

LAW AND ORDER IN THE INTERNATIONAL COMMUNITY  
THE IMPACT OF INTERNATIONAL LAW ON INTERSTATE RELATIONS

By

Raymond Scott Henson

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Approved:

Professor James L. Ray

Professor C. Neal Tate

Professor M. Donald Hancock

To Amy Henson

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## CHAPTER I

### INTRODUCTION

International law is an underachiever in terms of making an impact on international politics. Legalist and liberal proponents persistently tout expectations about the potential impact of international law on peace and order in the international system. However, there are few tangible results to highlight. The basis for such expectations seems well founded in the efficacy of the rule of law in most national polities where central government exercises authority, yet success in the international realm of politics has proven elusive. There are many possible explanations for this phenomenon beginning with the founding of international politics and law on state sovereignty. Anarchy or the lack of centralized international authority diminishes enforcement options and limits the impact of law on international relations. Interstate relations dominated by power politics and coercive diplomacy does not provide much opportunity for law to make a significant difference in policies. Laws as with any social norms work best in a community with shared values and interests, but the international community represents the maximum level of diversity and conflicting interests.

In spite of limited success and significant structural and philosophical obstacles, international law continues to garner widespread support both politically and financially. International law retains a prominent place in the discourse of international relations and academic research. Governments, inter-governmental organizations, corporations and

non-governmental organizations spend considerable budget amounts maintaining international legal institutions, and developing and practicing international law.

Public international law poses an interesting challenge to political theorists and researchers trying to understand and explain the impact of the law of nations on the behavior of nations. It is a perplexing puzzle that is just beginning to be pieced together. It is further complicated by the fact that lawyers and political scientists have studied international law along generally parallel tracks with little intersection and collaboration. The result is two separate bodies of research that can be very difficult to connect. There are, however, some noteworthy exceptions that influence this particular study, yet there is no standard roadmap to follow or research program to engage.

The primary goals of this work are to examine connections between legal and political treatises on the topic of international law and interstate politics, propose theoretical explanations and systematically evaluate hypotheses that increase understanding of the issues raised, and draw conclusions about fundamental questions concerning the role and effectiveness of international law in the realm of international politics. For example, questions are addressed such as whether international law tends to function as an alternative to power politics or an instrument of power politics, and to what extent international law has an impact on emerging political and economic integration, institutionalization, and transnational interdependence. This study is neither a scientific study of international law nor a judicial opinion on the merits of international politics. Those approaches would be over-generalizations of both disciplines even if they were feasible research programs. My target has been somewhere closer to the median. By respecting scholarship from both fields and making the attempt to connect them without

compromising the validity of either, I hope that this project offers valid insights that without such collaboration would be obscure. The results of this effort have not produced perfectly fitted pieces. The connections are at times awkward, but on the whole, I believe that the sum of the evidence and mutual reinforcement and clarifications developed in this project are worthwhile. I have sometimes wondered about the choice of nomenclature, “field of study”. As I look back over this research project, I am beginning to see a fertile garden, one that will require a great deal of pruning and weeding to develop its productive capabilities.

## CHAPTER II

### STATEMENT OF THESIS

The foundational premise of this research is that international law has an impact on relations among nation-states. The second premise is that international legal scholarship and international political scholarship have vast and largely untapped potential for cross-disciplinary collaboration. The goal of this research is to examine these two premises and advance our understanding of how international law impacts international relations and where potential collaboration exists. This goal is however much too broad and complex to be translated into a single, coherent research program. I have broken it down into categories based upon my judgment concerning resources, interests, and consistency within the research program. Existing literature and research, available data sets, current events and ancillary resources along with planning for a useful and coherent final product were determining factors in the scope and organization of this project.

The categories for inquiry settle on seven areas of crossover between international law and politics supported by several case studies and two primary topics for empirical analyses. Norms, sovereignty, human rights, jurisdiction, compliance, treaties and agreements, and institutions are the seven categories. The empirical research focuses on the Law of the Sea Conferences and the International Court of Justice (ICJ). Other institutions and events analyzed in comparative terms that correspond to the topic areas include the European Court of Justice (ECJ), Belgian National Courts, and the

International Criminal Court (ICC). Each category and corresponding analysis poses a particular set of questions. Some of those questions are addressed theoretically with an emphasis on synthesizing legal and political theory. Other questions extend to testable hypotheses and empirical analyses. The questions and issues raised in the context of this project fall into three main groups that represent the theses that structure the work.

- 1) International law has traditionally served as an instrument of powerful nations to maintain the status quo, but is increasingly being used as an alternative or counterbalance to power politics,
- 2) State sovereignty has been one of the fundamental principles in international law, but transnational and universal conceptions and non-state actors are gaining influence; however, the gains are primarily in the areas of institutional and procedural cooperation and dispute settlement, but limited in the areas of human rights and the use of force,
- 3) Proliferation of international legal regimes and institutions is increasing the usage, legitimacy and effectiveness of international law in the international political arena.

The emphasis here will be on the progression of international legal influence on politics, but I will not attempt to provide a final conclusion to the big quantitative and qualitative question of whether international law has a meaningful influence on international politics. That remains a subjective judgment open to individual interpretations. International law in many ways operates under the radar screen as power politics, liberal institutionalism and transnational interdependence define the struggle for a dominant explanation in international political affairs. This research characterizes international law as a dynamic and fluid factor that seeps into nearly every debate occurring on the international stage. Sometimes aligned with the interests of power and at other times championing the causes of the weak, international law is a versatile

participant in international politics, and has a strong degree of intellectual independence and broad diversity of expression. This project highlights this diverse nature of international law more than attempting to explain its immense complexity. In the end, the modest desire of this work is to develop useful cross-disciplinary research between international law and international politics and to illustrate several of these connections with theoretical and empirical analyses.

## CHAPTER III

### BASICS OF INTERNATIONAL LAW AND POLITICS

#### Introduction

It is necessary to describe a basic framework and vocabulary that informs the topics discussed in any research project. It is not the intent of this chapter to provide an exhaustive history of international relations theory or principles of international law or even to explore these issues in depth. Key relevant theories and principles are addressed in the course of the research project. It is, however, useful to lay out general parameters that organize and direct the research and provide reference points for subsequent discussions.

#### International Politics Theory

International relations theory is dominated by two alternative views of international politics: realism and liberalism. This dichotomy of views is a convenient and pervasive way to look at competing theories about the nature of relations among states, but it is also a gross over-simplification of world realities and academic scholarship. This work recognizes this fact, and attempts to provide a broader set of theoretical assumptions through the review of literature and applications of theory throughout the project. However, the contrast of realism and liberalism as competing paradigms is a useful starting point for understanding the basic foundations of this research and collaborative research between international law and politics in general.

In another over simplification yet useful formulation, the contrast between realism and liberalism can be drawn between their views of human nature and assumptions about the predominate forces in the international system. Realism poses that humans are essentially selfish and thirsty for power. Self-preservation and security dominate human concerns and the drive to attain and maintain power is overarching in all social interactions. Translated into terms of world politics, the acquisition and maintenance of power dominate the concerns of states and interstate relations. In his seminal book, Politics Among Nations, Hans Morgenthau outlines the primary tenets he derives from this basic assumption. Characterizing international politics as a struggle for power, Morgenthau posits that objective laws about human nature underlie political actions and that through reason and observation these laws can be ascertained. The primary concern of politics derived from human nature is that self-interests are defined in terms of power, and that this concern is universal. His theory further proposes that state actions are distinct from the individual and that moral prescriptions cannot be attached to state actions. In particular, the moral stance of any nation cannot be equated to universal moral laws but are subject to specific circumstances and the concerns of self-preservation and power. The political sphere is autonomous, and distinctly different from any other human aspirations or endeavors (Morgenthau 1993 ed., 4-16).

Morgenthau did not invent realism or all the concepts that he used but he did successfully develop theory incorporating existing ideas espoused by political philosophers from Thucydides and Machiavelli to the modern era into a coherent argument that has dominated much of 20<sup>th</sup> Century international politics and profoundly influenced international relations scholarship. For the purposes of this project, realism



establishes a theoretical basis for analyzing the relationship between power and law in determining state behaviors and interstate relations. Modifications to Morgenthau's classical realism such as Kenneth Waltz's structural realism and subsequent neorealist perspectives are examined in the topics sections and literature reviews, but as a foundational concept, Morgenthau's propositions set up the parameters for identifying power as the determinant of political action.

Liberalism cannot be as neatly defined in a single illustration as realism. There is no definitive work such as Morgenthau's depiction of classical realism nor is there one term or concept that encapsulates liberalism in the way "power" does the realist perspective. Where realism focuses on power in terms of coercive force, liberalism focuses on several interrelated ideas such as economic development, free trade, cooperation and integration. At the level of human nature, liberalism is much less pessimistic ascribing to humans the desire to share, help and rely on one another. Liberalism is much more amenable to institutions and cooperation. While recognizing nation states and political structures, liberalism does not hold tightly to absolute sovereignty for the state accepting the legitimate role of non-state and transnational actors in the international system. On the issue of morality, liberalism does not make the realist distinction between state actions and universal moral principles. The liberal view of international relations paints a much different picture of reality than realism with trade, development, institutions for peace and cooperation, economic and political integration, and democratic reform replacing the tactics and strategies of power politics. (Kegley and Wittkopf 2004)

Applying these two highly summarized explanations of competing visions of international politics, it is a straightforward process of dissecting international law along lines that correspond to each view. The bedrock principle of state sovereignty in international law relates closely to a realist perspective on political actors. The universal moral principles often cited in human rights law are more aligned with liberal views, and so forth. These types of distinctions albeit at a more refined level are used throughout this work for the purpose of establishing contrasting explanations of states behavior toward international law.

Another theoretical perspective that is utilized in conjunction with realism and liberalism in this work is the constructivist approach. It is used in particular to provide a framework for analysis in the case study of the European Court of Justice. Various constructivist views and proponents are discussed in the literature review and theory formations sections of succeeding chapters, but a brief mention is appropriate at this point. The constructivist perspective contributes to understanding international relations beyond the realist /liberal distinction by highlighting the socialization of international politics. Constructivists argue that political interactions and relationships are social constructions that are learned and can be analyzed from the point of view of origins and evolution of social circumstances and structures. This view emphasizes factors such as membership, prestige, reputation, etc, to describe and explain political behaviors and the development of international institutions. It is a useful theory for analyzing incentives and motivations stemming from the social environment rather than focusing exclusively on power and cooperative benefits. The constructivists' viewpoint does not have a direct

correlate in international law, but is closely associated with several aspects of law such as norms and customs that are prevalent in legal constructs of society. (Burgstaller 2005)

### International Law Principles

International law differs from the domestic laws that govern our lives on a daily basis. Laws instituted by constituted governments at the national and provincial levels operate on a system based in legitimate government authority. Whether it is constitutional or legislative law, laws are understood to derive from the law-making powers granted to government entities. There is no central authority at the international level, and no international law-making body. This state of political anarchy as defined in international relations terms differentiates international law and poses the question of whether international law exists at all. Without a governing law-making authority, international law must locate its origins and legitimacy in a different place.

Just as international relations theory can be conveniently bifurcated into the realist and liberal views, international law is grounded in two contrasting views: universalism and positivism. The universal view derives its origins in the Roman laws of *jus gentium* and *jus naturale*. *Jus gentium* is the conception of laws that are common to all people everywhere and serve as the basis for laws among nations. These are politically based yet universal and served as the basis for Roman imperialism. Universal but derived from nature instead of politics, *jus naturale* posits that certain laws at the level of the human being are universally common (Wolfe 2002). The universal view of international law is predominant in the area of human rights and encompasses additional views such as reason, morality and religion that make similar universal claims.

The positivist view of international law recognizes the role of political authority in creating international law. Laws that function to manage society work out differences and organize activities in particular circumstances and environments are derived from political authority and obligations rather than universal laws (Wolfe 2002, 2).

Complicating this distinction between universal and positivist law is the differentiation of voluntary and positive law that identifies the nature of obligation (Damrosch et al 2001).

Customary law as defined in the past resolutions of issues by states is voluntary in the sense that states accepted or rejected such outcomes by their will to action. However, as practices evolve into customs, states become obliged to adhere to those practices. Positive international law is voluntary in origin becoming compulsory through multinational consensus, but in all cases derived from states behaviors. Rather than recognizing one central political authority, international law derives its authority from various political sources paramount of which are nation states and their political relationships. This concept of deriving international law from the practices of sovereign nation states is the primary source of modern public international law. "States practices" is a form of customary international law that examines the established patterns of interactions between states and determines the generally agreed upon practices concerning any given issue. It is important to note here that international law from both the universal and positivist views recognizes other sources such as treaties, juris prudence and legal scholarship.

In the charter of the International Court of Justice, five sources of international law are cited. There is no unanimous agreement that this list is accurate or complete, but

it does represent a general consensus on original sources and aspects of international law.

The sources include:

- a) international treaties and conventions;
- b) international custom;
- c) general principles of laws recognized by civilized nations;
- d) judicial decisions and the teachings of the most highly qualified publicists
- e) the principles of equity (*ex aequo et bono*) if agreed upon by the parties<sup>1</sup>

Most notably absent from the list are non-governmental organizations and other non-state actors influential in certain interests areas of international law such as trade or the environment. Their role in creating international law is however contested with their influence often channeled through traditional sources such as international agreements, inter-governmental organizations and courts.

Treaties are the expressed will of nations documented in written agreements. While treaty law is a long standing aspect of international law it is not necessarily the highest authority. Customary rules that conflict with treaties and agreements can be regarded superior in certain cases. The rule, specific prevails over the general, is the accepted formula for deciding such cases (Damrosch et al 2001, 109). Additionally, the idea that a specific agreement or essentially a contract between consenting parties can be interpreted as general international law is debatable. The stronger case for treaty as law is based on evidence of states practices that is reflected in written agreements.

Custom as previously noted is based in state practice and tradition, but it leaves open many questions concerning the origin of international law. Identifying and

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<sup>1</sup> The International Court of Justice, Official Publication of the United Nations, pp. 9-10.

quantifying the practices of states is a challenge. It is difficult to determine when custom is established and when it changes. Applying custom to nations that have persistently resisted a particular practice, and weighting the influence of certain states including questions about the size and power of certain states or the importance of certain practices to particular states are factors in determining evidence for customary practices (Damrosch et al 2001, 59-62). The question of state influence on development of customary law is especially relevant to this study in examining the use of international law in power politics.

General principles of international law are concepts grouped by the characteristics of universal evidence for their existence. While not always universally accepted, these principles are universal in nature and often derived from moral or rational arguments with the exception of municipal law. The categories of general principles include:

- 1) The principles of municipal law “recognized by civilized nations”. (e.g. administrative law, jurists)
- 2) General principles of law “derived from the specific nature of the international community”. (e.g. states sovereignty)
- 3) Principles “intrinsic to the idea of law and basic to all legal systems”. (e.g. cannot judge in one’s own trial)
- 4) Principles “valid through all kinds of societies in relationships of hierarchy and co-ordination”. (e.g. appeals, legitimate governmental authority)
- 5) Principles of justice founded on “the very nature of man as a rational and social being”.<sup>2</sup> (e.g. self defense, property)

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<sup>2</sup> Damrosch et al 2001, Oscar Schachter, International Law in Theory and Practice, p. 118.

The principle of municipal law is based on consensus in national laws. The one qualifier is “civilized nations” and their systems of law. The idea here is that laws consistent across nearly all nations in their domestic or municipal law are valid at the international level. If everyone agrees, then the law must be right. Because municipal rules are not usually applicable to the types of issues that evolve between states, there is normally no existing customary international law. General principles help apply municipal laws in international situations such as bureaucratic rules and administrative roles.

The remaining principles share a reliance on logic, philosophy or definitional views of international law. They convey an idea that certain concepts are intrinsic to very nature of international law. Although often associated with moral prescriptions and human rights, these principles deal with a variety of issues that are foundational to human social interactions. Concepts of justice and fairness are interlaced with legal processes such as impartial trials and selection of judges. This also encompasses equity, the fifth component on the International Court of Justice’s list of sources.

Judicial decisions or *opinio juris* is the remaining source identified by the ICJ. This idea is closely related to precedent as used in legal decisions rendered in national court cases. The international judicial system does not have a hierarchy of courts or a firm notion of precedent as binding, but prior decisions of courts with competent jurisdiction on matters of international law are legitimate sources of international law. Often *opinio juris* is related to customary law as courts attempt to identify states practices in making decisions and thus help establish practices through a rigorous review. In addition to courts, publicists or scholars also contribute to international law by

performing a similar function of identifying and positing customary law. Publicists may also initiate modifications or expansion of international law through their writings, arguments and evidences. Together, judges and publicists do much of the work of interpreting and in some cases establishing international law.

Court opinions and scholarly writings are closely associated with the legalist view of international law. Simply put, the legalist view contends that the force of law resides at least substantially in its internal logic and reasoning. Legal rationale is persuasive and effective because it is both rigorous and intentional. A well-reasoned legal decision, argument or opinion can be convincing and authoritative on its merits and persuasiveness. The legalist view helps delineate a finer line between universalism and positivism in international law in much the same way that constructivism is an alternative to the realism and liberalism dichotomy in political theory. Legalism and constructivism give us additional ways to describe the complexity of legal and political interactions. They are both competing and complementary views to the dominant theoretical framework by providing explanations that can be contradictory or simply more nuanced.

### Conclusions

The origins of international law inform about the uses of international law, and in the realm of international politics, questions about universal and positivist views frequently arise. Expressed in different institutional settings and under different rules, international politics and law are based on very similar foundations. Christian Reus-Smit (2004), makes the case that calls for common research programs between law and politics have gone unheeded because of a reluctance from both sides to rethink their assumptions



or consider interrelations. He advocates a constructivist approach to overcoming these barriers emphasizing legitimacy through “constitutive association”. International law serves as the primary “feedback” on politics shaping discourse and structuring institutions (2004, 5). While my research does not adopt a strictly constructivist approach, Reus-Smit’s observations are useful in pointing out the functional interaction of politics and law. Viewing the interaction of law and politics as a process of informing and understanding social constructions highlights the necessity of utilizing both disciplines to more fully describe the world society. This type of dialogue between international law and politics will be a recurring theme of this research explored through various theoretical and methodological approaches. The sharing of ideas and descriptions of social interactions expressed from both perspectives are the starting points of each inquiry. Reus-Smit (2004, 44) argues that international law is more than just the interests of powerful states in codified form, or rational outcomes of working out problems through international cooperation suggesting that the realist and liberal dichotomy is inadequate to describe the relationship between law and politics. He chooses to focus on the institutional complexity of international law and historical contingencies integrated into its construction and development. He acknowledges that this perspective creates a trade-off between parsimony and completeness.

I also recognize this trade-off and have attempted to strike a balance in this work. There are chapters that explore theoretical conceptions in much more detail and breadth while others minimize complexity by utilizing simplified classifications and contrasts. These trade-offs were sometimes made to facilitate empirical analysis and sometimes based on the absence of source materials. They were however made with intention in

each case. The research contribution this work makes is at the same time general and specific, acknowledging the complexity of reality, and the need to simplify useful explanations. It is also important to note that the research design used in this work does not have one unifying method or overarching systematic organization. There is to my knowledge no program that attempts to interlace politics and law into a model research design.

The goal of this work is to bring these pieces into a coherent model for comparing the disciplines and understanding the underlying realities they both intend to explain. I have attempted to keep issues such as levels of analysis and variable selection consistent and simple. However, it is necessary to recognize that the decision to simplify poses certain risks. For example, the two main subjects of inquiry in this study, interstate relations and international law, function on multiple levels. For the purposes of this research, international law is generally treated as a system level variable. Thus the thesis statement, international law has an impact on interstate relations. International law can also be viewed at the state and dyadic level. International law influences state decisions, but it is also shaped and influenced by interstate relations. This is the basic premise of customary international law. These distinctions become important in designing empirical and analytical hypotheses tests, but they are also relevant to theoretical discussions and case study analyses. The uses and arrangements of such distinctions are intentional in this work and I have tried to make them apparent if not explicit in each case. Using the theoretical parameters discussed in this chapter, the following table identifies how specific issues addressed throughout the work are organized.

<b>INTERNATIONAL POLITICS</b>				
	<b>Realism</b>		<b>Liberalism</b>	
<u>Law</u>	<u>Politics</u>		<u>Law</u>	<u>Politics</u>
States Practices	State Sovereignty	Treaty	Intergovernmental Organizations	<b>Positivism</b>
				<b>INTERNATIONAL LAW</b>
<u>Law</u>	<u>Politics</u>		<u>Law</u>	<u>Politics</u>
Self-defense	Self-help	Human Rights	Integration	<b>Universalism</b>

Figure 1. **Matrix of Classifications and Comparisons**

Categorizations are by nature exclusive and over-simplified. This scheme is no exception, but the purpose is not to encompass all issues relevant to an inquiry into the relationships between international law and politics. This template is a basic organization of representative concepts according to their relationships to the primary theoretical divisions in both disciplines. Sometimes Positivism in law is identified with political Realism. They have a shared emphasis on the state with similar recognition of states practices and state sovereignty, but legal positivism also shares liberal perspectives as well. Intergovernmental cooperation (even relinquishing of some sovereignty, i.e. European Union) through organizations and recognition of treaty law as a primary source are positivist views aligned with Liberal tenets. Similarly, legal Universalism is often associated with political Liberalism especially in the area of human rights and global economic and political integration. However, international law also recognizes a universal principle of self-defense. This view aligns with the Realist notion of self-help. Internal division in the Universalist views such as the debate between human rights and

intervention in sovereign states' internal affairs, or Positivist debates over the standing of intergovernmental organizations in creating law versus states practices are informed by political delineations. The Realist/Universalist view values the autonomy of the state recognizing a universal principle of self-defense and self-help. The Liberal/Universalist position weighs human rights and interdependence more heavily. The Liberal/Positivist view would emphasize cooperative efforts dependent on state actions such as Treaty agreements or the United Nations. By contrast, the Realist/Positivist view focuses on state actions in self-interest. Figure 1 can be useful to illustrate other contrasts that will be discussed in this paper such as the issue of human rights treaties in Chapter VI. How can the Declaration of Human Rights treaty be universal (morally applicable to everyone) and at the same time, dependent on states to create and enforce it? This tension within Liberalism between Positivist and Universalist views is outlined in Figure 1. These categories are not the exclusive means of identification and do not define every relationship examined in this work. However, they do offer a useful and convenient way to organize major themes and thus contribute to the research design.

## CHAPTER IV

### NORMS

#### Introduction

This chapter focuses on the inter-relation of international norms and international law, and their impact on inter-state conflicts. The concept of norms has produced a broad selection of literature in law and politics that bring together fundamental questions relevant to both disciplines. The existing literature on this topic must be drawn from a variety of sources in order to examine the relationships between conflict studies involving analyses of norms and the perspective of international law on conflict and behavioral expectations. Scholarly studies that investigate the explicit relationship between international law and international norms in international politics are not as prevalent. Therefore, this work has potential for constructing useful models in studying the necessary intersection of international law and international political behaviors. The literature review reveals a number of parallel tracks of inquiry within the field of international relations and norms studies, and international legal scholarship. This work examines prominent studies in norms research, followed by a brief discussion of relationships to both political theory and international law, and concludes with examples of research that integrate the two concepts.

## Literature Review

The foundations for viewing norms as a systemic factor in international relations take a variety of theoretical perspectives. Many of the international relations studies focus on conflict and war among nations. Kegley and Raymond have produced individually and collaboratively a large body of literature on the topic of international norms in conflict situations. In the book, *When Trust Breaks Down Alliance Norms and World Politics*, they describe the role of alliance norms in establishing trusting relationships among nations. This trust is crucial for maintaining international order. They see trust developed through faithful compliance to alliance treaties and promissory obligations as a primary factor in global security. Kegley and Raymond test the connection between the strength of alliance norms and the occurrence and intensity of wars finding a weak association for central powers and stronger association for great powers. They conclude that the alliance commitment norm is likely an additive influence that is one aspect in understanding the onset of wars.

In an earlier journal article (Kegley and Raymond 1981), they assert from bivariate analyses of data 1820-1964 that only a weak association could be found between norms of dispute settlement and initiation of major power wars and the use of force short of war. A stronger association exists between an arbitration norm and the frequency in which major powers resort to arbitration. In another work, they further examine the influence of norms on the use of force short of war. (Kegley and Raymond 1986) Comparing two historical systems: the Metternichean Concert (1816-1848) and European Unification (1849-1870), they find that the capacity to restrain war depends on consensus by the great powers, attention paid to norm formation, and the creation of a

meaningful security regime. They note that the occurrences of these conditions are rare. In addition, they assert that a stable rank order of states and parity among major states tends to support friendly settlements to disputes (Raymond and Kegley 1985), and regimes that share a democratic domestic political culture (Vasquez 2000) will often allow mediation to settle disputed issues (Raymond 1996).

Mark Zacher (2001) moves the subject of international norms in another useful direction. He examines the relationship between international boundaries disputes, the use of force and territorial integrity norms. He provides a history by region since 1945 of the evolution of the territorial integrity norm, and descriptive tables of interstate territorial wars and aggressions from 1648-2000. Zacher does not use statistical analyses in making his assertions but identifies from the historical evidence economic development, democratic norms and other liberal explanations for major powers to resist territorial revisions and the associated risks of a major war. He asserts that borders are not frozen by this normative regime but states are proscribed from using force to alter the territorial status quo.

