significantly. When the Convention was negotiated, states were unable to agree even that they should be required to "report" (the term "report" was thought by some to suggest an intrusive, interventionist process, so the phrase "communication of information" was used instead). Today, states are discussing rules on reporting and review that mandate the use of particular methodologies for the preparation of national inventories and that permit expert review teams to suggest particular "adjustments" to inventories, in order to correct deficiencies. Similarly, the notion of emissions trading, which was just a gleam in the eye of a few states during the Convention negotiations, is now being elaborated by the Parties in a detailed series of rules, and is likely to become a reality later this year at COP-6 in the Hague.

The sheer scale of the climate change process has also changed dramatically. Back in 1991 and 1992, climate change meetings were comparatively small-scale affairs. Only a few NGOs and business representatives attended, national delegations consisted of at most several dozen people, usually only two or at most three meetings took place at any given time, and, except at the final round of negotiations, the schedule was relatively civilized. Now, climate change meetings have become six or seven ring circuses, attended by literally thousands of NGO delegates and members of the press, routinely running late into the night.

To be sure, the jury is still out as to where the process set in motion by the UNFCCC will end up. Actual emissions of greenhouse gases continue to rise in most industrialized countries. And the Kyoto Protocol itself remains a work in progress. Nevertheless, without the Framework Convention, it is hard to imagine that international attention would have continued to focus on climate change, or that we would be discussing such sophisticated and innovative rules. Indeed, in a real sense, the climate change negotiations have taken on a momentum of their own—just as the framework convention/protocol approach intended.

---

4. Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 558 (1993).

Seven years after it was written, my article is now largely of historical interest, particularly given the current focus on the Kyoto Protocol rather than the UNFCCC. Few burning issues of interpretation continue to arise with respect to the Convention that require a detailed legal commentary.

As history, however, the article fills an important need, for a reason little noted in international legal scholarship: the disappearance in recent years of formal negotiating records. Back in the 1950s and 1960s, verbatim records were still often kept of negotiating sessions and votes were recorded. Today, in contrast, virtually all meetings are "informals" (off the record) and votes are seldom, if ever, taken. Official reports say little more than that a meeting was held. As a result, articles by participants or observers have become virtually the only source of information about what transpires in negotiations: who proposed what provisions, for what reasons, and with what results. Although the negotiating history of an international agreement is, in theory, only a "secondary" basis of interpretation, the language of most international environmental treaties, including the Framework Convention, is sufficiently opaque that "readers' guides" play a critical role, explaining the history of the various provisions, why they were included, and what they were intended to do.

Although much has changed since the early years of the climate change regime, in some respects the more things change, the more they stay the same. In particular, the political dynamics between the United States and the European Union, between industrialized and developing countries, and between the oil-producing and the small island states, have changed very little over the intervening years. If a veteran of the UNFCCC negotiations returned to the negotiations today, the proposals under discussion would appear vastly more complex, but the political dynamics familiar.

The numerous citations to my article reflect the vitality of the climate change regime. In little more than seven years, we have moved from a comparatively simple treaty, which could be discussed comprehensively in a single article, to a complex network of institutions and rules, which require books to describe.[5] It is a pleasure to have had one of the first words on this subject—but an even greater one not to have had the last.

5. Indeed, two books have already appeared on the Kyoto Protocol: MICHAEL GRUBB, THE KYOTO PROTOCOL: A GUIDE AND ASSESSMENT (1999); and SEBASTIAN OBERTHUR & HERMANN E. OTT, THE KYOTO PROTOCOL: INTERNATIONAL CLIMATE POLICY FOR THE 21ST CENTURY (1999).

The Fount of Climate Change Scholarship

Daniel C. Esty†

Ten years ago, the world embarked on an extensive negotiating process to address the issue of possible climate change due to a buildup of greenhouse gas emissions in the atmosphere. The prospect of human-induced changes in mean temperatures, weather patterns, sea level, rainfall, soil moisture, and the severity of storms looms large as a potential threat to human well-being. But the complexity of the issue—arising from the need to address a range of sources of greenhouse gas emissions, engage the world community collectively, map the scientifically complex carbon cycle that lies at the heart of the issue, understand the role of sinks as well as sources, and confront the impacts of every business on the planet as well as virtually every individual—makes the task of fashioning an international policy response rather daunting. In 1992, the Framework Convention on Climate Change[1] was concluded and signed by more than 150 countries at the Rio Earth Summit. At the time, I was a climate change negotiator with the U.S. Environmental Protection Agency, making it a special privilege and pleasure to comment on *The United Nations Framework Convention on Climate Change: A Commentary*, written in 1993 by Dan Bodansky, at the time a young law professor.

Bodansky's article provides an extraordinarily detailed and thoroughly documented chronicle of the events that led to the development of the Convention. While written with the depth and nuance of a careful scholar, Bodansky's article benefited enormously from his insider's view of the process, derived from his experiences as a State Department lawyer and advisor to the Intergovernmental Negotiating Committee (INC) Secretariat. Bodansky's sweeping review of the issues, events, organizations, and personalities that contributed to the Convention that emerged in Rio makes for as compelling reading as one finds in the field of international law. In important ways, this *Commentary* laid the foundation for almost all of the climate change scholarship that has followed.

Indeed, one of the great virtues of the piece is its value as a reference work. For those interested in getting a basic understanding of climate change

---

† Clinical Professor of Environmental Law and Policy, Yale Law School; Associate Professor of Environmental Law and Policy and Associate Dean, Yale School of Forestry and Environmental Studies. Formerly Deputy Assistant Administrator for Policy and Chief Deputy of Staff for the U.S. Environmental Protection Agency.

1. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994) [hereinafter FCCC].

science, Professor Bodansky outlines how the greenhouse effect works, the various emissions sources, the array of sinks that sequester carbon, the workings of the carbon cycle, the differences between natural and anthropogenic flux in the cycle, and how computer models help to forecast what might occur when atmospheric concentrations of greenhouse gases rise. As a policy matter, Bodansky reviews the array of climate change effects that might be brought about by a buildup of greenhouse gases and he spells out the spectrum of policy options ranging from abatement through adaptation.

Perhaps more importantly, Bodansky provides a comprehensive history of the pre-negotiations that set the stage for the climate change discussions that occurred in 1991–92. For those who are unfamiliar with the extensive international process, Professor Bodansky traces the path from the Gillach Conference of 1985 through the Bellagio, Toronto, and Noordwijk conferences that followed. He explains the importance of the Second World Climate Conference and of the Bergen Declaration.[2] In doing so, Bodansky weaves together the intersecting roles played by international organizations such as the World Meteorological Organization and the U.N. Environment Programme, along with other pressures that were brought to bear from nongovernmental organizations, scientific entities, and governments. He also traces with great care the work undertaken by the Intergovernmental Negotiating Committee through its five negotiating sessions—from INC 1 in Chantilly, Virginia, in February 1991 through INC 5, which brought the negotiations to a close in New York in May 1992.

In telling the story of the negotiations, Professor Bodansky discusses what made the process so tortuous and difficult. He identifies the high stakes, significant scientific uncertainties, divergent interests (between the United States and Europe, as well as between the developed and developing worlds), and a wide range of levels of political commitment. The *Commentary* also paints a lively picture of how the negotiations unfolded, as delegates from 140 countries and an extensive list of nongovernmental organizations pushed and pulled the process in various directions.

Bodansky's *Commentary* further provides a thorough introduction to the Convention itself. He highlights many of the contentious issues and explains why they were so controversial. In many cases, these same elements remain contested today. For example, one can see the roots of the current difficulties of the Kyoto Protocol,[3] such as its lack of support in the U.S. Congress because of the limited participation of developing countries, in the 1992 Convention's suggestion that "standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."[4] In addition, the licensing of inaction on

2. Bergen Ministerial Declaration on Sustainable Development in the ECE Region, G.A. Preparatory Committee for the U. N. Conference on Environment and Development, 44th Sess., Annex I, at 19, U.N. Doc. A/CONF.151/PC/10 (1990).

3. Kyoto Protocol to the FCCC, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1998), *reprinted in* 37 I.L.M. 22 (1998).

4. FCCC, *supra* note 1, pmbl., 31 I.L.M. at 851.

the part of the developing world is evident in preambular language that emphasizes the "legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty."[5]

Bodansky walks through the commitments that were undertaken by the parties to the Convention and provides an excellent primer on the key concepts, and even the language, that continue to be at the center of climate change discussions. He spells out how the various classes of parties were identified, including the Annex I and Annex II countries that are still often separated out because they have undertaken the emissions control obligations that others have not. Bodansky's *Commentary* makes clear that the unwillingness in 1992 to have binding obligations was not simply a function of rejection by the United States, but reflected a broader negotiating dynamic that led to the famous compromise, committing OECD countries to "aim" at returning their year 2000 emissions to 1990 levels.[6] Bodansky also explains the dispute over whether to focus on just carbon dioxide, which represents about three-quarters of the impact or "radiative forcing" of all greenhouse gases, or to take a more "comprehensive approach" that would seek to control emissions of the full spectrum of greenhouse gases.

If there is a criticism to be leveled at the Bodansky commentary, it might be that after one hundred pages of narrative, the article concludes with a scant four pages of analysis. But this objection would really be a quibble and the article's value has been proven by the frequency of its citation. Moreover, Professor Bodansky catches most of the key issues in his closing analysis, noting that the results of the 1992 treaty negotiations were rather "modest." He suggests that, unlike the Montreal Protocol[7] and its various amendments, the Convention presents no real strategy for emissions control. Furthermore, again unlike the Montreal Protocol, the Convention has no enforcement mechanism.

With the benefit of the actual experience of the intervening years, one can add to Bodansky's observations. The seeds of later policy difficulties can clearly be found in the 1992 agreement. In particular, the disputes over who should take action and what a fair distribution of the burdens of action would be are already evident. Thus, while the Montreal Protocol provided for trade sanctions to be imposed on those who failed to join the CFC-control regime, the Convention provides no obligations for the developing world—and little in the way of inducements to bring them within the emissions control regime. The Convention offers lofty goals, but little in the way of a clear or realistic strategy for action. Fundamentally, the mechanisms for making progress are not identified and have yet to be fully developed. The Convention exists in a context of very serious weakness in the international environmental regime. There is little supporting infrastructure to provide the sort of institutional

5. *Id.*, 31 I.L.M. at 853.
6. *Id.* art. 4(2)(b), 31 I.L.M. at 857.
7. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541 (1987) (entered into force Jan. 1, 1989).

reinforcement that would be necessary for successful worldwide collective action on climate change.

The Bodansky *Commentary* has aged well, partly as a result of the fact that the policy process has advanced very little. As the debate over whether and how to implement the Kyoto Protocol moves forward, the very same set of issues Bodansky identified remains on the table. Who should act? Who should pay for the international emissions control program? How much of the problem can be addressed by enhancing sinks? What are the mechanisms available to motivate changes in behavior? How can developing countries be induced to play a role in the global climate change regime? What institutional structures are needed to make the policy response successful?

International law indubitably proceeds in fits and starts. But life does move on. Since the *Commentary* appeared, I have become a law professor and Professor Bodansky is now a climate change negotiator, developments that perhaps offer promise for the process of motivating global action, if not for improved international law scholarship.