Evan Luard (1988) develops a broad theory that provides a definition of norms and how they operate in an international political system to reduce levels of conflict. Although the absence of a central force makes a significant difference, Luard still believes that the observed behavior of nations often mirrors that of individuals in a society. By examining the formation of personal norms, he develops a typology of norms for national interactions. Practices or agreed upon forms of interactions between two or more individuals or communities relates directly to bilateral and multilateral agreements between nations. These become set procedures that the parties rely on for stable and

mutually beneficial interactions. Conventions are more general understandings and expectations that exist between members of a community. In international politics, these conventions take the form of international laws and custom. Finally, morality represents a personal code of conduct often rooted in deep convictions and a fundamental sense of the nature of social interaction. International morality consists of sentiments in the international society that evoke strong reactions of protest, revulsion and rebuke from the members when violated such as genocide, unprovoked aggression and human rights abuses. Luard views sovereign states as the collected individuals that constitute it and therefore subject to many of the same motives and actions concerning norms of conduct. However, Luard also recognizes that domestic norms do not necessarily conform to international norms. The international system is a distinct community that requires only the common interest of states in reducing conflict among its members.

While Luard focuses on the behavioral elements of state actions in explaining the nature of norms, Gregory Raymond (1997) argues that collective expectations must be taken into account for understanding and defining international norms. It is not only the behaviors and actions of states that identify norms, but the obligations perceived by the state. The failure to act in compliance with a norm does not mean that a state rejects the existence of that norm. States may feel an obligation to certain norms but fail to act accordingly for any number of reasons. It is therefore important to measure norms by means other than just compliance or patterns of behavior. This distinction is crucial in designing useful empirical tests for the effects produced by norms because norms identified only by patterns of behavior will always be reflected in measurements of those behaviors. It is a tautological argument to assert that states behave in patterns consistent



with norms established by their patterns of behavior. Nevertheless, it is difficult to create criteria for defining or identifying norms other than behavior. How can we ascertain that a particular state feels an obligation to a norm? Raymond suggests that looking at the natural flow of behavioral events allowing for fluctuations in the timing between events and responses will reveal cycles that better describe the interactions. He advocates a “skeptical tolerance” for empirical examination that takes into account the true nature of norm formation and decay. This approach does not build confidence in the prospects for meaningful statistical analyses of the interplay between norms and actions or events, but it does demonstrate the methodological challenge faced by a norm based research program.

Luard gives us another useful conception of norms that helps alleviate this problem. He theorizes that opinion must reflect norms in order for the norms to be effective and opinion to be powerful. Only when norms are widely known and deeply instilled will they influence behavior in times of crises. (Luard 1988, 281-283)

Measurements of norms should focus on mechanisms that communicate and reinforce norms in the general opinions of states actors and even domestic constituents. If a norm is widely known and deeply held, it should not be hard to identify. A second theoretical contribution is the idea that norms must be disseminated and inculcated into society to become effective inferring that there is a time lag between the initiation of a norm and its effectiveness at influencing behavior.

Raymond (1997) also adds another dimension to this aspect of international norm theory. He emphasizes the formation and decay cycle of norms reinforcing the idea that norms do not come and go quickly. There are periods of formation when norms will have

greater and lesser degrees of success at regulating behavior until the norm gets set in society. Either the occurrence of a novel situation or gradual changes will render an old norm irrelevant or ineffective represented by a period of decay and the initiation of a new norm.

Luard also makes an assertion about international law that aptly introduces the discussion of international law theory. He believes that international law does not adapt to change quickly enough to be truly effective for establishing norms. Therefore, international law is outmoded and is not closely related to current patterns of national conduct. This view presents a potential problem for this research project when the project asserts for example that international law conferences and treaties are norm initiating or codifying events. However, this research takes into account that norms require a long period of time to become influential and that conferences and treaties are merely signals of fluctuations or modifications in long standing normative orders and not necessarily the causal event.

There is a vast body of material concerning the development of international law and norms. There are, however, relatively few articles that attempt to bring international law and international relations together into a coherent set of principles and theories around the issue of norms. Beth A. Simmons is one scholar that has written about this specific topic. Simmons (2001) argues that more attention should be paid to collaborative efforts that yield theoretical and empirical advancements on the subjects of law and politics such as state compliance to international law. Simmons (1999) attributes the neglect of law in international relations theory to the dominance of realism and its focus on power. She examines Latin American cases that submit territorial disputes to third-

party arbitration for settlement and argues that realist theory does not adequately explain their behavior. Her cases include dyads with no disputes, disputes without third-party intervention, third-party suggested but not concluded, third-party rulings with compliance and without compliance. Simmons determines that this quasi-legal method is “a useful tool in overcoming domestic objectors and securing settlement once and for all.”

(Simmons 1999, 226)

As Beth Simmons (2001) notes, the realist paradigm has dominated international relations theory in the twentieth century and it has had a stifling effect on the development of alternative perspectives such as international order based on laws as norms. Hans J. Morgenthau (1993, 268) argues that international law is problematic because the international system is decentralized and lacks sufficient means of interpretation and enforcement. He says, “considerations of power rather than law determine compliance and enforcement.” This is a predictable view from the realist theorist who also asserts that all international politics are a struggle for power. In his six principles of political realism, Morgenthau expounds on several other ideas that are problematic for international law. He asserts that political interests are always defined in terms of power and therefore set apart from spheres such as ethics and other factors important to the concept of law. Political realism makes a distinction between what is desirable and what is possible while laws are fundamentally a set of standards and expectations. Realism denies that universal moral principles can be applied to the actions of states and therefore rejects one of the foundations of law (Morgenthau 1993, 4-26). Morgenthau recognizes in Western domestic societies that morals, mores and laws function as standards for conduct. He argues, however, that international morality

operates at a different level and that one can only measure the effectiveness of norms for controlling behaviors. He concludes that international treaties generally enforce themselves because of their mutually beneficial nature, yet when compliance with international law has a “direct bearing upon the relative power of the nations concerned” (Morgenthau 1993, 268), then the matter will be decided on the basis of a struggle for power.

The realist paradigm does pose a potentially damaging criticism of international law based on logic. If the international system dictates that sovereign states must willfully submit to rules of conduct, then why would any state comply with rules that do not serve its national interests? The realist paradigm qualifies this question further by defining interests in terms of the struggle for power. The answer could be that states do not always act out of national interests or that states define national interests in terms other than the struggle for power. The latter assertion if correct would seriously undermine realism and indicate that a different paradigm is necessary to truly explain international relations. Vasquez makes the claim that the realist paradigm should be displaced in *The Power of Power Politics*. Of all his critiques, the most salient to this research project states that the realist paradigm cannot explain the finding of zones of peace such as democratic liberalism. This finding challenges the realist assertion that international politics is always engaged in a struggle for power, and instead supports the predicted outcomes of the competing liberal paradigm. (Vasquez 1998) If other factors such as international normative systems explain certain zones of peace, then legal constructs of world order and issue politics paradigms could begin to usurp the dominance of the realist paradigm.

Another fundamental theory of international law developed by the early legal theorist Hugo Grotius is grounded in the idea that states forge agreements through mutual consent for mutual advantages. (Vasquez 1996)<sup>3</sup> Therefore, international law represents the long-term advantages of the collective society of states. It will be resistant to change in that international law requires consent to change and it cannot sacrifice the aggregate good for individual or short-term advantages. Since laws are made for advantages and by consent of the participants that recognize those collective advantages, they should only change in the interest of greater advantages as realized by the whole society. Members will only realize the advantages of the laws common to nations by mutually agreeing to sacrifice some individual advantages. Underpinning Grotius's theory of international law is a rationalist approach to natural law. He believes that promises given must be kept and that this is a natural law, *jus naturale*, derived from reason.

Grotius also recognizes a secondary approach to international law grounded in state practices, *jus gentium*. This view accepts that international law can also be customary developing out of the conduct and will of nations. (Damrosch et al 2001) Emerich de Vattel is the most prominent theorist on the early development of a positivist international law advocating in his writing for elevating the wills of nations above any abstract natural law.

One interesting evolution in international law theory that advances beyond the basic ideas of natural or universal law and positivist law is the concept of policy-oriented international law (also known as *The New Haven School* beginning at Yale Law School in the 1940's). This view espoused by scholars such as Harold Lasswell and Myres

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<sup>3</sup> Reprint from *The Law of War and Peace*, translated by Francis W. Kelsey in 1925.

McDougal recognizes that the process of decision making by which international actors work out common interests and devise effective controls on behavior is a central component of international law. (Damrosch et al 2001) While less formal than positivist rules, this conceptualization of international law does a better job of describing the processes that actually govern the workings of international law. The policy-oriented approach to international law more closely describes the interplay between international law and the development of international norms. The processes of international law form not only rules but also expectations that impact decision makers in world politics. This perspective can be linked to Luard's views to see how international law interacts with expectations that become norms instilled in the opinions of decision makers.

From an international law approach, the collaboration of politics and law are vital for the ultimate effectiveness and structures of international legal institutions. Anne-Marie Slaughter (1993) addresses the inter-dependence of international law and politics arguing that whether or not international relations theorists view international law as relevant to political outcomes, both disciplines share a common set of assumptions about interstate relations and rules of behavior. International law and international relations have an excellent opportunity to create and sustain collaboration on the issues core to both disciplines. In 1998, Slaughter goes further advocating a reconceptualization of international law enhanced by a thorough dialogue with international relations theory and research.<sup>4</sup> Robert Beck (1995) makes a similar contention concerning the inter-relationships between international law and politics. Beck argues that it is unfortunate that disciplines studying the same world phenomena do not collaborate and share their

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<sup>4</sup> Anne-Marie Slaughter, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, *The American Journal of International Law*, July, 1998, (92 A.J.I.L. 367).

respective vantage points with each other. He asserts that political scientist have largely ignored legal research because they consider it irrelevant and epiphenomenal.

Conversely, international lawyers have ignored international political research and its findings.<sup>5</sup> International law focuses on legal scholarship and precedence as sources for law neglecting the application of political science research and theory in many cases. Legal procedures can be rigid to the point of being insulated from alternative approaches. This work project attempts to address the opportunity for collaboration suggested by Slaughter and Beck by synthesizing various theoretical approaches. The concept of norms provides an excellent opportunity to merge the disciplines.

There are numerous perspectives on international law from legal as well as political scholarship. This chapter has summarized a few of the ideas that represent the core of my theoretical assumptions concerning the concept of norms. They include a range of approaches including natural law, realism, liberalism, and constructivism as well as ideas that focus on trust, community, and raising and resolving issues. The common theme that emerges from these ideas is the basic assertion that international law exists for the self-interests of states. The theory used to direct this research project expands on this fundamental idea by acknowledging the great diversity of self-interests and the complexity of customary international law, and anticipating the need for a more progressive codification and institutionalization of international law. This includes an expanded role for international courts such as the ICJ, criminal tribunals and the newly formed International Criminal Court. This concept also applies to more comprehensive multi-national treaties and agreements such as the Law of the Sea and the World Trade

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<sup>5</sup> Robert J. Beck, *International Law and International Relations: The Prospects of Interdisciplinary Collaboration*, *Journal of International Legal Studies*, Summer, 1995, (1 J. Int'l Legal Stud. 119).

Organization. However, the move away from basic realist assumptions about world politics is not easy to make. There are few quantitative studies to refute the main tenets of realism in regards to state autonomy and through the competing claims of laws and norms.

Stephen Kocs (1994) attempts to do this by opposing realist and neo-realist interpretations arguing that power lacks the logical clarity that international legal norms possess for explaining structure in the international system. Even states interacting in an anarchic system (no central authority) will restrain behavior based on mutually accepted guidelines when those guidelines are fundamentally established to protect the best interests of the states. Kocs says that, “[i]n upholding the law, therefore, states secure the conditions for their own continued existence” (Kocs 1994, 540), and “international legal norms *embody* the self-interests of states”. This view stands in stark contrast to the neo-realist idea espoused by Kenneth Waltz that anarchy will produce a self-help system ordered by power distribution and security threats. Kocs admits that power is important in the international system but identifies it as a secondary effect to international law.

Alexander Wendt argues that “[a]ll theories of international relations are based on social theories of the relationship between agency, process, and social structure.”<sup>6</sup> His constructivist approach to organizing the system level analyses of international politics focuses on identities, interests, and transformations in structure that occur as a result of processes such as learning and socialization. This approach seeks to explain how collective identities and shared norms are socially constructed by relationships and interactions among nations. Wendt (1992, 413) argues that structure translates into action

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<sup>6</sup> Alexander Wendt, “Anarchy is what states make of it: the social construction of power politics”, *International Organization* 46, 2, Spring 1992, pp. 391-422.



only through the inter-subjective processes of social construction in the international system where actual practices and perceptions become important factors. In this manner, international law can be viewed as a socially constructed institution based upon these interactions between states.

The approaches derived from the existing literature on norms help develop a framework for understanding how international relations and international law can integrate research programs. Norms research in both disciplines employ psychological and constructivist theories for explaining norm formation and compliance. There is a theoretical connection between certain scholarship such as Wendt and Luard work on law abidance and reputation. Other theoretical associations can be made between Simmons work on third party arbitration as a substitute for realist perspectives and Kocs structural arguments for international legal prescriptions over realist policies.

A different approach to understanding world politics applicable to the role of international law is advocated by John Vasquez and Richard Mansbach (1981) and focuses on raising and resolving issues between states. This perspective on world politics is utilized by Paul Hensel and Sara McLaughlin Mitchell (2001) argue that states do not pursue one overarching foreign policy but contend over many issues that vary in degrees of importance. They assert that salience of issues is very important and depends on many factors from economic valuations to intangibles such as prestige.

In order to bring together these various theoretical approaches into a coherent theory for the way international law and politics interact and the way law functions in the establishment of norms, it is important to first define the fundamental principles on which international law is determined. Oscar Schachter describes more fully than the previous

chapter the Doctrine of Sources as the foundation for positivist international law. The positivist view of international law replaces morality and natural reason with the positive science of observing political will and methods exercised by sovereign States. It has been the more dominant view of international law since World War II. This doctrine similar to the list outlined in the charter of the ICJ mentioned earlier identifies three sources for international law as rules accepted by the international community through 1) custom, 2) agreement or 3) general principles common to the major legal systems of the world (Damrosch et al, 56-59).<sup>7</sup> Customary law is derived from the “general and consistent” practices of states performed out of a sense of legal obligation. Treaties and agreements make law between the participating parties and may produce customary law through wide acceptance and adherence.

General principles are most often used to supplement customary law where appropriate and necessary. As stated earlier, these sources of international law are important to recognize because they describe the interplay of states’ practices and political wills with the creation of rules of law, and the means and processes by which international law is developed. However, Schachter also points out that the positivist interpretation that emphasizes the obligatory nature of international law is challenged by the classical conception of international law as voluntary. In this framework, the consent of sovereign States is a necessary component of all international law undermining the binding nature of states’ practices and *opinio juris* (legal precedent). This debate is evident in international agreements as well, illustrated in the contrast between *pacta sunt*

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<sup>7</sup> Oscar Schachter, International Law, p. 56-59.

*servanda* (always binding) and *clausa rebus sic stantibus* (binding as long as things remain the same) interpretations of the criteria for binding treaties.<sup>8</sup>

The fundamental idea of international law is that sovereign States decide for themselves the rules of the international community. All the theorists reviewed so far to some degree or another also argue that international law is created and maintained for the self-interests of states. The diversity of opinions concerning the nature of self-interests from the power considerations emphasized by realists to constructivist notions about image and social prestige demonstrate the complexity of this seemingly straightforward shared conception of states' attitudes toward international law. It is also helpful to refine the concept of law as a norm-producing factor.

It is useful however to expand on this theory of states' acceptance and adherence to international law by emphasizing the variety of interpretations of self-interests. Customary law based on "general and consistent" state practices is the outcome of long periods of working out competing motivations and interests within the international community. In the international system, states may view interests in terms of power, image, prestige, security, economic advantages, or any number of factors; however, customary law reflects in varying degrees all these competing and sometimes complementary interests in the way situations have been resolved and accepted between states over time just as norms are established through a process often taking a long period of time. Therefore, I believe that customary international law is a conservative and mostly accurate account of the political wills of states, and should be a useful record for studying and understanding political behaviors. As customary law becomes more

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<sup>8</sup> See Kegley and Raymond 1982.

comprehensive and widespread, adherence to law becomes more established as a principal norm in the international community. This aspect of the theoretical development of international law helps to explain international treaties and agreements in terms of dealing with the complexity and conservative nature of customary international law. As Grotius and Luard point out, customary law does not change or adapt quickly because it is based on long established practices and conceptions of mutual interests. Therefore, treaties and agreements become an increasingly useful tool for specifying complex customary law or initiating changes to existing law.

Finally, international law as established in custom and expanded by agreements becomes a primary means for settling disputes and resolving contentious issues between states. This progressive theory is especially applicable after World War II because I believe that a fundamental re-evaluation of existing custom and initiation of new conceptions of international law occurred in the immediate aftermath of the war as reflected in the founding of the United Nations, establishment of the ICJ, convening of the Geneva Conventions, etc. This period also corresponds with the predominance of positivist interpretations of international law. I also contend that the acceleration in change and technological progress in the twentieth century necessitated an expanded role for international law as well as other cooperative institutions and organizations in establishing order and stability in an increasingly interactive and interdependent world. Therefore, much of my empirical research is situated in the period between 1945 and 2005 and attempts to measure the impact of international law on issues such as conflict behaviors, dispute settlements and compliance with treaties and court decisions. The theoretical perspective based on norms permeates many of my analyses and are useful

throughout this work for explaining issues such as delays in compliance and periods of formation.

## CHAPTER V

### SOVEREIGNTY

#### Introduction

Another issue that is particularly relevant to the collaboration between politics and law is sovereignty. Sovereignty is a concept that has many usages and meanings. The initial task for establishing it conceptually in the study of politics and law is defining a political person or entity. The second involves defining a political geography or space in which sovereignty applies. This approach emerges primarily out of associations and connections drawn from a diverse group of political theorists and philosophers. The decision to focus on these two ideas is necessitated by the need to make an indistinct and ubiquitous term like sovereignty more concrete, discreet and usable in this study. The American College Dictionary defines sovereign(ry) as “a group or body of persons or state possessing sovereign authority”. The most definitive description cited is “supreme rank, power or authority (American College Dictionary, 1155).” That sentiment seems to capture the essence of the word. It is like looking to the person or group at the top of the decision making ladder, or seeking out the superior authority. There is a position (highest) and form (authority). The dictionary defines authority as “the right to control, command or determine (84).” These mere definitions of generally used words are not particularly insightful for understanding complex and contested theoretical concepts, but they help establish a context for the language used in conceptualizing sovereignty.

Political and legal theorists struggle with the meanings and applications of those very terms: authority, power, supremacy and body of persons. In the conception of a person (individual or group), the basis exists for law and rights, and in the conception of authority, the basis exists for establishing the domain of politics. It may be as simple to conceptualize as asking who has what authority? There are a myriad of issues that spring from this basic formula. Does authority come from natural, divine or legal right or it is gained through means such as power and force? Consent is at issue in both possibilities. How is sovereignty related to authority and can be it represented by all, more, some or enough authority? Is there a useful distinction to be made between power and authority? What is a sovereign person or state? The questions stack up quickly until it seems that no useful explanation of sovereignty can come from the morass of transecting ideas that emerge.

In political and legal discussions of sovereignty, the focus is primarily on the sovereignty of a nation state. The definitional emphasis on authority and power applies to the conception of a nation state as the absolute authority on all political and legal issues. Flowing from this idea are foundational political and legal constructs such as the prescription against military actions except by a sovereign nation state, and the legal principle of state practice in customary law. In the realm of international politics and law, the nation state is the primary actor and as such sovereign in matters of diplomacy, treaties, and other instruments of international relations. Simon Caney (2005) addresses issues created by sovereignty in terms of authority and power. If state authority is absolute, does it encompass all issues? The comprehensiveness of sovereignty questions the extent to which sovereignty dictates the authority of national governments to address

all issues concerning the state and its citizens or inhabitants. Territoriality is a second issue that arises in defining the place where sovereignty is exercised. If sovereignty is limited to a geographic space or within borders, then international prescriptions against intervention in national affairs and other laws are politically legitimate within the framework of sovereign states. However, comprehensiveness (authority in all areas of social interaction) and territoriality (authority over all social issues in a given space) contradict many of the social and political realities of the world. State sovereignty over all issues and extraterritorial concerns such as universal human rights (discussed in depth in the next section) contradicts prevailing patterns in human interaction such as globalization and trends in legal and political practices such as universalism (also discussed in the next section) and liberal institutionalism. A more refined understanding of sovereignty is necessary to adequately apply the concept to contemporary political and legal discourse. This section looks at the evolution of sovereignty through the writings of prominent theorists and focuses on the conception of sovereignty in terms of political person and space. The foray into classical political theory in the following section may seem tedious but nevertheless important to establish the nuanced description of sovereignty that exists in politics and law today. Many of the connotations we ascribe to sovereignty are taken for granted, but they evolved through a long process of political development.

### Theoretical History

Plato identifies the political person by the exercise of reason. It is a natural right conception of reason where the logic imbedded in the human nature is applied to the



dialectic process of reasoning upwards. The person eliminates logical contradictions and step-by-step arrives at the ideal forms, or ends and purposes naturally existent in reality. While all humans have this capacity, only one class privileged by education or selected by the demonstration of their merit actually get the opportunity to leave the cave of social conventions and enter the light of the intelligible world. These individuals alone are fit to be political rulers. The philosopher king in his natural right role is “the political person” in Plato’s *Republic*. Plato also clearly defines “the political space” as the *polis*. It is the only human aggregation that Plato attempts to conceptualize. The *polis* is synonymous with the Greek city state and it consists of economic, guardian and ruling classes. The classicists view humans as social animals that are not self-sufficient and therefore, the political space must be an economically interdependent social unit. By natural right and the supremacy of reason, the philosopher is the political person and the *polis* is the political space in Plato’s *Republic*. The sovereign is philosopher king and authority is exercised over the entire social structure of the *polis* and is based upon natural right and reason (Bloom 1968).

In Book III of *Politics*, Aristotle takes the reader right to the point on sovereignty. He asks the question, what person or body of people should be sovereign in a city: the people, the rich, the better sort of citizens, the one best, or the tyrant (Barker 1995, 106)? In the next chapter, Aristotle gives the “the scope of affairs in which they [people] should be sovereign, or the powers which they should exercise (1995, 108).” Aristotle succinctly addresses the primary issues raised in this inquiry. Aristotle’s views are characteristically laid out in a systematic fashion. He says that all the candidates for sovereign have problems attached. The poor who Aristotle always relates to the majority would take the

possessions of the wealthy and divide it among themselves if given sovereignty. This would ruin the city and be unjust according to Aristotle. He considers the law as a possible substitute for a sovereign person, but acknowledges that the laws would simply be designed to favor one or the other classes of people. Returning to the alternative persons, Aristotle recognizes that the people at large at least have the advantage of collective wisdom.

Easy identification of the sovereign eludes Aristotle until he considers the grounds for the political person. Aristotle had already posited that the constitution defines who citizens are. The constitution also creates political offices and roles along with descriptions and qualifications. The goal of the constitution is to balance the interests of all for the good of the society and therefore, the constitution holds the key to reconciling the problems raised by different possibilities for sovereign. The “political person” is who the constitution recognizes and ideally, the political person will be a representation of the important factions or classes in society. Then it is clear according to Aristotle that “We have always, however, to remember that rightly constituted laws should be the final sovereign, and that personal authority of any sort should only act in the particular cases which cannot be covered by a general law (Barker 1995, 108).” The political person is defined by the constitution. Therefore, constituted law is sovereign with its authority based in natural right which Aristotle views as the balance or mean that protects the interests of all. Political space can also be interpreted as the group of people under the constitution, although Aristotle thought almost exclusively of the Greek *polis*, and viewed Persians or other barbarians as inconsequential to political philosophy. Aristotle espouses a view that concisely sums up both a political and legal vision of sovereignty.

It is useful to make a brief mention of the Romans concerning views on political person and political space. The political and demographic realities of the Roman Empire significantly changed perspectives on these topics. It also created the foundation of modern conceptions of law. The Roman Empire was vast incorporating many cultures and groups. Persons were increasingly recognized by their affiliation to the empire instead of ethnicity as in Greek city-states. Political space also expanded to include geography and cultural landscapes foreign to the political center. This new conception led emperors like Marcus Aurelius to recognize the entire world as a political space and humanity as political persons. His self-designation as a citizen of the world describes this sentiment. The concept of sovereignty rested in the empire and its broad multicultural political space. Sovereign power while vested in the emperor still depended heavily on the conception of a Roman citizen and the Roman virtue of civic duty.

Another mass social and political upheaval that changed the entire landscape of Western political thought was the rise of Christianity. Its influence carried through the Middle Ages and into the Reformation. Church philosophers like Saint Augustine and Saint Thomas Aquinas established on Christian doctrine the idea of divine sovereignty. Merging Christian theology with Roman civil law, Western politics moved toward a view of sovereignty based upon the divine right of monarchs to rule. Sovereignty resided with God and was handed down to lesser kings and princes who in turn delegated sovereign power to lesser magistrates. Sovereignty and authority was certainly based upon rights and political space was in a sense universalized with God though contextualized within Christendom. Reformed theologian, John Calvin, epitomized the concept of divine sovereignty outside the Roman Catholic Church. He also redefined the political person by

bringing every human face to face with God. The authority of the Church and by extension the civil authorities sanctioned by the Church was challenged. This did not mean that all vestiges of divine right of sovereign disappeared after the Reformation. England retained the argument long after breaking with the Catholic Church.

The modern view of sovereignty applied to the state or civil government is greatly influenced by the views of French jurist and philosopher Jean Bodin. Bodin provides a systematic argument that unites the concepts of ruler and ruled into the argument for a sovereign state. Bodin illustrates the key dilemma of modern state sovereignty by highlighting the necessity of absolute political authority and perpetuity against the restraints that govern that authority. The contradiction between absolutism and rule under law (or rules) of both divine and natural reason origin reflects the tension between sovereign power to govern and good governance. Bodin claims on the one hand that the sovereign is above the law and has the right to impose law on subjects. However, he also says, "... the prince has no power to exceed the laws of nature which God himself, whose image he is, has decreed, he cannot take his subjects' property with just and reasonable cause... natural reason instructs us that the public good must be preferred for the particular..." (Bodin 1955 35) This tension is similar to Machiavelli's view of the Prince who retains sovereign authority while also compelled to remain at one with his subjects. John Hoffman (1998 38) describes the relationship this way, "Bodin identified sovereignty with the power of the political community *as a whole* and not (as in pre-modern conceptions) with this or that component part." "On the one hand, sovereignty has to be limited since it cannot be allowed to jeopardize the unity of ruler and ruled." Bodin's emphasis on unity between ruler and ruled is at the heart of his understanding of

commonwealth and conception of state sovereignty. (Bodin 1955 25) His view attempts to combine political person and space into a single indivisible entity capable of creating law and maintaining perpetual political authority for the society.

Closely associated with Bodin is the Dutch jurist Hugo Grotius. More will be said about Grotius's theories of international law in subsequent chapters, but the focus here is on the conception of sovereignty. Grotius conceives the modern state in ways similar to Bodin especially in terms of state authority in the international realm. Grotius (1994 237) recognizes for example that the right to declare war is essential to state sovereignty. Grotius and Bodin use similar nomenclature to describe the marks of sovereignty or those powers that distinguish the rulers authority over ruled. Grotius and Bodin rely on natural reason for the origin of laws. However, Grotius does not share Bodin's insistence on absolutism and unanimity in sovereign authority. Grotius (1994 225) makes distinctions between political person and space in ways that opens the possibility of multiple political persons and marks or authority in one political space. Sovereignty is divisible in the practical sense that various forms of government create unique sovereign relationships. The prince may exercise sovereignty by the majority principle (the greater part of authority), but that power is not necessarily absolute. Peter Lang in his critical introduction to Grotius's "Commentarius in Theses XI" (Lang 1994 127) explains this distinction between Grotius and Bodin by pointing to Grotius's acceptance of sovereign limitations imposed through contract, oath or natural laws. Grotius also accepts the idea that an assembly rather than a prince may exercise sovereign authority. (1994 129) Grotius allows for political person to be divisible as well as political space. Multiple parties may participate as sovereign persons in the state and sovereign powers are

divisible by contract or constitution within the state. However, Grotius views sovereignty in terms of international law and relations in the conception of a unified state with sovereign authority to wage war and otherwise conduct international affairs.

In Italy, Niccolo Machiavelli and in England, Thomas Hobbes wrote the classic works that lay the foundations for modern political ideas on sovereignty. Machiavelli assembles from his dealings in Florentine politics and study of political history a collection of propositions about the world of politics. He is often described as the founder of raw power politics and his works portray the idea that politics is really only about success in the end. Machiavelli develops in *The Prince* and *The Discourses* among other writings a form of reason concerned exclusively with security for the state (*raison e'tate*). Machiavelli argues that history demonstrates what works in politics is power and also that violence is inevitable. He reasons that the most moral response to the condition of politics is to minimize violence through the use of power. However, power is not always the result of force for the Prince must also understand and win over the people he wishes to rule. When the interests of the people and the Prince are one, the Prince can count on the loyalty of a fierce citizen army and avoid hatred that might lead to revolt. The interest that is of the most mutuality is security and therefore, it must be guarded at all costs (Machiavelli, trans. 1950).

Machiavelli is one of the first theorists to write specifically about the nation-state. His admiration and disdain for the power and influence of unified nations such as France is quite clear. Machiavelli realizes that political space must encompass a certain size area of resources, unified national identity and population in order to maintain security in the world.

Machiavelli also identifies for us the political person. In his writings, the only relevant persons are the Prince and the people. Political rivals, oligarchs, outsiders and any other possible political actors are a threat to the security pact between the Prince and the people. In the Prince, Machiavelli endorses the murder of such interlopers. The political persons that maintain the political power and security in the state are the Prince and the people, and sovereignty rests in the mutuality of interests shared between them. This mutuality of interest based in security must be expanded to include the nation-state as its political space for self-preservation, and international power and status. This view is still prevalent in the modern conception of the state in both law and politics.

Thomas Hobbes describes a world that resembles Machiavelli's violent and contentious description. However, he proposes a different approach to the issue of security. In Hobbes view, humans are in constant fear for their security and the world is embroiled in continuous strife. The commonwealth or state in Hobbes philosophy is like an artificial man consisting of one body and many parts. The purpose of this *Leviathan* or great corporate body is to protect the natural humankind that constitutes its parts. The commonwealth and the people that make it up are one, and all rights and duties of natural humankind are transferred to the state. In this state, a ruler will rise that assumes the sovereign power of the entire body in a compact that in return guarantees the security of all. The power of the commonwealth is based upon the compounded natural strength of all its members along with riches, reputation, nobility, eloquence and form that come out of this union of many into one (Hobbes 1996 ed., 62). Within the limits necessary for the creation of the commonwealth that in its power protects the security of each member, persons have the liberty to carry on their lives as they wish. But this liberty is confined to

those matters dictated by the ruler who in the compact of security must assume all authority in order to maintain that security. In Hobbes, we find that the corporate body (commonwealth or leviathan) is the only political person as individuals cede all political authority to the commonwealth in return for security. The political space is also defined by the body of the commonwealth naturally understood by Hobbes to be the emerging nation-states of Europe such as his England. He does not however articulate nationalism in the way Machiavelli attempts. The sovereign in Hobbes theory is one and the same with the political person and the political space represented as the Leviathan. The sovereign ruler is the embodiment of the commonwealth just as the commonwealth is the artificial body of the union of its natural members. Hobbes says in the introduction of *Leviathan*, “He that is to govern a whole Nation, must read into himself, not this, or that particular man; but Man-kind (Hobbes 1996, 11):”

John Locke followed Hobbes as a prominent English political philosopher. Locke completed his most famous treatises on government on the eve of the English Great Revolution. In the late seventeenth century, debates over religion and monarchy dominated the political life of England and Locke writes many of his political essays such as *An Essay on Toleration* to address the current issues of the times. Locke develops in his various writings a complex understanding of society and the role of government. He begins by imagining humans in the state of nature, and posits that reason would direct human behavior. Therefore, humans would not collect more than could be used because it would spoil, and that people would know certain basic things such as self-defense. Otherwise, humans live in the state of nature without social constraints or connections. However, humans did not remain in the state of nature but chose to bind together



primarily to protect property and the fruits of their labors that they discover can be accumulated. By mutual consent, human associations develop money as a means of accumulating wealth without spoilage. Humans must then enter into a society to protect property and value money and so they choose to make a vow that forms the society. This vow legitimates the formation of a legislature and the making of laws that are intended to perpetuate the interests of all members of society. Locke expands on this general theory of government extensively especially as it relates to England's constitution and representative forms of government, but for our purposes the basic treatise will suffice (Locke 1997 ed.).

Locke appears to put all political authority in the hands of people that must consent in order to create the society. They retain property and other benefits from the state of nature and also the right to withdraw consent. The vow that establishes society and legitimates government is enacted either voluntarily or tacitly by the people. The political person identified by Locke is the consent giver. Political space is demarcated by the scope of the compact made in the vow. The members of the compact along with the property and possessions owned by them are included in the political space. Locke in similar fashion to Aristotle looks toward the constitution for a definition of the political person and political space. Therefore, authority is based upon consent and distributed according to the stipulations in the compact (constitution). Sovereignty resides in the political person who retains the right to withdraw, but sovereign power is distributed according to the consent of the sovereign people through direct or tacit acceptance of the constitution.

Jean Jacques Rousseau develops a theory of politics known as the social contract. Similar to Locke, Rousseau envisions humankind in a state of nature and imagines the processes and circumstances that bring humans into society. Rousseau doesn't appear to be overly concerned with the accuracy of his thought experiment, but uses the method to discuss how humans get along with each other. Rousseau traces through how certain human social interactions might have occurred such as language, commerce, agriculture and the arts. He believes that humans gradually lose the value of doing things themselves and learn to depend on one another. This is good and bad news for humans because it creates leisure and luxuries but it also brings in inequities. Society becomes the means to establish rules that allow humans to regain a sense of self-improvement and advancement. Out of this commitment to society comes the idea of a general will. The general will takes into account the shared values of the society and denotes the notion of a public good, something that connects society at a level above private interests and factions. By making the commitment to society including concession of all property and rights to the collective, the person gets back in return all those same benefits along with rules and laws to insure their value and protection. The general will dictates the constitution of the government and any changes to the agreement must be approved by the general will. This act of association and aggregation of interests in a general will is the process that transforms humans from the state of nature into cultural and moral beings. In *The Social Contract*, Rousseau writes, "From that moment, [consent to the contract] instead of as many separate persons as there are contracting parties, this act of association produces a moral and collective body, composed of as many members as

there are votes in the assembly, which from this act receives its unity, its common self, its life, and its will (Rousseau 1947 trans., 16).”

Rousseau describes nicely his conception of the political person. The contracting individuals much like Locke’s vow givers are the political persons and collectively they become for Rousseau literally the body politic. The civil state that is formed by the social contract constitutes the political space. Again, it follows the pattern of Locke and Aristotle in positing that the political space is defined by the constitution that creates the union of individuals into a state. Rousseau states explicitly that property is conceded to the state and becomes part of the political space although members get the use of the property along with rules and protections back from the civil state. Clearly, Rousseau identifies sovereignty with the people entering into the contract. However, individual natural liberties are given up to the general will, and therefore, the general will as consented to in the social contract assumes sovereign power. Rousseau describes it this way, “But the body politic, or the Sovereign, which derives its existence from the sacredness of the contract, can never bind itself, even towards outsiders, in anything that would derogate from the original act, such as alienating any portion of itself, or submitting to another Sovereign. To violate the contract by which it exists would be to annihilate itself; and that which is nothing can produce nothing (1947, 17).

John Stuart Mill departs from the contract theorists’ perspective and develops under his utilitarian model a theory of sovereignty more associated with individual freedoms than security and association. In *Utilitarianism*, Mill denies that society is founded on a contract. He finds a different motivation for securing the society. He writes, “Though society is not founded on a contract, and though no good purpose is answered

by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest (Mill 1910 ed., 132).” This rationale is consistent with Mill’s utilitarian beliefs that society should increase the sum total of happiness for its members and that individuality will lead people to seek their own wellbeing. The only mandates for participation in society are that everyone pulls their fair share and avoids injuring others. Mill views society as a progressive enterprise and the more open, creative and diverse societies will progress the most rapidly. Freedom of speech and other liberties remove constraints on the exchange of ideas and facilitate the advancement of knowledge. In Mill’s society, government functions primarily as an administrative body operating on the basis of science and efficiency. The representative body decides on the goals and wants of society through the process of deliberation and then turns the task of implementation of government over to the technocrats.

The political person in Mill’s theory is the individual. Participation is the only criterion for maintaining political personhood because representative government derives its ideas and policies from the expressed will of the people. His theory is distinctly democratic and authority rests in the majority, but individuals can get their opinions on the agenda by participating in public discourse. Political space for Mill seems to exist wherever there is public discourse and a contestation over legitimacy to govern. Mill sees political arrangements are fairly stable over history with changes occurring slowly through a natural transition of ideas mostly among the elites. Mill maintains that individuals retain sovereignty over themselves and that society only obligates individuals

according to the benefit derived from participation in it. Political authority comes from the representative legislative body that serves the role of oversight to the delegated powers and duties of the government bureaucrats.

At this point, it would be helpful to explain how this discussion is contributing the subject of my work. The relationship between politics and law is complex especially when examined in a contemporary context. The proliferation of ideas and intersecting avenues of thought is extensive. Sovereignty is one of the issues that is easily clouded by the varied approaches and criticisms leveled in the current globalized environment. Peter Singer (2002) notes that increased interdependence in a shared and vulnerable world and rapid integration into one big economy are putting tremendous pressure on traditional views of sovereignty. Just what those traditional views are and how they became entrenched in our conception of international politics is key to understanding that pressure. The evolution of sovereignty is important because it traces the transformation of political and legal understandings of the term and helps explain its tenacity to remain a central issues even in today's critical environment. I will pick back up with Karl Marx.

Marx has no hesitation in identifying the political person and political space. While much of his theory focuses on economics and the role that owners of the means of production play in defining the political system, Marx also looks beyond the current system to an alternative vision of politics. Marx sees within capitalism the seeds of its own destruction. Capitalism will exhaust its own means of producing profit by the reduction of labor to the lowest level of subsistence cost and through the mechanization and estrangement of humans from the produce of their labor capitalism will facilitate a communist revolt on the part of the proletariat. Marx also criticizes the state as separated

from civil society. The capitalist state exists to preserve the needs of the owners of the means of production and political freedoms have no effect on the economic conditions in society. Marx envisions a political theory that seeks to transform history by exposing the capitalist scheme to exploited workers. Eventually the proletariat will revolt and change the economic system by abolishing private property (communism) and socializing politics. Actions such as dismissing religion and philosophy will also help to de-mystify politics. In a very abbreviated form, this Marxian scenario establishes the basis for understanding his conception of the political person and political space.

The true political person in Marx's theory is the proletariat because other political entities exist only to perpetuate the capitalist mode of production. Only the proletariat has the vision and motivation to produce a just political system. Marx is genuinely a universalist in that his theory expands the political space to include the proletariat of the entire world. Marx envisions a worldwide movement to unite the working class against the capitalist system. Political space has no geographic or cultural boundaries, and the common language of this new universal political space is the oppression and estrangement of workers from their labors. Sovereignty is radically shifted to the people with a complete disregard of the state. Marx makes this statement about sovereignty in response to Hegel. "As if the actual state were not the people. The state is an abstraction. The people alone are what is concrete. And it is remarkable that Hegel, who without hesitation attributes a living quality such as sovereignty to the abstraction, attributes it only with hesitation and reservations to something concrete (Marx 1978 ed., 18-19)."

I mention very briefly Michel Foucault as one last theorist that sheds a different light on the subject of sovereignty. Along the same lines as Marx's approach to critical

theory, Foucault challenges the very notion of objective knowledge. He posits that all knowledge is the product of an historical context. A tangible person or group decided that certain ideas constituted knowledge and wielded enough influence or power to propagate it as such. Therefore, in order to understand any concept, “truth”, idea or body of knowledge, one must trace the genealogy of its origin and dissemination. This notion applies clearly to the concept of sovereignty. In many cases it is apparent that historical context, intellectual paradigms and political powers influenced the conceptualization of sovereignty in the works of particular theorists. On the other hand, the methodology employed attempts to de-historicize discussions about sovereignty by isolating commonalities and differences in the identification of political persons and political space. Sovereignty then emerges as the logical consequence of the selection of political person and political space. This approach makes the influence of historical context even more obvious and to some extent less concealed and offensive.

### Literature Review and Summary

The topic of sovereignty is prevalent in political theory and international legal literature for the same reasons it occupies a large section of discussion in this paper. Sovereignty is conceptually important to both interstate political relations and legal formulations of the international system. In realism and customary international law, sovereignty is fundamental to the development of the most influential theoretical perspectives from both disciplines as well as prominent in many competing theories. At the conclusion of this chapter, the application of various concepts of sovereignty to the topics of research in this paper is outlined. In addition to the theoretical history described

above, it is important to discuss current and recent influential writers who attempt to conceptualize a modern view of sovereignty in their writings. The following literature review is organized in a manner to emphasize the synthesis of ideas on the issues of political person and space rather than give a comprehensive review of the extensive collection of literature available on the subject.

Jens Bartelson (1995, 2) remarks, “I will insist that the relationship between the very term sovereignty, the concept of sovereignty and the reality of sovereignty is historically open, contingent and unstable.” Using the analogy of fire, Bartelson says, “Yet if fire does not exist, we still speak and act as if it did. The same goes for sovereignty. For all we know, most human societies have confronted problems of power and authority, and where they should be located (1995, 3).” In describing his own genealogy of sovereignty that he does by periods of history instead of individual theorists, Bartelson recognizes that viewed in their particular context ideas about sovereignty look discontinuous and unconnected. However, he points out that sovereignty as a theme is consistently intertwined with the contextualized way of knowing. In other words, there is a tradition of sovereignty that works over time to function as one way of knowing political distinctions. While it is definitionally different over time, the concept of sovereignty is functionally the same. In this way, Bartelson changes the discussion from knowing what sovereignty is to discovering what the concept of sovereign tells us about political knowledge in any given historical context.

Harold Laski (1917) approaches a genealogy of sovereignty in yet another fashion. Laski traces the concept of sovereignty as it relates directly to the state. Similar to J.S. Mill, Laski uses this analysis to develop a concept of sovereignty that supports his



idea of a progressive state brought about through diversity of opinions and ideas. Laski sorts through issues raised by the Catholic Church in relation to nationalism and examines other historically relevant periods like the de Maistre and Bismarck. He even addresses federalism and its relation to sovereignty but always in the realm of the nation-state. This type of an approach to sovereignty may provide the most practical information for political discourse because of its salience to the international system of states yet it does not really develop the concept in theoretically useful ways.

F.H. Hinsley (1986) takes a different approach in that Hinsley divides the genealogy into three categories: ancient, modern and relations between states. Yet he makes some similar observations such as the association between political community and the state. In reviewing Hegel and Marx, Hinsley comments, “These attempts [change in political regime] have often sought not merely to narrow the gap between the community and the state, but to obliterate the distinction between them. This is the programme by Hegel, who contended that the predestined end of political evolution was that the nation should be absorbed into the state, and by Marx, who retaliated with the argument that the predestined goal was that political society should annihilate the state (Hinsley 1986, 214-215).” Ultimately, Hinsley cannot offer an alternative to an understanding of international relations based upon the concept of sovereignty in the modern nation-state.

John Hoffman (1998) refers to Hinsley when stating his own idea about the use of the concept to sovereignty. Hoffman espouses a relational view of sovereignty attempting to distinguish it from the modern statist view. He concludes with the following statement. “Hinsley’s classic definition of sovereignty as the absolute and final authority of the

political community must be reformulated in a relational manner. Sovereignty is multi-layered and plural. It is at once individual and collective; personal and social; national, local and global. It cannot be fixed or grounded in a specific institution. Hence, it must be detached from the state. As a relational concept, the one thing sovereignty cannot have is an exclusive and exclusionary character (Hoffman 1998, 107).” Hoffman offers a very broad and certainly inclusive notion of sovereignty, but his theory contradicts the idea posited in this work that identification of political person and political space makes the determination of sovereignty simple. In his relational definition, Hoffman incorporates multiple political persons (the state, individuals) and political spaces (local, national, global). Maybe as Bartelson suggests, the definitions posited for sovereignty tell us more about the nature of political knowledge when it is developed than about the concept itself. Hoffman seems to be searching for a way to talk about political knowledge in a manner that is looking beyond the modern statist realities. Sovereignty is in effect a proxy for talking about the changing relations between what constitutes a political person and political space in the modern world. That of course has been contention all along concerning a useful genealogy of sovereignty.

Bertrand de Jouvenel (1957) offers yet another option for discussing sovereignty in more general terms. Jouvenel’s approach declares that authority does not exist exclusively in the realm of politics. He encourages the political theorist or scientist to look outside of political institutions and practices in order to discover broader knowledge about human behavior and authority. Jouvenel identifies all human associations of any size and type and the formation of any type group as useful sources of information about authority. He asserts that the same dynamics that produce leaders in one group will apply

to political leadership, and humans as a general rule want to be persuaded to join a group. In every case, human associations originate from consent and authority depends upon the sovereign will of the members of the group. Jouvenel believes that the focus of attention should be on the “Initiator, the Promoter, and that the chief problem of the science [political science] is to study the conditions of dynamic balance between the driving forces and the adjusting factors (1957, 298).” The truly political person for Jouvenel is the individual who rallies others to his or her cause. Political space is potentially anywhere that a group can be gathered. Jouvenel says, “The essential freedom, as I see it, is the freedom to create a gathering, to generate a group, and thereby introduce in society a new power, a source of movement and change (1957, 299).” Authority for Jouvenel is essentially the ability to get consent from a group. It is therefore expected that Jouvenel identifies the sovereign as individual liberty brought into a power of concerted effort by the force or persuasion of an initiator. However, any new movement brought into society can be destabilizing and Jouvenel regards “it as the essential function of the sovereign to ensure the reliability of the individual’s environment (1957, 300).” The constant cycle of initiative followed by stabilization is the essential functioning of sovereign power.

I believe that the focus on political person and political space is an effective tool for identifying the use of sovereignty especially within the overlapping contexts of politics and law. This line of inquiry extends the scope beyond the conventional nation-state. The focus also shifts away from the perception of lost sovereign power on the part of states and toward the reality of changing expressions of political personhood and shifting allegiances to political spaces other than the nation-state. If theorists describe sovereignty not as political power in itself but as a conceptual product derived from the

realities of authority based in emerging political persons and spaces, then the statist position will be compelled to face these realities. The assertion of state sovereignty holds no real influence if it does not align with the reality of political persons and political spaces. Theorists cannot ignore the claims of sovereignty that will emerge from these new conceptions of political persons and political spaces. International institutions and organizations, feminist and human rights movements, religious solidarity movements such as Islamic fundamentalism, ethnic affiliations and irredentism, economic cartels, international courts, trade associations and many other human associations are contesting the sovereign power of states. Sorting out the political persons and political spaces staked out in these new realities and assigning sovereign status accordingly will be a formidable task for contemporary political and legal theorists.

In addition to the cultural and social division of political sovereignty, contemporary legal and political theorists debate the complexity of international relations. The continuing role of the state, the emerging role of transnational organizations and the rise of the individual through cosmopolitan associations and globalization further complicate the definition of political person and space. These political affiliations combined with the cultural and social connections examined above create uncertainty about the meaning of sovereignty in the emerging new world order. The prominent legal scholar, Anne-Marie Slaughter (2004) proposes that sovereignty will become disaggregated or dispersed. Transnational and global networks that form within and without existing political structures will find ways to exercise legitimate authority or sovereignty over issues and problems that confront changing social and political realities. She poses the scenario, "If the background conditions for the international system are

connection rather separation, interaction rather than isolation, and institutions rather than free space, then sovereignty-as-autonomy makes no sense (2004, 267).” She identifies membership and connection as the new sovereignty as states realize that their relevance and ability to exercise influence and gain advantages is based upon their relationships with the rest of the world and not their political autonomy. Interconnections through economic and regulatory agreements, international institutions, transnational security against threats, and other elements of the fabric of the international system will dictate the dispersion of sovereignty authority among actors (2004, 266-271). While states would not cede all sovereignty power to networks of interest groups and non-state actors, the dis-aggregation of specific aspects of sovereignty across a wide spectrum of political persons and spaces would foster cooperation and propel a liberal agenda for world politics forward. This also applies to advancement of international law in areas of human rights and international institutions.

The conceptual review of sovereignty has two purposes in the context of the research project. First, it establishes connections between the evolution of international law and international politics in dealing with changing social realities. These connections provide a common vocabulary and set of conceptual issues applied to the integration of legal and political research. Second, the concept of sovereignty is a backdrop for the research design for this project. It provides a framework for understanding realists and liberal, and other views of the international system and helps define the competition over the instrumentality of the state and non-state actors in both law and politics. This framework helps organize the hypotheses developed for testing state actions toward international institutions such as the International Court of Justice, and transnational legal

regimes such as the Law of the Sea. The next two sections will extend the theoretical examination beyond the sovereignty of nation states by considering the ramifications of universalism on law and politics. The most significant challenge to conventional ideas about state sovereignty in both law and politics has been the issue of human rights and the concept of universalism. Simon Caney (2005, 25) points out that human rights and universalism are not synonymous. Someone can ascribe to universal application of any issue. However, the unique notion of human rights as universal in law and politics produced the confrontation between state particularism and universalism that has generated so much debate over the role of the state in the international system.

Two additional important associations between political and legal conceptions of sovereignty are between legal personality and political persons, and jurisdiction and political space. The ideas are only loosely associated through the idea of standing and authorization. Legal and political personality give standing to an individual or entity in that they are recognized and normally granted some right or obligation through that standing, the right to bring a case to court or vote in an election. However, sovereignty implies a degree of control or authority that extends beyond the limited legal distinctions of legal personality and jurisdiction. Courts with geographic jurisdiction over a location are not granted sovereignty over the location. They can exercise authority, but normally limited to specific legal issues and judicial functions. Political spaces and legal jurisdictions often follow the same boundaries such as national borders or geographic regions, but again this does not address the central issue of sovereignty in the sense of political control. The concepts of legal and political personality, jurisdiction and political

space will be used throughout this work and are sometimes appropriately associated to one another. In these cases, the distinctions as well as the similarities should be noted.

<b>POLITICAL PERSONS (ENTITIES)</b>		
<i>Individual</i>	<i>State</i>	
NATIONAL CITIZENS	NATIONAL GOVERNMENTS	<b>State</b>
UNION CITIZENS	EUROPEAN UNION	<b>POLITICAL SPACE</b>
		<b>Regional</b>
HUMAN RIGHTS	UNITED NATIONS	<b>Universal</b>

<b>Group, Association, Organization</b>	
AARP	<b>State</b>
ASEAN	<b>POLITICAL SPACE</b>
	<b>Regional</b>
GREENPEACE	<b>Universal</b>

Figure 2. **Matrices of Sovereign Relationships**

These combined models illustrate the changing conceptions of sovereignty using the complementary ideas of political entity and political space. These tables are useful in that they organize sovereign relationships exhibited by various entities in terms of persons and space. It organizes the complexities of conventional and emerging conceptions in a way that highlights competing claims of sovereignty. The categories are also useful for description such as the idea of individuals exercising sovereign authority in multiple places such as national citizen, member of the European Union and citizen of the world. It shows that national governments exercise different forms of sovereignty in different political spaces or contexts such as political sovereignty within the state, as a member of a regional politic, or nearly universal in the context of the United Nations. It also describes emerging interest groups, associations and organizations at the state, regional and global levels that exercise some degree of political sovereignty through influence or authority.

In the big picture, this model represents the idea that sovereignty is becoming increasingly fragmented or disaggregated. Simultaneous and competing conceptions of sovereignty affect every level of political and legal analyses. Moving away from the conventional idea of absolute state sovereignty opens up new avenues of research into decision-making power, political efficacy, legal jurisdictions and rights, voting and representation, citizenship, and a myriad of other issues.



## CHAPTER VI

### HUMAN RIGHTS

#### Introduction

A major shift in the character and emphasis of international law occurred after World War II. The creation of the United Nations and other inter-governmental organizations and institutions expanded the role of international law from customary relations between nations to include a wider range of institutionalized legal processes. This shift is discussed more fully in a subsequent chapter. The second realignment was the advance of human rights issues in international politics. Largely a reaction to the atrocities and human suffering during the war, human rights concerns prompted a flurry of political and legal activities including conferences, committees, agreements and institutions for the protection of basic human rights. The recognition within international law of individuals and groups distinct from the state marked a watershed event in the evolution of international law with dramatic changes in practice and theory. Not only did the individual gain more recognition outside the state, the universal aspects of international law began to challenge the positivist and particularist natures of international law. During this period of realignment and reformulation, the international politics of the post-war and prescriptions for peace and justice interacted with the theory and practice of international law in profound ways. Human rights law extended arguments that challenged conventional politics of state sovereignty and customary international law quite significantly.

## Universal vs. Particular

The conventional statist view of politics and laws with the emphasis on particular international interactions is directly confronted by the claims of universal norms and human rights. The purpose of this section is to examine the prospects of political and legal collaboration in the area of universalism or the acceptance of universal norms that govern political behavior and legal processes. The section begins with a review of the evolution of human rights starting with the United Nations declaration of 1948. It follows with a selected review of political and legal theorist addressing the topic of universalism in human rights concluding with Wallenstein's analysis of universalist periods of peace, and a brief introduction to the International Criminal Court. The topic is continued into the following section with a legal analysis of universal jurisdiction and its impact on international politics including a case study of the Belgium courts.

On December 10, 1948, the United Nations adopted the *Universal Declaration of Human Rights*. This document proclaimed “a common standard of achievement for *all peoples and all nations*, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among *the peoples of the Member States themselves and among the peoples of territories under their jurisdiction*. (Italics mine)”<sup>9</sup>

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<sup>9</sup> <http://www.fourmilab.ch/etexts/www/un/udhr.html>

In this definitive international statement on the universality of human rights, a major problem in understanding the concept of universal human rights is clearly illustrated. How can a geo-political body consisting of Member States (and their territories) issue a declaration that applies to all peoples and all nations? This declaration suggests a problem with the conceptualization of the universality of human rights. There is a clear dichotomy between human rights that emerge from and apply jurisdictionally to a geo-political space and human rights that are a common standard for all peoples everywhere. It is certain that the framers of the declaration held both ideas in mind as is clear from the preamble. In the preamble of the declaration, it states the recognition of, “the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>10</sup> Near the conclusion of the preamble, it states, “Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights”.<sup>11</sup>

If it is the case that Member States view human rights as an obligation for themselves and also a universally applicable concept, then a second problem arises that concerns the origins and definitions of the universal. In the geo-political arena, the discourse includes distinctions such as civilized society, cultural relativism, international law and economic development. In the realm of universal humanity, the discussion involves concepts such as human nature, morality, religion, human reason, human commonalities and truths. In addition, the comparisons illustrate an associated distinction between theoretical and practical human rights. This dimension of human rights helps create a cross section within the physical and metaphysical conceptualizations as both a

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

critical tool and further differentiation. There are other more specific distinctions that emerge in the particular comparisons and these elements are also weaved into this model for dissecting the concept of universality in terms of human rights.

### Literature Review

Discussing the original declaration on human rights by the United Nations, Javaid Rehman (2003) addresses the question of how consensus was reached in the international community about the complex issue of human rights. He points to political realities that influenced the debate and the process. Rehman contends that the most important factor was that nations at the time did not view United Nations resolutions as legally binding, and additionally the language of the declaration was intentionally vague. The moral consensus against atrocities such as those committed in World War II did not necessarily translate into a political and legal consensus impacting state sovereignty. He notes that the political make-up of the United Nations and the world changed dramatically in subsequent years as former colonies emerged as nation states (2003, 56-57). These states had different interests than the established powers with their own interpretations of sovereignty and universal norms. Practical political realities and changing world politics continued to impact the debate on universality of human rights law.

Charles Sampford (2001) notes that in addition to the philosophical ideas of universalism, the practical reality of globalization is also a threat to conventional notions of state sovereignty in the human rights arena. Emerging institutions designed to address the challenges of globalization can undermine the status of strong states. Independent political communities are also developing outside the constraint of states' borders such as

special interest groups and non-governmental organizations (2001, 335). This redefinition of political persons and space relates directly to the earlier section conception of sovereignty, and suggests that social and political realities aligned with universalistic human rights law are attempting to erode the preeminence of state sovereignty in both law and politics.

E. Ike Udogu (2004) describes a cosmopolitan model that goes beyond the practical concerns of globalization to envision a human rights regime based on global interactions at the individual level. Associations by individuals across geo-political divisions form the basis for globalizing human rights issues and further undermining the strength and authority of the state. He describes the dilemma as states being sandwiched between an emerging global community at the top and powerful interest groups and individuals at the bottom losing its power to confront the demands of a global consensus on human rights (2004, 85).

In a similar vein, Ruti Teitel (2004) looks at the social realities of the contemporary citing changes in the relationship between the public and private realm, and between state and non-state actors as a determining factor in the emergence of universal human rights norms. He relates this change to a re-conceptualization of sovereignty at a global instead of state level. He sees widespread support for the International Criminal Court and other affirmations of universal human rights as an emerging political consensus for universal expansion of human rights law (Teitel 2004, 244-245). However, Teitel pulls back from the notion that human rights law can become autonomous from existing political institutions and arrangements. Its universal normative force is limited by national sovereignty and political predicates because it needs working

legal and political institutions and a viable rule of law to protect and foster its development. These institutions are the necessary vehicle to gain normative status and legitimacy for universally recognized norms (2004, 247). This position is useful in examining the Belgium case study in the next section because it recognizes the balance between universal human rights that is simultaneously in opposition to and dependent upon national political and legal structures and institutions.

Paul Lauren (2003) offers another practical observation on the evolution of human rights law suggesting that technology has a great impact on its development. Lauren notes that media coverage, internet access to information, satellite imaging and other technological advancements have increased the profile of human rights abuses and pushed them onto the global political stage. This exposure puts pressure on governments, corporations, and other organizations to consider human right issues in their decisions and policies. Increasing widespread consciousness of human rights abuses is crucial to developing universal consensus and pushing that consensus on the global political agenda (2003, 280-281).

Dunne and Wheeler (1999) make the distinction between positive and negative rights as posed in the UN Declaration of Human Rights. Positive rights include concepts such as basic education and welfare while negative rights are freedom from repressive regimes, abuse and other degradations. They note that two principles changed between the Westphalian concept of state sovereignty and the UN model of human rights. For instance, the human rights model challenged the notion of complete sovereignty on domestic matters and seeks to hold countries responsible for their internal acts even against their own citizens. Secondly, the new model realizes that internal order has a

profound effect on international relations and peace. A central theme is the gap between human rights standards and actual state practices. Issues arise such as the inconsistency across cultures and regions about the meaning of human rights, the normative failures of states, the existence of an essential human nature, and postmodern critiques of human rights regimes. They also refer to the two foundational claims of human rights that humans can be identified as subjects with entitlements and that to “possess a right presupposes the existence of a duty-bearer against whom the right is claimed (1999, 3).” Dunne and Wheeler then contrast universalists and foundationalists ideas of human rights with cultural relativist views explaining the liberal natural rights position as the underpinning of modern human rights arguments. They also discuss the role of diplomacy in human rights discourse and the political and economic realities that influence human rights developments.

These writers represent a small but representative group of scholars on the subject of human rights. The proliferation of research, theory and practice in the field of human rights is extraordinary. Non-governmental and inter-governmental organizations contribute huge volumes of information and thoughts on the subject. It would be impossible to adequately present a review of existing materials and literature. The selections highlighted here are intended to show cross-disciplinary concerns and opportunities for research between law and politics. They also establish foundational concepts and ideas concerning the predominate issue of universalism and particularism. This debate is further highlighted in a more in-depth comparative review in the next section.

The inquiry into universalism in human rights theory and law has its foundation in both practical realities and philosophical constructs. Both perspectives raise complex questions about the prospects for universal human rights permanently changing international legal and political institutions. Looking again at the United Nations *Universal Declaration of Human Rights* as a starting point, the basic dilemma between universal and particular, humanity and the state, is clearly illustrated. The universal is both politically contingent (*among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction*) and universally derived (*inalienable rights of all members of the human family*). This perspective extends beyond just state boundaries and international contingencies to include cultural and geographical specificities of application as well as religious and historically contingent values that pertain to origination. This aspect of human rights law often cited as cultural relativism versus universalism is informed by the writings of Abdullahi Ahmed Anna'im and Jack Donnelly. Both writers but from different reference points develop a concept of universal human rights that acknowledge cultural distinctions without subjecting it to cultural relativism. The work of Brooke A. Ackerly (2001) also parallels this conception of human rights developing the idea of a *contingent universal*. Although Ackerly's approach tends to emerge from more contemporary and original sources such as grass roots activism, and feminist, critical and cross-cultural theory, it is interesting that she arrives at a similar intersection from a different direction (2001, 311-316).



### Comparative Approaches

Anna'im's (Toward an Islamic Revolution, 1990) most ambitious scholarly and political undertaking is the push for reform of Islamic *Shari'a* law. He advocates an interpretation of Islamic history and doctrine that necessitates reforms that bring Islamic societies into more conformity with the prevalent views of universal human rights. Anna'im's approach emerges from within the cultural and historic particularity of Islam but also incorporates an expectation of congruence with universally applicable concepts of human rights. He believes in the interconnectedness between the socially, culturally, religiously and politically contingent conceptions of human rights, and the conception of human rights in a common and universal humanity. Even state-centric and Western oriented conceptions of human rights such as the United Nations *Universal Declaration of Human Rights* shares this interconnectedness with the culturally specific and universally human conceptions of rights. Anna'im's primary concern in articulating this intersection is the question of legitimacy. In the Islamic context, Anna'im recognizes that legitimacy is culturally and religiously contingent. The only practical use of universal human rights is one that finds legitimacy in the cultural and religious context where it is applied.

One area of criticism by Anna'im is that historical constitutionalism going back to Aristotelian conceptions of the citizen and political rights is flawed. Anna'im writes, "The 'constitutions' of historical civilizations were deficient not only because they failed to provide for the full range and scope of fundamental and welfare rights and lacked effective remedies for the enforcement of rights but also because the 'citizens' who enjoyed rights that were provided for did not include substantial groups (such as women

and slaves) who would qualify as citizens in the modern sense” (Anna’im 1990, 73). Yet, Anna’im recognizes the universal validity of the concept of constitutionalism and sees it as the fundamental principle that to some degree underlies every form of government. Anna’im identifies the Medina state as described in *Shari’a* law as the Islamic equivalent of constitutional theory. Anna’im accepts the universal validity of constitutional theory precisely because it has universal appeal. The concept is universal because it appears universally but he also does not deny alternative descriptions of its origins.

Anna’im is particularly critical of the discrepancy between human rights theory and practice. Anna’im is interested in transforming social, legal and political processes within communities to conform to rules and standards for human rights. Universal standards of human rights are external to the specific community, but Anna’im argues that cultural legitimacy is the key to real compliance. He writes, “The continuing processes of change and adjustment of political, social, and economic relationships within a community mean that internal changes can be made to accommodate a given human right, if that right is shown to be legitimate within the culture of the particular community” (1990, 332). The tactical issue of human rights enforcement is both a practical and cultural aspect of Anna’im’s arguments. Legitimacy is a means to elicit compliance, but it is also a valuable element of cultural relativism. Anna’im believes that cultures do have unique perspectives on human rights and these particularities contribute to the overall understanding of human rights.

Anna’im proposes a model for universal human rights that accepts the achievements and interpretations of human rights embedded in international agreements and law. He accepts the practical aspect of using standards that may have emerged from a

particular geographical and political context, but nevertheless gained a degree of universal appeal and consensus. Anna'im is not however satisfied with promoting international standards as the only model of universal human rights. He proposes an interaction between universally applicable standards and culturally relevant interpretations. Anna'im predicts that in this interplay, "Processes of internal cultural dynamics and change may then be used to reconcile and resolve any conflicts that exist between the values and institutions of a given cultural tradition and those envisaged by the current standards of human rights" (1990, 356). In this way Anna'im believes that cultures can both contribute to universal human rights conceptions and also change as a result of engaging universal standards in a culturally legitimate way.

Anna'im (Human Rights in Africa, 1990) specifically avoids exploring any abstract basis for human rights choosing instead to view the universality of human rights exclusively in the geographical, cultural, legal and political dimension. He says that he prefers to "wait until a satisfactory methodology for cross-cultural analysis is devised before embarking on an inquiry into the abstract philosophical nature and scope of 'human rights'" (367). Anna'im chooses to use culture and governments as they exist to understand the human condition

Anna'im's describes his own work in contrast to Donnelly in a manner that serves as a good introduction to Donnelly's views on universal human rights. Anna'im writes about Donnelly that basic human rights relative to 'human nature' must be assumed in order to assert universality (342). Donnelly (1999) proposes a conception of human rights that bases universality on a basic set of rights that are universal in origin (human nature) and applicability (enforced across the geographical, cultural, legal and political

dimension). Donnelly does not involve the particular society in working out the issue of rights. His concept is not socially contingent in the sense of a general will or cultural relativism. Donnelly's concept can however be criticized for relying on the socially contingent emergence of Western human rights as the universally applied standard of human rights. To his credit, Donnelly does confront the issue of human rights and historical particularity. Donnelly insists that human rights are inherent to being human, and this is the predominant and universal view of human rights. Donnelly says of rights that, "Human beings are seen as equal and autonomous individuals rather than bearers of ascriptively defined social roles" (Donnelly 1999, 80). Universal human rights are therefore beyond the historicity of their development, "a moral claim about the proper way to organise social, legal and political relations in the contemporary world, not an historical or anthropological fact" (81). Donnelly sees this understanding of human rights as the dividing line between pre-modern thought and modern Western thought. Donnelly draws a similar distinction about human rights between the civilized and uncivilized world in the modern context. Donnelly's concept of universality is based upon a notion of the individual (all individuals) as the right holder. Donnelly believes that this individualized concept of human rights is so powerful as to extend beyond a Western orientation to universal applicability both moral and consensual.

Donnelly sees the progression of human rights as the persistent march "towards the ideal of full and equal inclusion of all members of the species" (82). Again, Donnelly appeals to a justification for his concept of human rights based on moral persuasion and universal appeal. This justification attempts to eliminate the debate over origin in a particular context as irrelevant to universality and substantiation. Donnelly does

recognize that rights that are held universally are realized in a particular context.

Donnelly writes, “Human Rights, although held equally by all human beings, are held with respect to, and exercised against, the sovereign territorial state” (85). Donnelly addresses politics in the realm of international relations more directly than Anna’im. He tries to incorporate the reality of a world consisting of states without a central government or authority into his theory of human rights.

Donnelly also envisions a changing global political climate in which state sovereignty is no longer an absolute barrier to universal application of basic human rights. However, Donnelly believes that political realism and cultural relativism remain the primary threats to universal human rights. Contentions between these ideas of social organization are not surprising given that Donnelly views universal human rights as a potential moral standard for judging the legitimacy of governmental and civil authority.

Donnelly (1985) says about the question of human nature and the origin of human rights, “that the ‘human nature’ underlying human rights is a combination of ‘natural’, social, historical and moral elements” (1985, 43). Donnelly is sympathetic to a constructivist view of human rights that takes into account the various elements as they relate to the development of human rights theory and practice. It is far more evident however from Donnelly’s writings that the source of human rights is fundamentally the moral nature of humankind. Donnelly finds himself at the center of one of the primary distinctions discussed in this inquiry because he must recognize the interconnectedness of human rights is based both individual and inalienable rights and also a “social project”. Donnelly describes the paradox this way, “Just as an individual’s ‘nature’ or character emerges out of a wide range of given possibilities through the interaction of natural

endowment, individual action, and social institutions, so the species (through the instrument of society) creates its essential nature out of itself” (1989, 18). In addition to a dual perspective on the origin of human rights, Donnelly expresses a practical concern with advancement of basic human rights through the existing international (geographical, legal and political) system as well as the development of new human rights regimes that span national boundaries.

The primary distinction illustrated in this inquiry is between the origin and applicability of human rights as universal. Where do human rights originate, and to whom and how do they apply are questions so fundamental as to seem rhetorical. However, these questions permeate the writings explored in this inquiry. What does it mean politically and legally to say that human rights have a universal origin? In the progression of thought, the natural right origin of a universal humanity becomes increasing contingent of communal and political association. The benefits of society weigh heavy on the liberties of human nature. The underlying paradox is once again the dual recognition of both universal and contingent origins for human rights. Out of this paradox emerges the idea that the concept of human rights can be located in the universality of human nature, but the realization of human rights takes place in politically and culturally contingent settings. Interconnectedness is the term that I’ve appropriated to describe the dual origination of a universal ontology that gives rise to human rights and a contingent social, legal and political dimensions that produces the reality of human rights.

Donnelly (1998) is right out front with his ontological assumptions about the origin of universal human rights. Human rights are the sole product of being human. However, Donnelly cannot avoid the persistent problem of translating the universal

concept of human rights from the metaphysical to the physical dimension. Donnelly defends his approach to this problem on two fronts. First, Donnelly must connect the particular tradition of human rights as individual rights to a universal justification of this conception of rights, and secondly, Donnelly attempts to conceptualize a geographical and political universality of these human rights. Although it is contested as to the exact origin of individual rights, Donnelly is obviously drawing his metaphysical concept of rights from a Western enlightenment tradition contextualized in modern international law and liberal philosophy. He then proceeds to the practical application of this maxim in the dimension of geographical and political constraints. Donnelly recognizes that political realism and cultural relativism are barriers to the smooth and efficient application of international standards for human rights.

This inquiry suggests that questions into the universality of human rights have some ontological basis. Whether the idea of being is based on a natural right, religious, cross-cultural, transcendent, grass roots or other understanding of the common human condition does not preclude the assumption that humans share as Anna'im says, similar "predicaments". This is the foundation of my model of interconnectedness that human rights are inclusive based upon a shared humanity that doesn't disappear in the face of cultural, legal and political contingencies.

Secondly, interconnectedness suggests that cultural legitimacy can be an affirmation of universality as opposed to rejection. If progressive culture is inherent to human nature, then cultural legitimacy can take the form of internalizing universal norms through change, and also contributing to the development of universal norms through participation. Cultural interconnectedness with a common humanity is a dynamic

relationship that illustrates that universal principles reside in particular contingencies that have an impact on both the practical and theoretical evolution of human rights.

Lastly, this interconnectedness model suggests that the dialectic dimensions that characterize human rights debates such as universal and contingent, theoretical and practical, metaphysical and physical, transcendent and geographical, and absolute and relative are the fuel for human rights progress. The dynamics of the debate are in a Hegelian sense the steps to the next plateau of understanding. The paradoxical nature of the human rights conception of universality creates the tension that keeps pressure on important issues such as inclusivity, enforcement and compliance, creativity and innovation, progress and others. The structural dimensions of the debate inform directly these normative concerns.

### Universalism and Peaceful Periods

The issue of a universal versus particularist view of human rights manifests itself in many different areas of law and politics. The universal and particular debate is especially relevant the study of conflict. One such study that conceptualizes and tests for systemic periods of peace is Peter Wallensteen's article "Universalism vs. Particularism: On the Limits of Major Power Order". (Wallensteen, 1992)<sup>12</sup> In this article, Wallensteen defines universalist periods in history when major power states developed acceptable standards of behavior and methods for working out problems between them. Particularist periods are characterized by major powers that seek their own special interests even at the risk of disrupting the established international system. He describes periods of peace that

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<sup>12</sup> Reprint from the *Journal of Peace Research*, Vol. 21, No. 3 (1984), pp. 243-257.



have existed between major states and attempts to correlate periods of peace with periods of universalist policies. Wallensteen finds that no major power wars occur during *Universalist Periods* and only about half as many major power confrontations as the *Particularist Periods*. This study in international politics relates the concept of universalism to peace moving the discussion beyond human rights issues alone. Wallensteen demonstrates that the potential for building consensus on universal standards of conduct can impact relations between states. The conception of international law as norm producing applies at the individual level of human rights, but as noted in an earlier section and reinforced by Wallensteen's findings, norms can also impact the relationships at the state level. This has at least two implications on the issue of universalism. First, universal norms may exist supra-nationally but they are practiced within states. Therefore, universal normative orders or universalist periods must be characterized by state acceptance. Secondly, powerful states have a determining role in the creation and maintenance of universalist norms. For example, the influence of powerful states particularly the United States is a major component in the analysis of universal jurisdiction in the next section.

#### Preliminary Case Study: The International Criminal Court

A prominent institution related to the issue of human rights and embedded in the debate between universal and particular application of human rights laws is the International Criminal Court. The International Criminal Court (ICC) is a permanent court established by the United Nations to deal specifically with human rights violations of the gravest kind. It is the only permanent court of its kind to judge international

criminal cases. Related courts such as criminal tribunals and national courts discussed more fully in the succeeding chapter on universal jurisdiction have jurisdiction in certain international criminal cases, but the ICC will be the only permanent court with international jurisdiction on matters of human rights. The Court was established by the Treaty of Rome in 1999 and entered into force in July 2002. Because the Court is just beginning to operate, the opportunity to study its impact on international law and politics is limited. There are only three cases on the docket and no decisions have been rendered. It has however had a significant impact on the human rights issue and raised interesting questions within international politics. This brief review of the Court, its provisions and participants is a useful section for this study because it brings together in tangible institutional form the conceptual ideas such as universalism and particularism in international law, and realism and liberalism in international politics. The ICC is also an avenue of future research that can follow this work and continue its research program.

The framers of the Court and the treaty that created it had in mind the competing ideas of universal principles and states sovereignty as evidenced in the preamble. It refers to states responsibility to enforce universal norms of human rights while at the same time stating that the Court must adhere to the non-intervention norm of international law. It also gives primary jurisdiction to national courts and complementary jurisdiction to the ICC. The preamble is concise and drafted in a manner that elegantly expresses the tension between these ideas. It is excerpted here for reference.

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,  
...

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

SOURCE: [www.icc-cpi.int/home.html&l=en](http://www.icc-cpi.int/home.html&l=en)

The merit of establishing a Court that is complementary to national courts and subject to prohibitions against intervening in the affairs of states while charged with the prosecution of criminals seems questionable. The Court is undoubtedly subject to customary international law and states sovereignty to a degree that dictates much of its actions, however, it is not clear that the Court lacks real authority. In fact, the treaty grants “international legal personality” to the Court. The Court in its jurisdictional boundaries actually has significant authority to act. These boundaries include both geographic and issue jurisdictions.

The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Source: [www.icc-cpi.int/home.html&l=en](http://www.icc-cpi.int/home.html&l=en)

The jurisdictional restrictions placed on the Court reflect concerns about exercising authority in states that have not granted it by treaty or special agreements. It restricts universal application of judicial authority by limiting the geographic and issue parameters, but where jurisdiction is granted, the Court has full legal if not political capacity to fulfill its purposes. In the areas of universal principles of law, the Court also has some restriction with preference given to specific guidelines stated in the treaty, and customary rules of international law and national court precedence. Internationally recognized norms and human rights are mentioned only at the end of the section entitled Applicable Law.

The ICC is located at The Hague, Netherlands and consists of four organs or functional offices: The Presidency, Appeals Division, Prosecutor, and Registry. Judges in the Presidency are elected by the member states and sit on the Court on a full-time basis. Additional judges can be appointed according to the need and serve as determined by the Presidency (Article 34). The procedures that the Court follow are similar to most domestic criminal courts with special provisions for issues such as penalties, legal arguments and records that adapt to the international component of the Court and the types of crimes prosecuted.

The ICC faces many challenges to fulfilling its purpose of bringing to justice perpetrators of the most serious human rights crimes and deterring such crimes in the future by eliminating impunity. The Court must overcome barriers to successful prosecution of these very difficult cases. The Court also must also succeed at the level of international politics to be effective. Opposition to the Court by major powers such as the United States complicates the task of political legitimacy and support. Participation and compliance are issues that will determine the effectiveness of the ICC to impact interstate relations by promoting universal human rights irrespective of national borders. The following table lists the states that have ratified the treaty and became member states of the ICC. It shows that 98 states are members of the ICC with Western Europe and Africa as the most represented regions. The table of current cases is also provided for reference. Participation in the form of membership and cases will be useful trends to observe. It should be possible to conduct future studies of the Court similar to the research on the ICJ in this work. The future collection of participation and compliance data will be one ongoing aspect of this research project.

Table 1.

### **Member States to the International Criminal Court**

<u>Africa</u>	
Burkina Faso	30 November 1998
Senegal	2 February 1999
Ghana	20 December 1999
Mali	16 August 2000
Lesotho	6 September 2000
Botswana	8 September 2000
Sierra Leone	15 September 2000
Gabon	20 September 2000

South Africa	27 November 2000
Nigeria	27 September 2001
Central African Republic	3 October 2001
Benin	22 January 2002
Mauritius	5 March 2002
Democratic Republic of the Congo	11 April 2002
Niger	11 April 2002
Uganda	14 June 2002
Namibia	20 June 2002
Gambia	28 June 2002
United Republic of Tanzania	20 August 2002
Malawi	9 September 2002
Djibouti	5 November 2002
Zambia	13 November 2002
Guinea	14 July 2003
Congo	3 May 2004
Burundi	21 September 2004
Liberia	22 September 2004
Kenya	15 March 2005

#### Asia

Fiji	29 November 1999
Marshall Islands	7 December 2000
Nauru	12 November 2001
Cyprus	7 March 2002
Cambodia	11 April 2002
Mongolia	11 April 2002
Jordan	11 April 2002
Tajikistan	5 May 2002
Timor-Leste	6 September 2002
Samoa	16 September 2002
Republic of Korea	13 November 2002
Afghanistan	10 February 2003

#### Eastern Europe

Croatia	21 May 2001
Serbia and Montenegro	6 September 2001
Poland	12 November 2001
Hungary	30 November 2001
Slovenia	31 December 2001
Estonia	30 January 2002
The Former Yugoslav Republic of Macedonia	6 March 2002
Bosnia and Herzegovina	11 April 2002
Bulgaria	11 April 2002

Romania	11 April 2002
Slovakia	11 April 2002
Latvia	28 June 2002
Albania	31 January 2003
Lithuania	12 May 2003
Georgia	5 September 2003

Latin America and Caribbean

Trinidad and Tobago	6 April 1999
Belize	5 April 2000
Venezuela	7 June 2000
Costa Rica	30 January 2001
Argentina	8 February 2001
Dominica	12 February 2001
Paraguay	14 May 2001
Antigua and Barbuda	18 June 2001
Peru	10 November 2001
Ecuador	5 February 2002
Panama	21 March 2002
Brazil	14 June 2002
Bolivia	27 June 2002
Uruguay	28 June 2002
Honduras	1 July 2002
Colombia	5 August 2002
Saint Vincent and the Grenadines	3 December 2002
Barbados	10 December 2002
Guyana	24 September 2004

Europe

San Marino	13 May 1999
Italy	26 July 1999
Norway	16 February 2000
Iceland	25 May 2000
France	9 June 2000
Belgium	28 June 2000
Canada	7 July 2000
Luxembourg	8 September 2000
Germany	11 December 2000
Austria	28 December 2000
Finland	29 December 2000
Sweden	28 January 2001
Andorra	30 April 2001
Denmark	21 June 2001
Netherlands	17 July 2001
Liechtenstein	2 October 2001

United Kingdom	4 October 2001
Switzerland	12 October 2001
Portugal	5 February 2002
Ireland	11 April 2002
Greece	15 May 2002
Australia	1 July 2002
New Zealand	7 September 2002
Spain	24 October 2002
Malta	29 November 2002

Source: [www.icc-cpi.int/home.html&l=en](http://www.icc-cpi.int/home.html&l=en)

Table 2.

### **Current Cases Submitted to the International Criminal Court**

Three States Parties have referred situations to the Office of the Prosecutor:

The Central African Republic – **January 2005**  
The Democratic Republic of Congo – **April 2004**  
The Republic of Uganda – **January 2004**

United Nations Security Council referred one situation to the Prosecutor :  
The Darfur, Sudan – **March 2003**

The Chief Prosecutor has decided so far to open investigations into two of the situations in Africa:

The Democratic Republic of Congo  
The Republic of Uganda

Source: [www.icc-cpi.int/home.html&l=en](http://www.icc-cpi.int/home.html&l=en)



## CHAPTER VII

### UNIVERSAL JURISDICTION

#### Introduction

The purpose for including a lengthy discussion of human rights and developing the concept of universalism in this work is the prevalence of human rights law in political discourse today. Universal human rights and enforcement comes into direct confrontation with conventional concepts and practices such as non-intervention and the sovereign autonomy of internal politics. A discussion of universal jurisdiction is useful to examine the practical ramifications both legally and politically of applying the concept of universalism in real world circumstances. Universal jurisdiction is only applied in cases involving grave human rights abuses and relates clearly to the previous section discussion on human rights in the context of universalism. The following review of universal jurisdiction further highlights the contingencies that impact the conception of universal human rights including considerations of sovereignty, law, power politics and liberal ideals.

Attempts to prosecute cases, particularly human rights violations, across national borders based on universal jurisdiction have been prominent since World War II, and provide us with useful case studies in repercussions of universalism in international politics. This section outlines a historical perspective on the evolution of the concept of universal jurisdiction including the influential but fluid stance taken by the United States. It focuses on the case study of Belgian's statute on universal jurisdiction and its

application in Belgium national courts and the insights it gives into the political and legal struggles between state autonomy and universal norms.

### Historical Review

The topic of universal jurisdiction has garnered a great deal of attention over the past decade. Historically applied to piracy and slavery, universal jurisdiction gained prominence during the Nuremberg Trials after World War II. In the post-war context, theorists such as Evan Luard began to articulate a transition in thinking about the conception of universal human rights in the international community. Luard (1967) states the issue in this way, “Only in the period between the two world wars, and above all after the Second World War, did the idea become widespread that there existed a responsibility to secure respect for certain standards that was universal and was independent of national boundaries (1967, 306).” Luard notes that according to his theory this responsibility extends to include all nations in the international community in a sense of collective accountability. Subsequent to these and other responses to World War II atrocities, the principle of universal jurisdiction lay dormant for much of the second half of the Twentieth Century. Its re-emergence as a prominent issue can be largely attributed interestingly to the formation of International Criminal Tribunals in Rwanda and Yugoslavia and the Rome Statute of the International Criminal Court that do not even exercise universal jurisdiction but raise related issues about jurisdiction, international cooperation in criminal law and state sovereignty. Specific contemporary cases particularly in Europe of national courts exercising universal jurisdiction in human rights

cases have also sparked a renewed interest in the topic such as the Belgian case examined in this chapter.

There are several existing and planned prominent studies of universal jurisdiction some of which will be referenced frequently in this essay including the New England School of Law Symposium: *Universal Jurisdiction: Myths, Realities, and Prospects*, the Princeton Project on Universal Jurisdiction, Amnesty International's *14 Principles on Effective Exercise of Universal Jurisdiction* and the TMC Asser Instituut for International Law at the Hague project, *Universal Jurisdiction in Theory and Practice*. Universal jurisdiction has also been featured in Conventions and Treaties including the *1949 Geneva Conventions* and *1984 Convention Against Torture*. One of the richest sources of material on the topic stems from the news media accounts of the actions taken by domestic courts in recent years such as the Belgian cases to utilize universal jurisdiction in a tangible way in attempts to bring alleged international criminals to justice.

At its most basic level, universal jurisdiction is a simple concept. It refers to the exercise of jurisdiction by any competent court, such as a standing international tribunal (except where prohibited by its charter) or an official national or domestic court, over certain criminal behavior without regard to when and where the offence occurred or who committed and who was the victim of the crime. In order for universal jurisdiction to be used effectively, the court exercising this principle has historically required the presence of the accused perpetrator within its territorial jurisdiction, or the capability to get the accused delivered to the court's territorial jurisdiction. This issue is one area that has limited the exercise of effective prosecution under universal jurisdiction.

The principle idea behind the concept of universal jurisdiction is that some crimes are such gross violations of human decency and the basic international order that jurisdictional rules should be expanded to include these crimes regardless of conventional jurisdictional determinations such as territory and nationality to insure that the perpetrators do not escape accountability. The complication arises in the interpretation of universal jurisdiction in a practical sense. Courts must decide how to apply international law, and determine what crimes and under what circumstances they will accept universal jurisdiction and how the cases should be prosecuted. In addition, the principle of universal jurisdiction also comes into conflict with more than jurisdictional rules by challenging certain aspects of conducting internal affairs without interference fundamental to the concept of state sovereignty. Although international law does clearly recognize various forms of extra-territorial jurisdiction, it requires the existence of other relationships that establish the sovereign interests of the nation exercising jurisdiction. In light of the political and legal complexities that universal jurisdiction potentially creates it is important to trace the development of this idea within the legal and political context in which it evolved and exists today.

The response of the international community to the menace of piracy is often cited as a seminal point in the development of universal jurisdiction. Piracy was considered an affront to the most basic premise of the modern nation state system and the commercial system of international transportation and trade. By exploiting the neutrality of the high seas and operating outside the legal obligations and protections of a single state, pirates posed a real threat to the idea first espoused by Hugo Grotius of a self-regulating international system made up of sovereign states responsible for enforcement

of international law within their individual borders (Megret 2001, 247). This decentralized form of international legal enforcement was ineffective in controlling a criminal organization able to move from country to country and perpetuate its criminal activity on the neutral high seas. It was also recognized that the threat of piracy to the international system of travel and trade posed harm to the entire international community albeit the wealthiest trading nations stood to lose significantly more in many cases from the threat of piracy.

The component of international law most associated with the case of piracy is embodied in *the principle of universality*. This principle, although similar to universal jurisdiction, is not the functional equivalent of contemporary practices concerning universal jurisdiction and cannot be identified as its sole or comprehensive origin. The principle of universality emerged primarily to deal with the problem of crimes “committed in a place not subject to the authority of any State”.<sup>13</sup> While sharing with universal jurisdiction the goal of insuring that international criminals do not escape punishment, the early application of the principle of universality for the most part recognized conventional jurisdictional rules and focused instead on areas that lacked specific state authority for enforcement such as piracy on the high seas. This principle does however provide a foundation for recognizing the authority and possibly the responsibility of all nations to combat certain threats and criminal behaviors that are destructive to the international system as a whole. The initial and basic concept of the principle of universality evolved over time to include additional jurisdictional situations,

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<sup>13</sup> Article 10 – Universality—Other Crimes, *American Journal of International Law*, Volume 29, Issue Supplement: Research in International Law (1935), p. 573.

emerging threats and criminal behaviors, and new human rights norms on the way to becoming the contemporary concept of universal jurisdiction.

One of the most obvious and important sources for the further development of universal jurisdiction is the Nuremberg and Tokyo Tribunals after World War II. The degree of human suffering experienced and the cruelty exhibited in World War II impacted the world with such a moral shock that many institutions were shaken and societal conventions undermined. International law and particularly humanitarian law was transformed by the events of the war and the succeeding tribunals. The concept of universality was one potential idea that emerged to deal with traumatic atrocities such as those committed during the war. While the attributes and decisions of one tribunal do not establish customary international law, the Nuremberg Tribunal had a profound impact on the development of the law of war and implications for broader issues of human rights (e.g. genocide) law with certain precepts reaffirmed many times in subsequent conventions and treaties such as the Geneva Conventions on War Crimes. Nuremberg arguably laid the foundation for submitting serious crimes such as war crimes, genocide and crimes against humanity to universal jurisdiction (Orentlicher 1998).

Although the Nuremberg and Tokyo Tribunals were held in the offending countries, the issue of territorial jurisdiction did not seem to be paramount. Many of the atrocities took place in occupied nations perpetrated by and against persons of different national affiliations. It seems unlikely that the allied states felt bound by territorial distinctions given the scale of the offenses and un-precedented nature of the tribunal itself. While the principle of universal jurisdiction was not the centerpiece of the tribunal and the trials were conducted in the perpetrating countries of Germany and Japan, the

implications for conventional jurisdiction, state sovereignty, and international criminal law are still evident. The impact of the trials extends beyond the legal precedence and influence on subsequent conventions and treaties to include a shift in thinking about isolationism and detachment from human suffering wherever it might occur.

At Nuremberg, German war criminals were placed on trial before a military tribunal consisting of judges from the allied states of Great Britain, The United States, France and the Soviet Union. It has been criticized as a case of victor's justice lacking a genuine sense of fairness, but the outcome was viewed by many as a triumph over the impunity of evil done in the context of state action or war. It put limits on the behaviors tolerated by the international community and most importantly for this study the Nuremberg Tribunal pierced the veil of immunity for state actors as protection from international criminal accountability. It established that nationals, even government officials, could be made to stand trial before a court established by foreign powers and that court could exercise jurisdiction over the criminal proceedings although the crimes were perpetrated within the borders of a sovereign state largely against citizens of that state. Nuremberg represents a unique articulation and practice of criminal law and the law of war in unprecedented ways in the international arena. While differing in many aspects from universal jurisdiction, the Nuremberg and Tokyo Trials influenced greatly international norms concerning the conduct of war, immunity of state actors from criminal prosecution and global human rights concerns thus focusing greater attention on the conceptual foundations for universal jurisdiction and development of international criminal law.

In 2001, the Princeton University Program in Law and Public Affairs held a conference to outline fundamental principles concerning universal jurisdiction. The conference was designed to help national legal systems interpret and incorporate universal jurisdiction into domestic law and also to advance the development of universal jurisdiction in international law.<sup>14</sup> In principle 1 of the resulting document, the conference proposes the following definition of universal jurisdiction, “universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction (Princeton Program 2001, 1).” While this principle represents the opinion of a respected group of scholars, it cannot be affirmed as the definitive statement of the international community. The practical definition as used in customary international law is based on state practice and the limited number of judicial decisions held on this subject. It is therefore unlikely that any single precise definition can be constructed. This does not mean that definitional attempts by this conference and other thoughtful constructions can not help us gain an understanding of the most appropriate parameters to be followed in legal applications of this principle.

The *Fourteen Principles* go on to describe other fundamental elements of universal jurisdiction such as any competent and ordinary judicial body may exercise universal jurisdiction, universal jurisdiction is a basis for extradition and that certain obligations under international law concerning the good faith exercise of universal jurisdiction exist (2001, 1). As stated, these principles do not represent the codified

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<sup>14</sup> Princeton University Program in Law and Public Affairs, “The Princeton Principles on Universal Jurisdiction”, 28 (2001).



international law on universal jurisdiction. As with most customary international law, codified rules do not exist. However, the principles espoused by the Princeton group are indicative of international opinions on the fundamentals of universal jurisdiction.

Amnesty International published a similar statement in 1999 that interestingly also contains 14 principles. It focuses on the “effective exercise” of universal jurisdiction and outlines a strategy for using universal jurisdiction to promote humanitarian law. The document called, *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, highlights the power and duty of states to exercise universal jurisdiction and attempts to assist in incorporating universal jurisdiction into domestic law. In this document, Amnesty International uses the following definition, “International law and standards now permit, and, in some cases, require states to exercise jurisdiction over persons suspected of certain grave crimes under international law, no matter where these crimes occurred, even if they took place in the territory of another state, involved suspects or victims who are not nationals of their state or posed no direct threat to the state’s own particular security interests.”<sup>15</sup> The Amnesty International report also notes that the principle of universal jurisdiction is justified because perpetrators of certain crimes threaten the “entire international framework of law” (1999, 1) and all states’ interests.

The Princeton document and Amnesty International reports have very similar descriptions of the fundamental principles of universal jurisdiction, but they differ somewhat in recognition of the specific international crimes applicable to universal jurisdiction. The Princeton Principles list: piracy, slavery, war crimes, crimes against

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<sup>15</sup> “Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction”, Amnesty International, 1999, p.1.

peace, crimes against humanity, genocide and torture as the serious crimes related to universal jurisdiction. The Amnesty International principles include all grave breaches from the 1949 Geneva Conventions such as crimes committed in an international armed conflict including willful killing, torture and inhuman treatment, willfully causing great suffering or serious injury, extensive destruction of property, compelling prisoner to serve in forces of a hostile power, depriving prisoners of a fair trial, taking hostages, deportation and other war crimes (1999, 2). The report goes on to include “genocide, crimes against humanity, extrajudicial executions, enforced disappearances and torture” (1999, 2) as serious crimes within the scope of universal jurisdiction. It is quite likely that the Princeton reference to war crimes encompasses the grave breaches of the Geneva Conventions and the Amnesty International report could be interpreted to include slavery and piracy under crimes against humanity so that the two lists are compatible.

Speakers at the New England Law Review Symposium: *Universal Jurisdiction: Myths, Realities, and Prospects* offered similar but more general descriptions for the definition and scope of universal jurisdiction. Bartram Brown (2001, 383) says, “Universal jurisdiction is a functional doctrine based on the need to remedy, in some small measure, the inability of the decentralized international system to enforce even its most fundamental laws.” Madeline Morris (2001, 337-338) contributes the following description, “Under universal jurisdiction, the courts of any state may exercise jurisdiction without regard to the territory where the crime occurred or the nationality of perpetrators or victims.” “The rationale for universal jurisdiction is that crimes such as genocide, war crimes, and crimes against humanity are an affront to humanity and, therefore, are of concern to all states.” In another article unrelated to the New England

Law Review Symposium, Jon Jordan (2000, 3) uses the term “universally condemned” to describe crimes subject to universal jurisdiction and traces this concept back to the “eighteenth century doctrine that perpetrators of certain crimes were *hostis humani generis* or ‘enemies of all mankind’.” Jordan lists piracy, slave trading, war crimes, genocide, hijacking, terrorism and torture as international crimes potentially subject to universal jurisdiction based upon the status of preemptory international norms.

The process of defining and listing serious crimes to be included under universal jurisdiction is a difficult endeavor. Although there is widespread agreement on certain core crime such as genocide and war crimes, there is debate as to how broadly the principle should be applied. Even standard definitions such as the description for genocide used at the Nuremberg Tribunal and adopted in the Genocide Convention are not always interpreted uniformly in all cultures and contexts. Issues such as terrorism and drug trafficking may be the modern equivalent of piracy making them potential targets of states exercising universal jurisdiction and so forth. It is necessary in criminal prosecutions in most legal systems to clearly outline offenses that are within the courts jurisdiction as well as the elements and punishments for those crimes. It is a serious potential problem for effective exercise of universal jurisdiction that specific identification of crimes is difficult to ascertain. In cases where the legality of including an increasingly broader set of crimes under universal jurisdiction is in question, public international law and international political opinion will likely come down against the prosecuting courts. In the studies selected for this inquiry, the problem of identifying specific crimes under universal jurisdiction in specific countries becomes quite evident. This work attempts to address a more standardized method for selecting crimes for

universal jurisdiction by looking at existing agreements, tribunals and court cases that have complementary purposes to those that under gird the principle of universal jurisdiction.

The problem of categorizing and defining serious crimes and more specifically any crimes that might evoke universal jurisdiction is more difficult than situations such as the task confronting the drafters of specific treaties that address international crimes such as the Rome Statute of the International Criminal Court (ICC). In that case, the process allowed for a deliberation of the crimes as well as the opportunity to adopt specific language and categories of crimes. Notably, universal jurisdiction was rejected as a basis for jurisdiction in the ICC. Universal jurisdiction remains in the domain of customary international law beyond the rigidity imposed on codified agreements and treaties. Universal jurisdiction will likely cast a broader net than the ICC and ad hoc criminal tribunals that do not have universal jurisdiction, and in the opinion of many observers fill the gaps left by the restrictions and rules imposed on them.

Certain treaties have specified that states parties have an obligation under the treaty to exercise universal jurisdiction at least in regard to the treaties' purposes. The most pervasive example of this situation is the Geneva Conventions of 1949. Article 49 of the Geneva Convention (I) For the Amelioration of the Conditions of the Wounded and Sick in Armed Forces on the Field states, "Each High Contracting Party shall be under obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." "It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High

Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”<sup>16</sup> The subsequent Geneva Conventions reiterate this provision and having been ratified by most nations these agreements bind the states parties that represent nearly all the international community by treaty to the principle of universal jurisdiction at least in the case of prosecuting war criminals in their own courts irregardless of nationality as well as strengthens customary international law in this area.

Other treaties such as the 1984 Convention Against Torture also incorporate conceptual elements if not formal universal jurisdiction as it relates to the difficult issue of national prosecutions and extraditions by mandating that states parties are required “when persons suspected of torture are found in their territories to bring them to justice in their own courts or to extradite them to a state able and willing to do so.”<sup>17</sup> The provision, prosecute or extradite, and other similar language is used in multiple treaties concerning terrorism adopted since the 1970’s.<sup>18</sup> The Inter-American Convention on Forced Disappearances of Persons requires ratifying members of the Organisation of American States to exercise universal jurisdiction or extradite suspects of the crime of forced disappearance found in their territory.<sup>19</sup>

Another common theme in international treaties is the requirement that states parties incorporate provisions of the treaty law into domestic law to insure the enforcement of the provisions in the treaty. Treaty law has served to integrate principles related to universal jurisdiction into international agreements thereby making a

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<sup>16</sup> Article 49 of the Geneva Convention (I) For the Amelioration of the Conditions of the Wounded and Sick in Armed Forces on the Field. Public Domain.

<sup>17</sup> “Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction”, Amnesty International, 1999, p.2.

<sup>18</sup> <http://www-unix.oit.umass.edu/~leg497b/clas4-23.htm>, lecture notes.

<sup>19</sup> “Universal Jurisdiction: Questions and Answers”, Amnesty International December 2001, p. 2.

contribution to international law in this area, and treaty law has also influenced the development of universal jurisdiction principles incorporated into domestic laws. The inclusion of certain aspects of universal jurisdiction and related ideas such as prosecute or extradict in treaty law cannot be construed to mean that these treaties fully incorporate or define universal jurisdiction, but they do contribute to the conceptual development of universal jurisdiction in relation to serious international crimes and jurisdictional exceptions, and in most cases, reflect principles already existent in public international law thus affirming the general application of universal jurisdiction.

According to a study by Amnesty International, only fifteen nations according to the criteria stated in the “14 Principles on the Effective Exercise of Universal Jurisdiction” have started prosecutions based on universal jurisdiction since World War II. These include, “Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, The United Kingdom and the United States (9).” Only a few of these cases progressed far enough to receive international attention.<sup>20</sup> One of the most recent (2000) and important cases involves the Foreign Minister of the Democratic Republic of the Congo. There are also several other prominent cases that make unique contributions to the definition and application of universal jurisdiction in the modern world. A summary of these cases will help expand an understanding of the past evolution and future trajectory for the interpretation and application of universal jurisdiction.

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<sup>20</sup> In the article by M. Cerif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices, *Virginia Journal of International Law*, 42 Va. J. Int’l L. 81, Fall, 2001, Bassiouni argues that universal jurisdiction is not relied upon in as many cases as reported by ardent supporters such as human rights organizations and that cases cited by these organizations are often not part of this proposition or exaggerated.

### Case Study: The Belgium Statute on Universal Jurisdiction

Belgian courts used universal jurisdiction successfully to secure convictions of four perpetrators of genocide and crimes against humanity in Rwanda. The defendants included a professor, businessman and two Benedictine nuns accused of helping Rwandan Hutu militia during the massacre of the Tutsi minority in 1994. This case is interesting from many different angles including elements of colonial responsibility, political will, legal and institutional reform and human drama. As a former Belgian trusteeship, Rwanda and its ethnic turmoil had been attributed to some extent to the system of government used prior to independence that divided ethnic groups into different administrative functions. Also, Belgium removed its peacekeepers from Rwanda at the outset of the genocide in 1994. Likely motivated out of a sense of responsibility and complicity, the Belgian government expended large sums of money, political capital and energy to prosecute the cases. The success of the Belgian trials can be largely attributed to the legal structures within Belgian national law that explicitly endorsed universal jurisdiction. The original “statute passed in 1993 gave Belgian authorities the power to judge war crimes regardless of where they were committed, the nationality of the victims, or even the place of residence of the accused.”<sup>21</sup> Focused on war crimes, this statute derived its authority from the 1949 Geneva Conventions, but subsequent additions to the law expanded to include crimes against humanity and genocide. The defendants were all found guilty and sentenced to prison in Belgium. The prison terms ranged from twelve to twenty years (Garrett 2002). The Rwandan cases before the Belgian courts benefited from the fact that the defendants were found in Belgian territory and that

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<sup>21</sup> Stephen A. Garrett. *The Promise of Universal Jurisdiction* (New York: America, 2002) p. 2.

Belgian law provided a specific and legitimate structure for utilizing universal jurisdiction in national courts. Stephen Garrett makes the following statement about the case, “The exceptional thing about the Belgian trial, however, was that 12 ordinary Belgian citizens sat in judgment on four individuals whose violence had not affected any Belgian nationals and had taken place in a faraway land of which the jurors (probably) knew relatively little.” (Garrett 2002 2)

The Belgium courts encountered a major problem in its exercise of universal jurisdiction in February 2002. After assuming a leadership position in the international community for its willingness and success at using universal jurisdiction against serious human rights offences, Belgium became embroiled in a political conflict with The Democratic Republic of the Congo over extradition of its Minister of Foreign Affairs. Belgium had issued an arrest warrant for Yerodia Abdoulaye Ndombasi for atrocities committed against Congolese Tutsi in 1998. The Democratic Republic of the Congo challenged the arrest warrant before the International Court of Justice (ICJ) citing Ndombasi’s official role as Minister of Foreign Affairs as grounds for immunity.<sup>22</sup>

The controversy centered primarily on the principle of immunity for persons acting in the official capacity of government representative and did not directly address universal jurisdiction. However, the decision by the ICJ in favor of the Democratic Republic of the Congo cast a shadow over the future prospects of the unrestrained exercise of universal jurisdiction. While not contradicting the principle of universal jurisdiction directly, the decision did exempt a critically important class of individuals from prosecution. In its judgment the court said, “that the issue against Mr. Abdulye

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<sup>22</sup> Pieter H.F. Bekker, The American Society of International Law, <http://www.asil.org>, October 2000, pp. 1-3.



Yerodia Ndombasi of the arrest warrant 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent minister of Foreign Affairs of the Democratic Republic of Congo enjoyed under international law”.<sup>23</sup> The ICJ based its finding on customary international law and unlike specific treaties that waive these immunities such as the Rome Statute of the ICC and the Geneva Conventions immunity for government officials acting in their official capacity remains valid in customary international law.

The court also distinguishes between the criminal jurisdictional immunity and criminal impunity stating that the decision does not exonerate the accused of any criminal action. It is apparent that the ICJ considered the merits of the longstanding principle of jurisdictional immunity for officials a valid argument. The prospect of countries using criminal prosecutions to disrupt the political arrangements and responsibilities of government officials in rival states is still regarded by the court as a real threat. This reaffirmation of customary law does not however detract from treaty law, ad hoc tribunals, agreements between consenting parties, and other codified legal arrangements that exclude immunity for individuals accused of serious international crimes even while acting in their official capacity.

It is still unclear what the long-term impact of the ICJ decision will be on the development of universal jurisdiction in practice and theory. The decision does not directly challenge the validity of universal jurisdiction, but it does raise policy issues such

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<sup>23</sup> International Court of Justice, Press release 14 February 2002, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).

as continued immunity for government officials. While the decision upholds the customary international law of immunity, it is also careful to reaffirm the principle of accountability mentioning specifically their decision does not in any way exonerate the accused of possible crimes.

The ICJ decision in my opinion strengthens the argument that international support for universal jurisdiction relies largely on adherence to existing international law and respect for political relationships arranged within the international order such as immunities for government officials designed to protect legitimate political functions. Madeline Morris says at the New England Review Symposium cited earlier that due process, impartiality and political sensitivity are essential components to international acceptance of universal jurisdiction, however, “The problem with universal jurisdiction is that we cannot insure these conditions are met.” “Rather, there is a real risk of prosecutions that are politically motivated; that are carried out without due process; that apply law that exceeds what is universally accepted as established international law; or that are undertaken without sufficient political control to avoid dire consequences on the international plane (Morris 2001, 338).” Cherif Bassiouni echoes this view writing, “Even with the best intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued under this theory (2001, 43).” While I do not contend that Belgium in this case makes these mistakes, the ICJ’s decision to uphold customary international law regarding immunity recognizes that political relationships must be protected. This includes the functions performed by government representatives conducting vital foreign affairs and other politically necessary activities.

Morris and Bassiouni's descriptions of potential pitfalls to universal jurisdiction reflect the sentiments argued in this analysis that adherence to long standing and established international law and political oversight in the application of universal jurisdiction is an essential component of maintaining political stability, security and other important policy issues.

A Belgian appeals court also issued a subsequent ruling that further modified Belgium's law concerning universal jurisdiction. The court dismissed a war crime case against Prime Minister Ariel Sharon of Israel for the massacre of Palestinians at refugee camps in Lebanon in 1982 (Richburg 2002). Keith Richburg (2002) reported "Critics, including members of the Belgian government, warned that the law (*Belgian universal jurisdiction law*) interfered with Belgium's foreign relations and could bring on a flurry of cases filed for political reasons (1)." Belgium's law incorporating universal jurisdiction has been both hailed as a human rights breakthrough and also criticized as a foreign relations fiasco. Not only could the Belgium law create tensions in dealing with other nations, but also jeopardize the credibility of its own claims of immunity for Belgium representatives conducting foreign affairs.

It appears evident that Belgium's law was highly praised after successes such as the Rwanda genocide cases and roundly criticized in instances such as the Ariel Sharon case. These results support the contention in this work that selectivity based on political considerations and location of the perpetrators in cases of universal jurisdiction is critical for success. While the Rwanda cases involved non-political perpetrators located in Belgium territory, the Sharon case was highly political and involved an official in Israel. This does not imply that prosecutions can only be initiated for lower level offenders or

that perpetrators must always be located in the court's territorial jurisdiction for universal jurisdiction to apply, but it highlights the necessity of domestic and international political support for the prosecution, and cooperation in delivering the alleged perpetrators for trial.

The Belgian case study does not end with the political retreat from sensitive cases after criticism of the application of their universal jurisdiction law. In 2003, the Belgian parliament repealed the 1993 statute that authorized the Belgian courts to exercise universal jurisdiction for certain international crimes. The parliament's actions restricted the extraterritorial provisions of the principle of universal jurisdiction. However, some specified cases already in the Belgian courts were allowed to continue. This move on the part of the parliament was prompted by pressure from the United States to withdraw the statute. The United States Chamber of Commerce expressed directly to the Speaker of the House in the Belgian Parliament its concerns over the potential prosecution of United State's businesspersons doing business in areas and with government leaders even though the businesspersons have no control over their actions.<sup>24</sup> Reportedly, Donald Rumsfeld expressed similar concerns about U.S. military personnel facing criminal charges in Belgian courts threatening to withdraw support for keeping NATO headquarters in Brussels.<sup>25</sup> The Belgian case study of universal jurisdiction reveals several aspects concerning the political and legal efficacy of the principle. Belgium's initial success and international support shows that universal jurisdiction has support and legitimacy in the international community. However, the subsequent reaction against cases that involved political sensitive issues and leaders tempers that support. The ultimate withdrawal of the

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<sup>24</sup> [www.uschamber.com](http://www.uschamber.com)

<sup>25</sup> [www.hrw.org/press/2003/08](http://www.hrw.org/press/2003/08)

statute after political pressure from the United States seems to demonstrate that state power politics trumps the aspirations for universal humanitarian law. However, a more detailed look at the historic stance of the United States shows that the debate has many facets.

### Stance of the United States

Bruce Broomhall of the International Justice Lawyers Committee says, ““The US has been inconsistent in its approach””, ““Sometimes they’re in favor of [universal jurisdiction], sometimes they’re against it.” (Broomhall 2001)” The trend seems to be toward using universal jurisdiction for civil cases brought by individuals against alleged perpetrators while avoiding criminal cases brought by the U.S. government because of the fear that other countries will retaliate against the sovereignty claims of the United States. In civil cases, the plaintiffs are individuals and do not bear the political responsibilities of states who must prosecute criminal cases. This distinction is key to understanding the U.S. hesitancy to extend the principle from civil to criminal law.

In one civil case before U.S. courts, Muslim women sued Radovan Karadzic for damages from crimes committed against them in Bosnia by the army under his command. Another case involves claims against Syrian officials stemming from a terrorist attack in Jerusalem. A key component of the civil cases is the Alien Torts Act that “allows aliens to sue in US federal court for acts committed against them in violation of the law of nations or a US treaty (3).” Criminal cases are considered a different matter because of the sensitivity to issues such as diplomatic immunity, state sovereignty and foreign policy. Curtis Bradley (2001) notes an irony in U.S. practices because there is substantial

support for universal jurisdiction in treaties and customary law concerning criminal offenses and very little in the civil context, however U.S. courts are primarily addressing only civil cases (323-324).

Additionally, nations that often follow a realist perspective in foreign policy such as the U.S. and China view the issue of sovereignty as primarily a security issue. Realism perceives the international system as a self-help arrangement where nations struggle for power. Power insures security and also dictates the stability in the international system. Therefore, nations will be reluctant to relinquish power or embrace cooperation in cases that might undermine national sovereignty or authority. This view is expressed by one prominent former U.S. official who is an outspoken critic of universal jurisdiction supporting the idea that it threatens U.S. sovereignty. Henry Kissinger believes that zealous prosecutors particularly like the prosecutorial design of the ICC will disrupt the international political order by imposing their will on nations regardless of the longstanding principle of sovereign consent. Kissinger worries that such prosecutors will have broad discretion without sufficient accountability. (Roth 2001)

Kissinger also argues against the principle of universal jurisdiction on the grounds of due process, national courts competence, selective application by courts, constitutional superiority and several other concerns about states sovereignty. He argues that opportunities for abuse abound in situations where national courts are not truly competent or impartial, and many national courts lack sufficient protections of due process. Influenced by a realist perspective, Kissinger views the national interests of the United States and national institutions such as the Constitution as paramount to international interests and institutions. Although many of Kissinger's concerns can be refuted by facts

concerning the actual jurisdiction of the ICC (which does not exercise universal jurisdiction) and the fundamental principles of universal jurisdiction, he nevertheless articulates existing fears that universal jurisdiction has the potential to disrupt the established international state system and undermine U.S. interests. The prominence of the realist perspective in international relations and foreign policy is a distinct problem for international support of universal jurisdiction. It requires compromises such as selectivity in choosing cases to pursue and sensitivity to political perceptions in the way cases are conducted and publicized. National courts and prosecutors must be particularly sensitive to the perception by other nations of political motive, retaliation, or recklessness on their part.

### Conclusion

Universal jurisdiction can facilitate the efforts of complementary institutions and tribunals combating grave international crimes such as the ICC and International Criminal Tribunal for Rwanda by conforming to emerging practices and consensuses under these agreements, avoiding the exercise of jurisdictional overlap and competition, and cooperating with ongoing prosecutions. This approach is illustrated in the case of Belgium's successful prosecutions of perpetrators in the Rwandan genocide.

Universal jurisdiction can also be utilized to increase international security and discourage crimes particularly harmful to the entire community of states and humanity such as genocide and war crimes. However, acceptance of this method for dealing with such crimes is contingent on political legitimacy and respect for the established political order. Therefore, universal jurisdiction cannot be fully exercised in certain cases or in a

manner that violate existing customary or treaty law or disrupt the international political system. This does not necessarily mean that corrupt or repressive regimes should be allowed to perpetrate or shield such criminal activity for the sake of maintaining the political status quo, but national courts must recognize when international political support or resistance exists for a given action. The recognition of customary international law by the ICJ in the Belgian case is an example of incorporating international legal restrictions into the use of universal jurisdiction. It is possible that additional clarification and also modification to the interpretation of universal jurisdiction in public international law can be accomplished through cases before the ICJ involving state-to-state relations affected by the application of universal jurisdiction.

It would be impractical to view the entire decision making process as a legal construct. Because the political circumstances and basis for determining support are fluid and unpredictable, the rule of law would be difficult to apply. However, the norms and beliefs that underlie many of the principles of international law are important to this process. Bassiouni believes “it is indispensable to arrive at norms of regulating the resort by states and international adjudicating bodies to the application of this theory (*universal jurisdiction*) (2001, 44).” However, norms are often difficult to create and even more difficult to identify and define. In international politics, norms are often understood as expectations of behavior recognized by the members of the international community. Norms can be formalized in international law, but sometimes vary from law for reasons such as political arrangements and circumstances, lack of legal involvement in certain areas or situational policy decisions. Norms are sometimes reflected in political decisions and official publications, but positions taken by the United Nations, ICJ and other



international institutions are also possible indicators of international sentiment as well as direct diplomatic interactions between nations. State leaders consider norms or international political expectations in many aspects of decision making and although this same process is not directly applicable to the decision making of courts, it is necessary that knowledge in such matters as foreign policy and international security be available to the courts. The domestic relationship between national courts and national governments take many forms and the idea of limiting universal jurisdiction based on political necessities can only be managed on a country-by-country basis. This raises the subsequent issue of effective incorporation of the principle of universal jurisdiction into national law.

If the purpose of universal jurisdiction is to prevent the most perpetrators of the worst international crimes from escaping accountability, then the best approach is one that complements other efforts to accomplish similar goals and garners the most international support by respecting established political and legal norms, and insures the best chance of successful prosecution by skillfully drafting appropriate domestic legislation and seeking out public and political approval. The relationship with other courts can also be complementary such as the model case of Belgium and the Rwandan genocide. A moderate approach that emphasizes domestic court competence, political sensitivity and cooperation with complementary efforts to combat international crimes can be the common ground that advances the purposes of universal jurisdiction by encouraging international cooperation and support, and promoting the effective if somewhat limited use of the principle of universal jurisdiction by national courts.

Although the ICJ ruling in the Democratic Republic of Congo case and the repeal of Belgian's statute on universal jurisdiction are serious setbacks to the efficacy of universal jurisdiction in both law and politics, it has recently gained prominence through the recent ratification of the International Criminal Court highlighted in the previous section. The recent setbacks of universal jurisdiction in the ICJ and Belgian Courts is compelling evidence that the universalist claims in human rights law is too great of an affront to state sovereignty and power politics to be tolerated. The impact of international human rights law is at best limited in international politics. Apathy in Rwanda and Sudan supports the argument that state interests outweigh human rights abuses in international politics. The ICC and other efforts to revive the efficacy of human rights law will be a test whether the trend can be reversed. The ICC will be an important institution to observe going forward.

## CHAPTER VIII

### COMPLIANCE

#### Introduction

The impact of international law on interstate relations is directly related to the issue of compliance in many aspects. Once international law is established and applied to an issue, the impact can really only be measured in states' willingness to comply with the law. There is an extensive body of literature concerning the development of compliance theory in international law. Several of the more prominent theories such as norms, realism, constructivism and liberal institutionalism have already been discussed in this work and will be applied to the discussion of compliance. The main premises of these theoretical perspectives do not need to be reviewed again. Their particular applications to the concept of compliance are instructive for building the model of compliance used here.

From the realist perspective, compliance is an issue of coercion or enforcement based upon power. Power can even be defined as the capability to control the actions of another. Compliance depends upon force or sanction that compels a party to follow the rules. From the constructivist perspective, compliance depends often on reputation and the social pressure exerted on members to follow the rules. The status that comes from membership and the reputation that evolves from law abidance provides incentive for compliance. The liberal perspective depends primarily on the benefits of cooperation and the resulting interdependence between members that facilitates conformance to rules and norms. These rules are instrumental in cooperation and provide structure for institutions

and cooperative arrangements in the system. Compliance is necessary to insure the system runs well and cooperation is efficient and predictable. These three perspectives are expressed in a variety of approaches to compliance with international law. Sometimes they overlap or reinforce each other and at other times they compete or contradict as the following brief review will reveal.

One useful distinction about compliance for purposes of this research focuses on compliance as a key factor of measurement for the impact of international law on cooperation. This approach makes a clear connection between compliance and the cooperative model. The relationship is significant because willingness to play by the same rules is a probable condition necessary to facilitate cooperation. A formal rational choice model is not necessary to recognize that tangible incentives for compliance in the rational choice or utilitarian mode such as economic growth and other benefits from inclusion in the international system are applicable to cooperative models. Cooperation is the means to many of the payoffs from the institutional liberal perspective. Willingness to comply with the rules opens the door to inclusion in cooperative associations that leads in turn to benefits derived from the cooperative associations, for example, the World Trade Organization. The European Union (EU) is another example. The case study for this section will examine the European Union and more specifically its judicial organ known as the European Court of Justice (ECJ). I chose this subject because the EU represents one of the most comprehensive cooperative associations in international politics and the ECJ represents the international legal institution with one of the most impressive records of compliance. Examining the relationship between compliance to the rule of law and

liberal models of cooperation extended to the point of significant economic and political integration is the focus of inquiry in this section.

### Literature Review

An interesting perspective on the relationship between law and cooperation is the idea of efficiency through judicial processes. Espoused by Eyal Benvenisti (2004), this approach is based on the nature of customary law and norms working to make the international system function more efficiently. He proposes that “states practice” is used as a proxy for efficient interactions, and that overtime states practices reflect efficient norms and predictable modes of behavior. This method also provides a basis on which to judge the evolution of customary law. Defining when and how customs change has always been a problem in customary law, but the more scientific and observable criteria of efficiency gives judges and lawyers a standard to apply. Are customs providing an efficient way to resolve conflicts and settle disputes? Does following custom make the system work more efficiently? These types of questions offer one rationale for state compliance with customary law based on efficient interactions. This also relates directly to an important criterion for cooperation. Does cooperation work more efficiently than competition? It also relates to the division between the neo-realist view of self-help and neo-liberal view of institutionalized cooperation. The incentive to conduct interstate relations efficiently is, simply put, a justification for judicial authority over state behaviors. It provides the framework for normative behavior that produces over the long-term more efficient and desirable outcomes for everyone in the system.

Gregory Downs and Michael Jones (2004, 117) make the constructivist case that the reputation of a state as reliable makes it a more attractive partner and higher valued member of an association. Inclusion in trade agreements, investments, alliances and other cooperative arrangements has tangible values, but trustworthiness and reliability are major factors in choosing cooperative partners. Compliance with international law and legal arrangements such as treaties provides a distinguishable measurement of reliability. The reputation of being a law abider can provide the direct benefits of cooperative relations with other states. The issue of compliance with a common European law is a major factor in the cooperative fabric of the European Union.

The reputational perspective has the element of utility, but can also encompass the social constructivist aspects such as identity, internalized norms and values to explain compliance behavior (Hirsch 2004). This approach can help explain a broader range of behaviors and motivations, and implies that inclusion in a cooperative association such as the European Union may have more benefits than just free trade and efficient interstate transactions. How influential social factors are in eliciting compliance behavior is an interesting and complex question. Individual judicial decisions in the European Court can't provide good outcomes for both sides in every dispute. Whether states consider the long-term utility of the courts as efficient or the desire of social benefits in identity and status when they are faced with compliance to a legal decision not in their favor is not the question this research can answer. There is an assumption that some combination of motivations becomes sufficient to produce compliance. The question that is more relevant to this study is whether compliance with international law produces or enables more cooperation, thus propelling a liberal agenda forward in world politics, or is compliance

more associated with realist ideas such as enforcement, custom and maintaining status. This also addresses the dilemma of the United States in trying to maintain the reputation of a law abider while simultaneously practicing power politics and engaging in cooperative agreements. In response to this dilemma, the United States tends to ascribe to customary international law while remaining wary of international courts and other institutions with independent authority to interpret and apply law. If you view international law as a tool for maintaining the status quo particularly if it benefits the most powerful members, then compliance becomes a more coercive endeavor. If, however, international law functions primarily to facilitate cooperation and build reputation, then compliance depends more on incentives or status.

Markus Burgstaller (2005) describes compliance as a fluid system with incidences of compliance and non-compliance. At the core of his view is the idea of governance that he defines as the capacity and legal competence to command certain things to be done. At the global level governance takes the form of control mechanisms. These mechanisms operate in a multitude of ways and conditions. This patchwork of control mechanisms using a wide variety of incentives and coercion create pockets of compliance. Burgstaller's approach addresses quite well the complexity of international interactions and acknowledges both emerging models of cooperation and traditional power relationships. It also recognizes the continuing role of states and the introduction of alternative influences. The concept of international law as one control mechanism that demonstrates capacity and competence over a range of issues and situations suggests a regulatory role for law in the international system. Regulation is similar to the efficiency concept in that international law imposes and monitors rules designed to regulate

(control) certain interactions making them work as expected by the participants. It also reinforces consistency making the system work more efficiently the way removing uncertainty from financial markets increases the value of stocks.

Closely related to regulation, international law can also fulfill a management function. Participants in international interactions have limited resources and want to maximize results from investing those resources. International law manages interactions often through IGO's, NGO's and courts by resolving conflicts, providing guidelines and best practices, interpreting contracts and many other management functions. Legal terms such as "good offices", arbitration and mediation seamlessly crossover into the language of managers and business transactions. Participants comply with international law in the way businesses make and keep deals, or managers implement strategies and policies. International law facilitates processes and transactions just as municipal and commercial law smooth out social and business interactions in the domestic realm.

Burgstaller broadly categorizes international law into coercive compliance (hard law) and self-interest compliance (soft law). This is a useful dichotomy in much the same way that realism and liberalism help establish sharp contrasts and clear distinctions in political analyses. He notes that such distinctions describe components within international law but does not offer a plausible theory for the way things really are. He uses the concept of *cosmopolitan communitarianism* to describe a comprehensive explanation of these various components. His cosmopolitan communitarian model applies to the European Union quite well because it encompasses the sense of community fostered by the Union. It also describes from the cosmopolitan view the cultural diversity in the EU and the challenge of amalgamating the best qualities of the Union into a shared



community. Burgstaller believes this approach incorporates both “soft” and “hard” law into one model and also accurately describes the limitations of international law in a complex system that includes many competing forces. By recognizing several different elements working simultaneously within the Community to elicit compliance, he argues that the cosmopolitan communitarianism approach best approximates reality and provides the best descriptions of incentives presented to states for compliance. While Burgstaller’s approach attempts to capture the essence of international community and law abidance in one comprehensive theory, it complicates the task of analyzing the impact of international law on compliance in its distinct forms.

For the purposes of this research, I chose to compare the separate components of compliance behavior individually. Focusing on realism, constructivism and liberalism as the underlying theoretical propositions of compliance, I make comparisons between the elements that influence compliance. The factors that I distinguish are power, reputation and cooperation. In the following case study of the ECJ, these factors are identified in relation to compliance by member states to the decisions of the Court. The ability of the Court to issue punitive sanctions, affect reputation and membership standing, and facilitate efficient interactions between member states are key measurements of the impact of international adjudication to impact interstate relations within the EU. After a summary of the court’s history and structure, this section will compare how the evidence presented in three in-depth studies conducted recently on the ECJ evaluate the factors of power, status and cooperation.

### Case Study: The European Court of Justice

The European Court of Justice convenes in the small country of Luxembourg. As the primary judicial organ of the European Union, the ECJ is the supreme court in Europe. However, it is a supreme court different in many respects from national supreme courts. The uniqueness of the Court stems from the political entity that created and empowered it to act. The European Union consists of member nation-states that by treaty ceded aspects of sovereignty to the larger union. John Peterson and Michael Shackleton (2002, 2) suggest that the fundamental goal of this union was to produce collective goods such as a common market and single currency. This merging into a common economic and political entity would also result in increased international power and prestige. (2) It is not the intent of this section to explain the formation of the EU, but it is instructive to realize that the EU is a voluntary association that provides some measure of value to its membership. The goals stated by Peterson and Shackleton describe liberal, constructivist and realist perspectives on the incentives of member states to join. As a primary institution in the union, the ECJ is subject to the same influences that provide incentive to member states to participate and comply with ECJ decisions. A brief history and description of the court will help illustrate the points of pressure exerted by each of these three factors.

The Court was established in the Treaty of Paris and began in 1952 under the name Court of Justice of the European Coal and Steel Community. (Peterson and Shackleton 2002, 120) The Treaties of Rome establishing the European Economic Community (EEC) and EUROATOM in 1957 prescribed that one court would handle legal issues arising from all three treaties (Dehousse, 1994 5). In 1986, the Single European

Act attached the Court of First Instance to the ECJ. With some procedural modifications in the Maastricht Treaty of 1992, the Amsterdam Treaty in 1997, and the treaty of Nice in 2001, the ECJ took the form that exists today. The pending Constitution of the European Union will make several additional modifications to the ECJ.

It is important to note that the treaties affecting the evolution of the ECJ were primarily designed to modify the growing integration of European states. The history of the European Union is too complex to explain in any detail in this work. However, two components are worth mention: the increased participation of states in the Union and the increased levels of integration. The EU had six original members: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined in 1973, Greece in 1981, Spain and Portugal in 1986, Austria, Finland and Sweden in 1995. In 2004, the largest expansion occurred with ten new members: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. The next expansion is expected to include Bulgaria and Romania as early as 2007. Mentioned as potential members, Croatia and Turkey are negotiating entrance (<http://europa.eu.int>). With twenty-five members and expansion into Eastern Europe, the EU has shown the ability to adapt to a much greater diversity and level of cooperation than ever. It also demonstrates the attractiveness of membership. Incentives for membership is an interesting topic, but beyond the scope of this research. More relevant is the increased economic, political and legal integration coinciding increased membership. From development of a common currency to the creation of a constitution, the Union has moved steadily forward toward integration. This has affected the ECJ in several ways to be discussed later such as consolidation of Courts and modifications to

jurisdiction. The ECJ has also taken an active role in steering the integration. The administrative function as well as dispute settlement function of the Court has been a tool for advancing integration. It has also been instrumental at establishing a supranational European Law. These factors are important for recognizing the political and legal evolution of both the Union and its Court.

The structure of the ECJ has remained relatively stable over this evolution. The Court has one judge per member state of the EU selected by the state. The Court derives much of its legal reference from national jurisprudence and the diversity of the Court is cited as one component of its success. (Peterson and Shackelton 2002, 120). Cases are argued before a panel of judges consisting of varying numbers. Only cases that are very difficult, precedent setting or resolutions of inconsistent interpretations of the law merit a full plenary session with all or substantially all judges participating. Normally chambers consist of only 3-5 judges. Decisions are made by majority vote and there are no dissents published.<sup>26</sup> The Court also consists of eight advocates-general who present “public and impartial” opinions before the Court ([www.europa.eu.int](http://www.europa.eu.int)). These opinions are normally adopted by the judges even though judges are not bound to accept them. Judges and Advocates-General are appointed to six-year terms that are renewable for 1 or 2 three-year terms. (Peterson and Shackelton 2002, 120). The Court also has rapporteurs who are responsible for managing the cases and performing such vital services to the Court as translation and record keeping. Translation of legal arguments, documents and opinions is one of the greatest challenges to the effective operation of the Court (Shine 2005). Cases involving member states, EU institutions, businesses and individuals may be

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<sup>26</sup> Bruce Shine, presentation given at Vanderbilt University, March 30, 2005, “The European Court of Justice”.

brought before the Court ([www.europa.eu.int](http://www.europa.eu.int)). It is highly unusual for individuals to have standing in an international court. The mandate of the Court is to decide cases involving the consistent application of EU Law among the member states. It also ensures consistency by providing interpretation of these laws.

In 1989, the Court of First Instance was created to offset some of the workload of the Court and provide better access and timeliness for certain classes of cases. These cases usually involve complaints brought by individuals or businesses ([www.europa.eu.int](http://www.europa.eu.int)). The Court of First Instance also specializes in cases where fact-finding is a major component, and often focuses on claims against EU institutions. Parties may appeal decisions of the Court of First Instance to the ECJ. Similar to appeals courts in many national systems, the ECJ may review the application of laws in appellate cases but does not review the fact-finding conclusions.

The Treaty of Nice established a third Court consisting of judicial panels. It is essentially a set of Courts of First Instance that specialize in certain areas of European law known as Community Law (Peterson and Shackelton 2002, 123). The judicial panels' decision may be appealed to the Court of First Instance. The current system works much like the appellate systems in most national court systems. Lower courts are subject to appeal to higher courts. National courts of member states are expected to uphold Community Law and comprise a major component of the implementation of Community Law as well. While it is not completely accurate to equate the European system to the federal and state system in the United States, it may be useful to compare the relationship between national courts in the EU and the ECJ, Court of First Instance and judicial panels to state courts and federal district courts, appellate courts and the Supreme Court. Other

interesting comparisons between these judicial systems will be examined in this chapter including the concepts of judicial review and supremacy of federal law.

In addition to understanding the structure of the Court, it is important to briefly review the types of cases and authority of the Court to make rulings. The most basic role played by the Court is advisor to national courts. Through a procedure known as “preliminary rulings”, the ECJ may offer an interpretation of EU law to a national court or give advice on the applicability to EU law to a particular case. As with all cases brought before the Court, it is passive. The ECJ cannot create or seek out cases to promote an agenda or specifically address a given issue. Cases are brought directly to the Court by litigants or come through the appeals process.

The ECJ is also authorized to make judgments on whether a member state is fulfilling its commitments and obligations under Community Law ([www.europa.eu.int](http://www.europa.eu.int)). This type of case is referred to as a failure to fulfill obligations or infringement action (Peterson and Shackelton 2002, 123). These cases are brought to the Court by the Commission of the EU or by another member state. Another type of case usually brought by the Commission or a member state is a proceeding for annulment although individuals can bring such cases. A proceeding for annulment is similar to the concept of judicial review in U.S. law<sup>27</sup> where certain laws can be declared annulled because they violate provisions of Treaties that are in force. The ECJ relies primarily on Treaties to judge the acceptability of laws in accordance with Community Law. The proposed Constitution of the EU if ratified will become the primary standard of measure.

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<sup>27</sup> In U.S. law, the Supreme Court may review laws passed by Congress to ensure that the Constitution is not violated. This power was not expressly granted in the U.S. Constitution, but came into effect after the *Marbury v. Madison* case. The EU has not ratified a Constitution and the ECJ currently relies on Treaties and International Law to judge the validity of laws. More on the power of judicial review in the EU legal framework will be discussed in subsequent sections of this chapter.

Cases can also be brought to the Court when there is a failure to act on an obligation by the institutions of the EU. Member states and others may petition the ECJ to order EU Institutions to comply with obligations or make decisions in certain ways outlined by Treaties. This proceeding is rarely used (2002, 127). The Court may also accept cases that involve damages caused by an action or failure to act by institutions of the EU.

In the realm of international politics, the ECJ also has jurisdiction to rule in cases involving international treaties and agreements. International law binds nations to the treaties and agreements they sign. When the ECJ reviews such agreements, it must consider the obligations that exist in international law beyond Community Law. The act of annulling agreements that violate EU obligations does not annul standing of these agreements in international law and could potentially bring the ECJ into a direct contradiction of international law. To avoid this problem, rulings on international agreements are usually given as preventative opinions of the Court (issued to discourage states actions before the fact). However, these opinions are usually binding and compel the member state to amend the agreements to comply with EU law (2002, 127).

The newly drafted Constitution for the European Union, if eventually passed, will affect the Court in several ways. In addition to providing the Court with a document superior to previous treaties and acts by the Commission, Parliament and member states from which to decide Community Law issues, the Constitution also outlines specific changes to the Court. In May 2005, France and the Netherlands rejected the ratification of the EU Constitution making it certain that provisions will not impact the Court anytime in the near future. However, it is still useful to examine the proposed changes for

several reasons. The propositions indicate intentions and evaluations of the Court at the time of the Constitution's drafting. The Court was not a public issue in the debates over ratification of the Constitution and there is no indication that future attempts to further integrate the Union would have different proposals for modifying the Court. It is also possible that certain reforms of the Court would be pursued even if the Constitutional process comes to a halt.

Article 28 of the draft Constitution for the European Union contains the description of the Court. Just as the description of the Judicial Branch of government in the United States Constitution is quite brief and non-specific, the Court of Justice receives sparse treatment in the Constitution of the EU. The entire article is recited below.

#### **Article 28: The Court of Justice**

1. The Court of Justice shall include the European Court of Justice, the High Court and specialised courts. It shall ensure respect for the law in the interpretation and application of the Constitution. Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.
2. The European Court of Justice shall consist of one judge from each Member State, and shall be assisted by Advocates-General. The High Court shall include at least one judge per Member State: the number shall be fixed by the Statute of the Court of Justice. The judges and the Advocates-General of the European Court of Justice and the judges of the High Court, chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles III-260 and III-261, shall be appointed by common accord of the governments of the Member States for a term of six years, renewable.
3. The Court of Justice shall: a) rule on actions brought by a Member State, an Institution or a natural or legal person in accordance with the provisions of Part III; b) give preliminary rulings, at the request of Member State courts, on the interpretation of Union law or the validity of acts adopted by the Institutions; c) rule on the other cases provided for in the Constitution.

Source: CONV 850/03 25 (<http://european-convention.eu.int/DraftTreaty.asp?lang=EN>)



The Constitution also renames the Court and its bodies. The ECJ and the Court of First Instance will be known together as the “Court of Justice of the European Union” and the higher court will be called the Court of Justice and lower court the General Court (Article I-29). Judicial panels can continue under the new designations referred to only as specialized courts. The General Court and its specialized courts will be organized according to directions from the Court of Justice and the Commission.

Another significant change is the establishment of a review process for judicial appointments. The absence of a review process has been a persistent criticism of the Court (Peterson and Shackelton 2002). Under Article III-357, a panel will be created to give opinion on the qualifications and suitability of judges and advocates-general candidates. This opinion will be given prior to the appointments by member countries.

Private individuals will also benefit from changes to the Court instituted by the Constitution. Under Article III-365, any legal person in the EU may bring cases against any regulatory action taken by institutions of the EU. This provision applies to "a regulatory act which is of direct concern to him or her and does not entail implementing measures" indicating that the regulation does not have to create damages or a cause of action to the individual personally before it can be challenged in the Court ([http://europa.eu.int/scadplus/constitution/institutions\\_en.htm#COURT](http://europa.eu.int/scadplus/constitution/institutions_en.htm#COURT)).

Article 9 also provides important insight into the application of Community law and the workings of the Court of Justice. The concepts of conferral, subsidiarity and proportionality are outlined as the fundamental principles governing the European Union and its institutions including the Court of Justice and lower courts. These principles also govern legal interpretation of the Constitution and serve as the basis for instructions to all

institutions in implementing the purposes of the Union. This brief but essential text is also included here in its entirety.

### **Article 9: Fundamental principles**

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level...
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

Source: CONV 850/03 10 (<http://european-convention.eu.int/DraftTreaty.asp?lang=EN>)

The principles of conferral, subsidiarity and proportionality are key to understanding the ECJ in the context of a political union of states. These principles are legally applied but not necessarily derived. They are primarily political in nature emphasizing the complementary role of the Court to the political purposes of the Union. In this context, they make an interesting discussion of the premises of this work in and of themselves. Remembering that these principles are general to all aspects of the Union and specifically designed for the Court, it is unclear what ramifications they are intended to have on the judicial process. In effect, they recognize that political and judicial authority is conferred on the Union and its institutions by member states. This has an interesting parallel in the history of the United States national government as states conferred powers

and structure on the national government through the creation and ratification of the Constitution. Through the amending of the Constitution, states retain the power to modify the national government. However, national government in practical judicial, executive and legislative terms has supremacy over state offices. In the EU, the Constitution outlines a similar system based on the concept of conferral. The language of the EU Constitution advances the idea of competence in conferral and explicitly retains for member states those competences not given to the Union. This relates closely to the U.S. Constitution. It also reflects elements of the necessary and proper clause widely interpreted to grant significant powers to the national government.

The subsidiarity and proportionality principles are somewhat different in nature. Subsidiarity gives member states the first opportunity to achieve common purposes not specifically outlined in the Constitution, and assigns to the Union only those competencies, duties, powers that cannot be better exercised by member states. It speaks to competency not as a legal term for assigned responsibility, but the actual ability to perform a task or achieve an objective better. The principle of proportionality restricts Union actions by emphasizing the minimum required to achieve the objectives of the Union and not the maximum allowed. In other words, actions should be in proportion to objectives. Applied to the ECJ, these principles tend to support a conservative judiciary that restrains judicial impact on political affairs. The Court exercises powers and takes actions only as conferred by the Constitution, not achievable by national courts, and minimized to only what is necessary to achieve stated objectives.

This Constitutional interpretation seems to favor the theses of the first writer featured in the analytical section of this chapter. Lisa Conant in her book, Justice

Contained, looks at how member states have contained the judiciary through both constitutive and political arrangements. Her analysis will illustrate the political aspects of influence on and by the ECJ. This view will be contrasted with the analysis of Karen Alter in Establishing the Supremacy of European Law. Alter studies the aspirations of the Court and Community Law to shape the political relationships of the Union. Her analysis will illustrate aspects of the constructivist view such as prestige and reputation. The analytical portion of the chapter will end with a review of Anthony Arnall's book, The European Union and its Court of Justice, which takes a more institutional approach to the Court. He emphasizes cooperation and institutionalization of processes facilitated by the judiciary and how they impact the functioning of the Union. His analysis will illustrate the liberal institutionalist view with a focus on cooperation. I do not intend to infer from the organization of this analytical section that Conant, Alter and Arnall should be interpreted exclusively through the lens of realism, liberalism and constructivism. Indeed, their analyses are much too complex and nuanced to fall into such broad and definitive categories. I am simply using their analyses to illustrate how these theoretical perspectives relate to the ECJ. The associations that I have identified are by my estimation accurate and useful. They are not comprehensive in the sense they embody the entire work of these writers. The summarizations of their findings provide the evidence for making inferences about the efficacy of the ECJ in the realm of interstate politics. Comparing the relative strength of their arguments and results of their research will inform the purposes of this research project by addressing the relationship between the legal institution of the ECJ and political institution of the EU.

## Conant: Justice Contained

Lisa Conant begins her book with the observation that the ECJ has no means to enforce its decisions except the support it receives from states who leverage their power and influence to coerce compliance. This is the premise that undergirds the realist explanation of compliance and international law. At the root, power must still be the determining factor in states' behaviors. Conant does not endorse this line of reasoning, but she does accept some of the skepticism it shows for the Court as a champion of integration and arbitrator of state power. Her approach attempts to explain how the Court operates in an environment where state power and interests remain significant. Her primary contention is that the ECJ must mobilize a broader coalition of allies to exert pressure on its behalf. These forces can come from a variety of areas but often include interest groups pursuing a coordinated legal strategy or political lobbying effort. The title of her book, "Justice Contained" refers to the evasive tactics that states use to avoid compliance with unwanted ECJ decisions or interference in their affairs. One primary tactic is to comply with specific decisions and instructions from the Court while ignoring the broader policy applications. She describes this "single shot" approach as the strict adherence to Community Law and ECJ interpretations in national court cases, but continued violations of the decision in general practices and policies. The Courts would in effect need to bring to trial every related case in order to change policy across the board. Secondarily, justice is contained when policy makers respond to the mobilization of pressure not by adhering to judicial mandates and principles, but through reforms that pacify opposition or re-interpret Court decisions. The struggle between mobilized pressures for Court legitimacy and the countervailing will of states is an analysis that

offers many insights on the issue of power politics and compliance with judicial decisions.

Conant's approach emphasizes the relationship between Union and national law and politics. The ECJ receives much of its support from national courts that follow its decisions or adopt its interpretations. However, national courts have the same deficiency as the Union's Court in that they rely on someone else for enforcement. National courts must elicit support from the executive in the national government. If member states policies are in conflict with an ECJ decision, then the national courts can hardly rely on their support in enforcing parallel judicial positions domestically. The Court can persuade through legal reasoning and entice through collective interests, but compliance cannot be separated entirely from the issue of states' support.

Conant describes the exercise of judicial influence on politics as a three-step process of reform that begins with the ECJ creating or promoting a right or obligation. The public and private sectors will then mobilize in support or opposition to the decision. Eventually member states and EU institutions will incorporate the Courts decision into reforms in national laws and policies. It is the central step of mobilization that is the focus and novelty of Conant's thesis. Without the politicization of ECJ decisions and pronouncements, they have no real force on the behavior of states. This step highlights her contention that member states will contain justice when it conflicts with national interests. They contain it by segregating judicial proceedings from policies. This is particularly true when Court decisions are intended to establish systemic norms on issues such as fundamental rights that are have diverse political interpretations across states. Compliance with individual Court decisions cannot have broad normative influences

without political action.

Conant sees litigation and ECJ rulings as potential leverage for political action. In this way, the ECJ exercises influence by providing a forum for debate and reform. Legal decisions can also bolster political positions as well as provide an institutional expression of countervailing views. The Court may also be used by the privileged to reinforce prevailing views. In this way, political contests between different strata of society are played out in the judicial setting. Since Courts have only passive power to hear cases brought to the Court, politically defined interests provide the backdrop for much of the Court's activities.

However, the argument that the Court maintains legal authority by providing prudent reasoning and service to the goals of the Union persists. A properly functioning Court adjudicates each case on its merits and renders judgments based on sound legal reasoning. The Court is not immune to political and enforcement issues stemming from its decisions, but over time will gain support by upholding the purposes of the EU and providing a legitimate judicial service (related to the legalist view). This judicial prudence will translate into influence in the political realm. Conant continues to argue however that pressure mobilization is the key element of compliance. She posits from a theoretical stance that mobilization of pressure will result in observable actions such as streams of copycat cases in the Court and lobbying efforts by interest groups. Judicial containment by states will be manifest by policy dilution of Court decisions and principles. With these parameters, Conant chooses four sectors of EU Law and Policy to examine. They are 1) regulation of the telecommunications sector, 2) regulation of the electricity sector, 3) discrimination in public sector employment at the national level, and

4) discrimination in access to public benefits at the national level. (8)

Conant also provides interesting statistics of overall compliance issues. For example, she shows that the average number of years delay when states choose to delay compliance with ECJ rulings is over two and that some incidents are delayed more than 10 years. Interestingly, smaller countries such as Denmark and Portugal have fewer incidences of delay and longer durations while major powers such as Germany, France and Italy have the highest frequency and durations of delays. This may be attributed to the probability that larger states will have more judgments overall and therefore more opportunities to delay. This would not however explain fully why the duration is longer. It also does not explain the case of the United Kingdom, a major power who had fewer incidences of delay than the average for European states but the highest average duration (Table 31, 71). She parallels these findings with information about the inclusion of ECJ rulings in national court citations and decisions as well as the frequency of national court decisions involving Community Law. She notes that the diversity in national court interactions with the ECJ and Community Law will likely lead to inconsistent and decentralized interpretations across jurisdictions throughout the national courts system. (83).

In the case of telecommunications reform, Conant finds that treaty provisions intended to liberalize the telecommunications sector across the EU and subsequent reinforcement in case law before the ECJ did not have a significant or timely impact on policy changes. Conant finds that mobilization of pressure by concentrated interest groups and monopolistic interests opposed to changing the sector were successful at thwarting judicial influence on policy makers. The vast majority of reform was the result



of political processes designed to build consensus and produce incremental changes rather than legal interpretations and principles. She attributes only a broadening of the scope of reforms and acceleration of negotiations to the influence of the Courts (120-121).

Conant finds in the case of the electricity sector that the Court had a similarly ineffectual part to play. The creation of an internal market for electricity and the regulatory reforms mandated by EU treaties and laws were slow or non-existent. The market has never really developed as a liberalization model would predict or produced market competition. Conant argues that reforms and policy changes were most affected by actors that mobilized politically or that possessed structural power to inhibit reform. The resulting compromises between institutions, governments and interest groups were largely outside of the legal framework although the legal mechanism to endorse and require reforms was available.

Conant also refers to mobilized pressures as a constellation of interests in a particular area. In the case of discrimination in public sector employment, Conant finds that evasive actions by governments to resist ECJ rulings were prevalent and that compliance often lagged more than a decade. Only large-scale introductions of infringement cases into the Court system garnered much attention. However, the rights of migrant EU nationals were not universally recognized. She identifies clearly the containment strategy outlined in her theoretical arguments as the reason. She also notes that the political weakness inherent to migrants left them vulnerable to this strategy. Although migrants consistently won cases against discrimination, their victories did not translate into widespread recognition of rights (175-176).

The findings in the case of social benefits for migrant EU nationals were much the same with containment tactics including pre-emptive national legislation against Court rulings as well as contained compliance were employed by states and interests within states that opposed the rulings. The point is made in this analysis that responses within member states were largely democratic as governments implemented policies that were at odds with the Court but aligned with national public opinion. In these two cases, the lack of political efficacy for migrant residents is directly related to the lack of judicial authority on the issue. Mobilization of political pressure or interests in support of the Court's decisions was improbable.

Conant's analyses provide substantive evidence for her theses that compliance with the ECJ is predominately dependent on mobilization of political and social pressure. This would tend to support the realist proposition that political power dictates compliance with international law. However, Conant's study also points out that the ECJ is a player in mobilizing pressure through its advocacy, legal reasoning and judicial authority. The Court competes with other institutions such as national courts, legislators and executives in harnessing political will for reform. It also promotes rights that with societal support can evolve into norms, policies and practices. She concludes that no institution within the EU reigns over the Union. It is a contest and the ICJ does exert influence albeit often indirect through the mobilization of pressure on policy makers.

Alter: Establishing the Supremacy of European Law

Karen Alter's study of the European Court of Justice and its role in establishing the supremacy of Community Law in the EU is not as easily characterized as Conant's

analysis. There is no evidence in the text that Alter views her perspective as constructivist or based upon any one factor such as socialization, power or cooperation. The application of her findings to the constructivist view that reputation and prestige can influence behavior is however valid in my opinion. Alter's research questions and observations relate closely to perceptions of the Court and Community Law. These perceptions are connected to evaluations of success, competence and legitimacy of the Court in ways that affect prestige. The characteristics are not the exclusive findings in Alter's analysis but they are prominent to an extent that informs the questions in this work. Alter's basic assumption that the supremacy of European Law as interpreted by the ECJ is accepted throughout the EU is in some respects a statement of the status achieved by the Court.

The methods of achieving this status are varied as will be pointed out in this review, and many do not follow constructivist patterns, yet the process of socialization around the central construct that supremacy of the ECJ and Community Law is a shared norm is at its core constructivist oriented. One of the best examples of this phenomenon is the comparison Alter makes between John Marshall's opinion in *Marbury v. Madison* establishing the power of judicial review for the U.S. Supreme Court and a similar self-granted power in the ECJ stemming from a case concerning Italy. Both cases illustrate the power of status. The ability to assume powers by the exercise of judicial reasoning, political maneuver and self-aggrandizement is an example of the social construction of influence. As long as Marshall contended that the Supreme Court held this power and no one effectively opposed that contention then perception and status achieved the increase in influence through jurisdiction.

Alter chooses to compare neo-realist, neo-functional and institutionalist

approaches in relation to her research design citing faults in each of the theories. She instead focuses on judicial interests and attempts to identify shared interests such as autonomy of the judiciary and influence on policy as desires of the Court. The Court wants to influence the development of both law and in many cases politics by exercising independent authority and deciding cases as it sees appropriate. Alter then juxtaposes interests of competing institutions describing the resulting picture as a competition for influence in shaping integration. It is at this point that I propose a constructivist perspective is appropriate and useful. Although competition is a dynamic process with institutional battles waged in a myriad of individual situations and elements of power politics and functional explanations of outcomes applicable to a wide range of activities, Alter's premise is that the Court's place is in some sense established. The achievement of status is the result of this process that could appropriately be characterized as a process of socialization among competing interests. It is also at this point that Alter sets up the design of her research program. Using Germany and France as case studies, Alter plans to show how European Law achieved the status of supremacy in the EU. She chooses for her level of analysis integration of European law at the national courts level. Alter insightfully points out that the ECJ is a supranational court and not an international court in the full expression of the term. It spans nationalities and incorporates supranational political and legal principles, but it does not claim jurisdiction at the international system level. Alter also chooses to study national courts as the dependent variable and European Law as interpreted by the ECJ as the independent variable. Her study is clearly focused on explaining the impact of the ECJ on the behavior of national courts and governments in accepting the supremacy of European Law, although she does mention instances when

national courts have exerted influence on the ECJ.

Alter has another interesting element of constructivism in her study where she states that national judges and ECJ judges work together to promote European Law supremacy. Shared identity between national judges and ECJ judges enhancing the “independence, influence and authority by vis a vis the courts and political actors” (Alter 2001, 28) of both judicial authorities. This argument is supported by the constructivist idea that social identification is a major factor in influence. Self-identity and identity in relation to others is crucial for establishing status and reputation and thus influence.

In the case of Germany, Alter explains how lower courts were able to influence integration of European Law into national jurisprudence by playing the ECJ against higher national courts and vice versa. The high or supreme court in Germany known as the BVerfG decides all matters of constitutional interpretations. In the German legal system, the issue of supremacy of European Law is a constitutional issue. Rivalries between Courts within the German legal system account for many of the references of issues to the ECJ. The hierarchical structure of the German system generates much of the competition as lower courts search for ways to exert more influence. Hierarchy also implies a certain level of prestige and status as will be discussed more later.

The German system is also dualist meaning that treaty law is separate from national law and gets incorporated into national law by acts of the legislature or parliament. This means that international law and treaty law is subject to the German Constitution just like legislative law. This structural component of German law requires that a Constitutional argument for the supremacy of European Law would need to be created. Alter describes the process of forming a legal basis for the supremacy of

European Law as five rounds of evolution. The rounds progressed from a recognition that Germany could join the Union and submit to EU regulations to an obligation for German Courts to accept European Law in rounds 1 and 2 (1963-67 and 1965-71). Round 3 (1971-1985) focused on sovereignty issues and Round 4 (1981-87) instituted the transfer of legal authority over matters of European Law to the ECJ. It was not until Round 5 (1993-2000) post-Maastricht that the German Courts reasserted the authority to decide the extent of EU authority in national affairs.

The case history and evolution of the relationship between German Courts and the ECJ is quite detailed. Alter summarizes these interactions by highlighting the persistent position by the German Courts that obligations under Union Laws are binding on the German government including the national courts. Even during times of dispute between the BVerfG and the ECJ, this principle was never challenged (118-119). However, Alter points out that the German Constitutional Court seldom rules an act of parliament unconstitutional because the German system has a strong anticipatory element meaning that the Parliament does not act without consulting with the Court first to avoid conflict later. Projecting this on the German position in the European Union, the disagreements between the Constitutional Court and the ECJ are anticipated and negotiated in the policy formation at the Union level.

Alter makes two evaluative observations from the German case. She sees reason for optimism in the fact that European Law Supremacy is a highly entrenched and longstanding principle. On the other hand, the trend toward more confrontation between European Law and German Constitutional Law or more specifically the ECJ and the BVerfG raises concerns. She sees the process of integration and the increase of practical

and political ramifications as the source of rising conflicts. The question is whether the early acceptance and status of supremacy for European Law will withstand challenges created at the pragmatic level. This question is particularly important as Germany exercises a high degree of influence in the EU.

In the case of France, the doctrine of supremacy was not accepted until 1989. The French system is not as hierarchical as the German system and differences between internal courts can be lateral. The French national courts actually have three supreme courts. Also, the French Constitution is not at all ambiguous on the question of supremacy of European Law. The French system is a monist system and treaty law is automatically incorporated into national law. These aspects of French law did not facilitate the quick adoption of European Law supremacy undermining the legalist argument that sound legal reasoning produces acceptance. Alter reviews possible explanations for this course of events ranging from sanctions against activist courts in France to neo-realist conceptions of national sovereignty. Alter finds these explanations incomplete and poses party politics as a more useful explanation.

Alter notes that rivalries between French courts also existed and contributed to the evolution of the supremacy doctrine in the French legal system. This competition unlike Germany was between the higher courts instead of from below. The three high courts known as the *Conseil Constitutionnel*, *Conseil d'Etat* and *Cour de Cassation* approached the issues of European Law supremacy in different ways. The Constitutional Court has actually had the least interaction with European Law issues preferring to avoid constitutional challenges and their political ramifications. The administrative court (*Conseil d'Etat*) allows private citizens to challenge national laws and might be expected

to be where European Law is tested against national policies. However, the administrative court is closely connected with government offices and relationships with academic and social elites. These social relations are indicative of constructivist arguments about how social status is attained and social conventions are established. This is another element of the constructivist view that is illustrated in the Alter study as a factor in the way European Law and politics impact legal issues. The *Cour de Cassation* does not hear challenges to French policies and issues of European Law supremacy are only raised indirectly (124-133). The lack of clear jurisdiction on issues of European Law supremacy and the political relations of the Supreme Courts combined to restrict the judicial consideration of the issue. The question of supremacy did not occupy the Courts attention, but the question of whether French Courts had the authority to enforce ECJ rulings and European Law has been prominent (135).

Alter also describes five rounds in the evolution of supremacy of European Law in the French courts. Round 1 was characterized by timidity on the part of all three courts to address the issue out of fear of political retribution at the hands of De Gaulle. (1962-69). In Round 2, the *Cour de Cassation* makes the first move to enforce European law supremacy by setting aside a government regulation on the grounds it violated European Law (1970). In 1974, the *Conseil d'Etat* entered the debate by referring a case to the ECJ expecting that its position would be affirmed. The ECJ ruled against the *Conseil d'Etat* and sparked a period of conflict between the courts, the French government and the ECJ. In the 1980's, the political sentiment toward European integration shifted significantly and so did the stance of the Courts. Both the constitutional and administrative courts asserted the supremacy of European Law in the national courts. Round 5 showed a



repositioning of the stance of the constitutional court and the administrative court during the 1990's. The desire to have more influence over European Law and the transitions associated with the Maastricht Treaty motivated the courts to exert more authority in deciding issues regarding European Community Law. The French Parliament also co-opted the courts positions in order to increase their influence over the executive in negotiating European Union agreements.

Alter concludes from the French example that the French Courts have been less involved in direct interactions with the ECJ and less inclined to subject ECJ rulings to a French constitutional test. She asserts that France has also had less influence on the ECJ decisions and more broadly EU policy. The diversity of the French Supreme Courts and the stronger connections to French politics has inhibited the French courts ability to exercise independent influence. While the German Constitutional Court can refer to the German Constitution for its stance on ECJ rulings and EU Law, the French Courts do not have this reference. Alter suggests that factions within the French government that would like to see the judiciary exert more influence on European Law will push the French Courts to move in the direction of the German judiciary. The French Courts especially the constitutional and administrative courts have already opened structural and logical avenues to become more involved in ECJ ruling and European Law. Another important factor is the constructivist issue of reputation. The German Courts have established a reputation for being tough on ECJ rulings and EU Law Supremacy that has increased their influence. The French Courts must combine a more involved approach with the campaign of changing perceptions in order to become more influential. Increasing its status and changing its reputation is a key component in exercising more influence.

Alter concludes her analysis with possible explanations for why national courts ceded authority or supremacy to the ECJ and why they have not attempted to regain it. Alter makes two observations that are particularly relevant to the premise of this section that compliance with international law (supranational law) emanates from socially constructed norms or incentives such as reputation and prestige. She notes that political threats against the court lack credibility. A direct challenge of the supremacy of European Law is an attack on the institution of the Union itself. The Court can operate within fairly well understood political boundaries without much risk of a direct confrontation. In addition to credibility, Alter points to the idea of a virtuous circle where legal competence and effective jurisprudence leads to increased influence and enhanced rule of law. As the reputation of the Court as being effective and impartial improves, the authority of the Court will increase. Respect for the Court either because its value is readily recognized or because its consistent application of rewards and punishments demonstrates its efficacy is key to increasing its influence. Respect like status and prestige is a constructivist convention. Respect for a strong legal system also increases its influence in the political realm. Alter concludes by stating “the transformation of the European legal system made possible the emergence of an international rule of law in Europe where violations of the law are brought to court, legal decisions are respected, and the autonomous influence of law and legal rulings extends to the political process itself” (229). Alter contends that the rule of law can and does influence politics. I believe that her reference to the rule of law is best interpreted in terms of the status that law holds in society and the political sphere. This idea is generally associated with a constructivist view of political processes. If Alter’s arguments are correct, the influence of status and

reputation has a profound impact on compliance with international law.

#### Arnull: The European Union and its Court of Justice

Anthony Arnull acknowledges several aspects of the ECJ's influence discussed so far including issues of reputation and politics. However, his analysis favors the more conventional idea that the ECJ is predominantly an institution to facilitate the smooth operation of an integrated European economy. The liberal institutional model of compliance focuses on the incentive to accrue benefits through participation in a free and liberal market system regulated by competent institutions. This approach emphasizes the problem solving and dispute settlement functions of the Court. The dominant feature in the judicial system is the promotion of a free market and open borders for the free movement of goods.

It is relevant to note that Arnull's study was conducted considerably sooner than Conant and Alter. Published in 1999, Arnull analyzed the Union and its Court in a much different time period although all three writers use significant amounts of historical data. It is evident that the period before the Treaty of Nice and negotiations on the proposed Constitution was more concerned with economic factors and the creation of institutions for economic integration. Political issues over rights and similar debates were in the backdrop of an enthusiastic push toward the perceived benefits of a liberalized and integrated common market. Not surprisingly, studies focused on the liberal institution model are more prevalent from this period. Conant and Alter's studies are more indicative of current studies that examine emerging political and judicial situations as political integration garners more attention. This does not mean that Arnull's study is less

useful or appropriate for comparison purposes. Arnall's findings are historically valid and the perspectives he considers are still quite prevalent in ongoing issues of economic and political integration in Europe. In fact, the recent large expansion of the EU and corresponding market and institutional reforms needed in newly admitted countries are bringing many of these issues back to the forefront. Economic integration is also a persistent issue for well established members as the Union seeks to achieve the promised benefits from cooperation and integration. Arnall's study is also a complex and comprehensive study that can not be limited to the liberal institutional model, but aspects of the study are especially relevant and useful in my analysis of this perspective. Arnall presents in many ways a problem-solving model well suited for demonstrating the strength of the liberal institutional approach.

From Arnall's extensive study of the ECJ, I focus on a large section called *Judging Europe's Judges*. In this section, Arnall examines the effectiveness of the Court. He organizes this analysis around three phases in the Court's evolution. Phase 1 begins with the founding of the Court and extends into the early 1980's. Phase 2 extends from that point to the signing of the Treaty of Maastricht in 1992. The third phase carries through to the end date of his study in the late nineties.

In Phase 1, Arnall focuses on the transition of the Court from consensus to qualified majority voting. The overriding concern of the Court in this period according to Arnall is a desire to see the system work. In order to work, the system must have compliance from the member states. The issue of qualified voting emanated from Council decisions but impacted the Court's position because the criterion of consensus was lessened throughout the institutional system. The impact of treaty law interpreted by the

Court extended to other institution in the Union especially for the Commission in dealing independently with third parties and entering into international agreements. The granting of “legal personality” for the Commission and the establishment of Community Law provided the foundation to move beyond consensus to qualified voting. This and other modifications to the rules and norms of the Union followed a path of maximizing efficiency. The goal of the Court to make the Community work complemented the political and other institutional efforts to bring about a functioning Community of member states. Another noteworthy aspect of ECJ activity during this period was a consideration of rights for individuals. It is not as clear what the motivations were for this emphasis but it is plausible that considerations of popular support were highly salient to the issue of successfully founding the Community. It is also equally plausible that the Court viewed this task as its judicial responsibility.

During Phase 2, the idea of majority voting and an acceleration of market reforms shifted the emphasis even more in the direction of institutional utility for the Court. The creation of a Court of First Instance and the “Single European Act” adopted to further free market reforms firmly established an emphasis on problem solving and more efficient operation for the institutions of the Community particularly the ECJ. The emphasis also shifted toward processing heavier case loads and building a body of case law. The Court took a more active role in procedural issues and the factors affecting the adoption of Community objectives by member states. Pressure from the Court on member states to uphold their obligations under the Treaty typified a period of expansion in the scope and number of cases adjudicated by the Court. Arnall characterizes this shift as protecting the institutional balance in the Community. He notes that the Court’s

insistence on respect for the institutional balance necessary to create an efficient system of integration produced a “potent combination” of institutional efficiency and internal market development. (Arnold 1999, 549) The idea that attainment of free market reforms and benefits was contingent on well functioning institutions with a balanced and consistent application of the principles of integration.

Phase 3 introduces more autonomy to the Court as fundamental principles such as conferral, subsidiarity and proportionality began to gain influence over purely utilitarian concerns. The powers conferred on institutions were enumerated with much more clarity in the Maastricht treaty allowing the Court and other institutions to stake out their authority in more constitutive ways. This however did not entirely replace the need for maintaining efficiency and utility. In fact, member state reluctance to fully implement tenets of the treaty that significantly encroached on issues of sovereignty and political autonomy created a backlash against usurpation of authority on the part of the Court. The Court actually expanded its interpretation of policy choices in the implementation showing reluctance to impose on the discretion exercised by national parliaments and courts. This reticence is directly related to the principle of subsidiarity. The granting of more explicit conferred powers was offset by the principle of imposing no more restrictions on national discretion than is necessary to achieve Community objectives. Subsidiarity is basically an expression of utility in that the Court’s purpose is aimed at achieving objectives rather than judicial autonomy. The treaty also excluded security issues and home affairs from the jurisdiction of the Court further relegating it to a problem solving role as opposed to a policy prescription function. The focus on defining Community objectives and protecting the prerogatives of member states reflects a

renewed emphasis on the smooth operation of the union. It is a pragmatic approach grounded in a commitment to achieve the utilitarian goals and to some extent ideals of the Community. Decisions in this period frequently involved powers of the Commission to participate in certain activities or engage in certain practices. In 1994 for example, the Court granted the Commission competence to conclude agreements connected to the World Trade Organization (554).

Arnull points out that in the Treaty of Amsterdam, the Court's influence was advanced by allowing the Court to address certain issues of cooperation with a highly political undertone. The realization that achieving full potential from integration and the internal market required addressing political obstacles. One such case is the intervention of the Court into the issue of majority will. The Court participated in a series of decisions that established the rationale for a majority of member states to take action against a minority of states that resist participation or adherence to provisions intended to further the overall objectives of the Community. This intensified move away from consensus to majority rule was directly related to issues of efficiency. Majority rule is characteristically a more stable and efficient system of decision making than consensus.

Arnull offers a summary description of the three phases that focuses on the relationship between the ECJ and national courts. It stresses both the utilitarian and relational aspects of the Court's influence. Even in the discussion of social legitimacy, Arnull points out the utility factor stating, "However, the Court's own legitimacy also depends on the way it discharges the particular responsibilities conferred on it" (562). He states further that "the Court's inventiveness has been most apparent in devising mechanisms ... which go with the grain of the EC Treaty by enhancing its capacity to

achieve its objective” (564). Arnall’s analysis concludes by reinforcing the concept of institutional balance and Community objectives. The Court’s preference for Community goals such as a free market and liberal market serve as the key indicator of the Court’s activities and effectiveness. This view supports the contention of a liberal institutional approach. Liberal markets, cooperation and efficient operations are hallmarks of a model that emphasizes utility. The influence of the ECJ is most apparent according to Arnall when it is efficiently and effectively enabling and enhancing these Community objectives.

### Conclusion

Conant, Alter and Arnall provide three unique perspectives on the European Court of Justice. Conant and Alter take a comparative approach highlighting case studies from the Court’s history to analyze the impact of the Court on European society and politics. Arnall’s analysis organizes his arguments around episodic periods in the Courts history but also provides numerous case reviews to illustrate his points. They reach different conclusions. One explanation of the differences could be that their choices of cases dictated the results. Selection bias is potential problem in any type of analytical study, and certainly it is a danger in comparative cases studies. A thorough review of the cases can yield insightful information regardless of the selection method, and unlike a statistical analysis, the findings are not necessarily skewed. That is to say, the results of a case study provides some specific and useful information about the subject while a statistical result will yield a numeric probability that can be wiped out completely by biased or incomplete data. I found the cases studies in these three works to be very



thorough and insightful. I also believe that the salience of the cases as well as the variety tends to show a lack of bias. Another possible explanation of the differences in findings is that the writers looked at the Court's impact in different circumstances and times. I find this a more probable and useful distinction. Arnall reviews the Court during a period where economic integration is the key issue at stake. Alter and Conant write during the same time period but their perspectives are quite recent and circumstances are fluid as change accelerates in the Union. Alter's views seem to coincide with the larger themes that are emerging such as the process of creating a Constitution and the identity issues emerging out of rapid expansion in member states. Parallel to these events, the Court and the Union itself is experiencing a rapid increase in transactions and new levels of administration to conduct. Rapid growth and integration is increasing the workload on EU institutions, and bringing new issues to light. Conant's analysis tends to focus on the methods adopted by the Court to address these changes and new issues.

The comparison of these three studies provides this research project with useful insights concerning the impact of international law on politics. However, it has some qualifications. The ECJ is actually a supranational judiciary. While it spans national borders and incorporates international law into its practices, the Court still operates within a defined jurisdiction under the political supervision of a limited number of states. Because the European Union of states created and manages the affairs of their institutions including the ECJ, it is important to recognize that the relationship between law and politics is distinctive. First, the impact of the Court on EU and member state politics is dependent in many ways on the controls member states have placed on the Courts. In international law and politics, influence is also a two-way street with states dictating the

composition of law and law influencing state behavior. The primary difference is that the EU and ECJ have a more formal structure for that interplay. In many ways, the EU and ECJ are more akin to a federal constitutional system like the U.S. judiciary. Secondly, the ECJ has specific constitutive powers, duties and jurisdictions. The international system does not have a Constitution or other supreme document that organizes and defines judicial parameters. The ECJ much like a federal supreme court exercises the power of judicial review. There is no role of this type in the international system of law. In fact, there is no organized or authoritative judiciary at all. Even the International Court of Justice and International Criminal Court, the two permanent standing courts with broad international geographic jurisdiction, are very limited in jurisdiction on issues.

In spite of these qualifications, the ECJ is relevant to understanding the impact of law on politics in the international arena. For instance, the issue of national sovereignty is prominent in the European judicial system. The central issue of this chapter, state compliance with law outside the domestic arena (international or supranational), is also a prominent issue for the ECJ. Therefore, I believe that the ECJ is an excellent subject of inquiry concerning the issue of compliance.

The Conant, Alter and Arnall studies provide several key insights into the issue of state compliance with international law. Conant shows that politics in the form of interest groups and the mobilization of political pressure is both an ally and threat to the Court. The impact of the ECJ is directly related to the political support and opposition that its decisions encounter. Political circumstances are the primary conditions that influence the Court's impact. Alter looks more to the larger issue of the rule of law in Europe. While identifying and examining specific cases to illustrate her points, Alter's primary analysis

is focused on the supremacy of European Law in the national court systems of member states. Her conclusions are more systemic and generalized. Alter's conclusions are that the influence of the ECJ is greatly enhanced by the acceptance of EU Law supremacy and that the ECJ through its maturation and judicial work has contributed to the ascendance of European or Community Law. The impact of the ECJ is primarily a result of its reputation of judicial prudence and treaty (interpretation) status as the supreme court on matters of the EU. Arnall asserts that the Court's primary function is to help make the EU work and that its primary impact has been through its ability to solve problems and make modifications to enhance the Union's efficiency. The institutional role of the Court as the facilitator in the judicial realm toward the goal of integration is its most effective means of influencing member states that share that political objective. Who is right?

I believe that Conant provides the most compelling argument and stronger case evidence, but the better answer to the question is that all three are right. The studies are complementary. First, all three studies show that the ECJ is influential in state policies and the political function of the Union. They agree that the ECJ has a significant impact. Second, their reasons for why the Court has an impact are not mutually exclusive conclusions. In one respect, they are different because they look at different periods and circumstances so they are correct for those periods. The implication is that ECJ influence changes across periods and circumstances. It is also possible that ECJ influence at any given time is diverse. The ECJ can exert pressure through the mobilization of political support while simultaneously using its constitutive position and reputation to reinforce the rule of law and supremacy of European Law. Underlying both of these complementary efforts, the forces of market reform and incentives behind an efficient

institutional system in the EU is bolstering the case being made by the Court. It seems logical to conclude that the influence exerted by the Court over politics in the EU varies with the situation and circumstance and entails some combination of political mobilization, Court prestige and operational utility. The effective manipulation of these factors by the Court or allies of the Court seems to be the recipe for increased influence. The same is true of the opposition. If the ECJ is as some suggest the best model for an international judicial system, this system's success will depend on its ability to mobilize global political support, establish its reputation and status, and function as an efficient judicial instrument.

Table 3.

### **Treaties of the European Union**

The Treaty establishing the European Coal and Steel Community (ECSC), which was signed on 18 April 1951 in Paris, entered into force on 23 July 1952 and expired on 23 July 2002;

The Treaty establishing the European Economic Community (EEC);

The Treaty establishing the European Atomic Energy Community (Euratom), which was signed (along with the EEC Treaty) in Rome on 25 March 1957, and entered into force on 1 January 1958. These Treaties are often referred to as the "Treaties of Rome". When the term "Treaty of Rome" is used, only the EEC Treaty is meant;

The Treaty on European Union, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. 'The Maastricht Treaty changed the name of the European Economic Community to simply "the European Community". It also introduced new forms of co-operation between the Member State governments - for example on defence, and in the area of "justice and home affairs". By adding this inter-governmental co-operation to the existing "Community" system, the Maastricht Treaty created a new structure with three "pillars" which is political as well economic. This is the European Union (EU).

Moreover, the founding treaties have been amended on several occasions, in particular when new Member States acceded in 1973 (Denmark, Ireland, United Kingdom), 1981

(Greece), 1986 (Spain, Portugal) and 1995 (Austria, Finland, Sweden). There have also been more far-reaching reforms bringing major institutional changes and introducing new areas of responsibility for the European institutions:

The Merger Treaty, signed in Brussels on 8 April 1965 and in force since 1 July 1967, provided for a Single Commission and a Single Council of the then three European Communities;

The Single European Act (SEA), signed in Luxembourg and the Hague, and entered into force on 1 July 1987, provided for the adaptations required for the achievement of the Internal Market;

The Treaty of Amsterdam, signed on 2 October 1997, entered into force on 1 May 1999: it amended and renumbered the EU and EC Treaties. Consolidated versions of the EU and EC Treaties are attached to it. The Treaty of Amsterdam changed the articles of the Treaty on European Union, identified by letters A to S, into numerical form;

The Treaty of Nice, signed on 26 February 2001, entered into force on 1 February 2003.

The Treaty of Nice, the former Treaty of the EU and the Treaty of the EC have been merged into one consolidated version.

Further changes will probably be made to the Treaties as a result of the Convention on the Future of Europe and of the Treaty on the Accession of 10 new Member States, which was signed on 16 April 2003 and came into force on 1 May 2004.

Source: [www.europa.eu.int/abc/treaties\\_en.htm](http://www.europa.eu.int/abc/treaties_en.htm)

## CHAPTER IX

### TREATIES AND CONFERENCES

#### Introduction

Treaties are a specialized area of international law that involve written agreements or codifications of rules that govern interactions between and among states. Beyond the supranational treaties of the EU, it is important to examine system-wide or international treaties and how they are developed and operate. Oscar Schachter expounds on the idea of progressive development in codification as related to treaties as international law (in Damrosch et al 2001, 111-118). Codification refers to the standard way treaties systematize and put into a formal document practices, precedents and doctrines that are already existent in the international system. Progressive development refers to codification in treaties that attempts to formulate new principles and rules for areas that do not have previous foundations in international law. This approach to codification distinguishes between treaty law and traditional views on customary international law.

#### Literature Review

Kegley and Raymond (1982) utilize a different theory about international treaties in the field of international relations. They develop periods based on the prevailing attitude among nations toward the binding nature of treaties. Periods characterized by the attitude that treaties are only binding as long as matters stand as they were at the time of the agreement were labeled *clausa rebus sic stantibus*. When nations favored the

interpretation that treaties are always binding, the period is *pacta sunt servanda*. They find that all *rebus* periods have a major power war, but this is the case in only half the *servanda* periods. Subsequent studies show that a similar effect holds for disputes and use of force short of war indicating that established rules do help nations resolve disputes in ways other than force. The use of treaty law as a measurement of system level rules and norms also supports the methodology employed in this project.

The predominant feature of the international political system is the absence of a centralized authority. Nation states conduct political affairs according to the rules and norms they adopt. While leaders are influenced by pressures exerted by other states in the system and even some non-state actors such as non-governmental organizations (NGO's) and international social and political movements, the political reality is that states are sovereign and retain the option to resist outside pressures in the interests of the national will. The legal scholar and theorist, Hugo Grotius, described this system as the law of nations and proposed that it forms the basis of authority for international law. Grotius envisions a system with laws agreed upon by the sovereign states that govern international relations for the mutual good of the states in the system. The political scientist, Kenneth Waltz, accepts the anarchical international system as one of the foundational assumptions of his influential theory of structural realism. Waltz sees a different international system where states respond to anarchy by seeking to balance power and insure security. This study accepts the Grotian model of international relations and attempts to demonstrate the direct relationship between a particular international legal system or regime and states' behaviors in militarized interstate disputes. In addition to the Grotian legal tradition, this study draws from political theories and studies of

international norms discussed earlier. Because the set of states in the Law of the Sea empirical component of this chapter is made up exclusively of democracies, the democratic peace theory and other international relations studies related to democratic regimes will also be incorporated.

Political scientists in the field of international relations are preoccupied with explaining the means employed by states to assert their national political wills in an international system that is based on both independence and inter-relations. Explanations range from power and coercion to cooperation and compromise. This analysis attempts to break down this broad arena of international politics into subsets of political theory and existing research that explain theoretically how international systemic norms are created and maintained and then propose a set of propositions that can be empirically tested for influences on state behaviors. This project is primarily exploratory looking for patterns in existing datasets that open the door to broader inquiries that may require the creation of new measurements and expanded datasets. The empirical scope of this chapter is limited to fishing disputes between democratic states from 1949-1992. The original data set for this project was provided by Sarah McLaughlin Mitchell from the ICOW (Issues Correlates of War) research project and Florida State University. The data set has been expanded for this project to include all militarized interstate disputes between democracies from 1949-1992. Planned future expansions in the data set include adding all regime types involved in fishing and maritime disputes for this period. These enhancements will increase the number of cases and allow me to better differentiate between affects of international norms and the democratic peace component.



Since this chapter is concerned with a set of states and conditions that have not produced war, it is difficult to relate it to other areas of study in international relations. However, an understanding of how international norms govern periods of relative peace and conflict resolution is a valuable piece in the war equation. John Vasquez (1993) makes the theoretical assumption in his book on this topic that “war is a product of interaction and not simply systemic conditions” (40) indicating that there is more to war making than a system orientation, yet leaving open the possibility that systemic conditions nevertheless do have some impact. He makes several other assumptions of which two seem particularly encouraging to the usefulness of international norms. Vasquez assumes that “war is learned” and that “war is a way of making decisions (40-41).” In this context as the analysis of norm theory will show, international norms can be viewed as decision-making rules that evolve out of state practices and expectations that are essentially learned patterns of behavior. It is also a logical assumption that reduced levels of conflict and dispute will have a lessening effect on the occurrences of war. Given the potential benefit of reducing conflict in general and subsequently discouraging the onset of war, it is important to know how international norms are formed, how they operate and how effective they are in reducing and resolving conflict

The analysis in this chapter finds its place among existing and ongoing studies of peace and similar topics both broadly and narrowly. One body of research that is applicable to this study is the Issues Correlates of War project. Long before the beginning of the ICOW project, Vasquez and Richard W. Mansbach (1981) argued that world politics could be viewed from the perspective of raising and resolving issues. This approach influenced the work of Paul Diehl (1992), he writes that some studies have

looked at issue related factors in world politics and find that foreign policy behavior varies by issue area and that states are more willing to fight over issues they regard as important. He also devises a methodological framework for incorporating issues into research designs requiring that issues be first identified, applied in a relevant context and then examined for salience. This approach was instrumental in identifying fishing disputes as the issue measurement for this project.

Paul Hensel and Sara McLaughlin Mitchell (2001) argue that states do not pursue one overarching vision of foreign policy but contend over many issues that have varying degrees of importance. They assert that salience of the issues depends on tangible factors such as economic value and intangible factors such as prestige. The work further develops measurements based upon claims including maritime claims thus bringing maritime issues of contention to forefront of world politics analysis. Sara McLaughlin Mitchell and Brandon C. Prins (1999) find that “a large proportion of the militarized disputes between democracies in the post-WWII period involve fisheries, maritime boundaries, and the resources of the sea (169).” They show from the ICOW dataset that 25% of the 92 democratic dyadic disputes between 1946 and 1992 were the result of fishing disputes. The theoretical thrust of their article focuses on issue salience for democratic dyads.

There are also studies that focus on maritime and fishing disputes outside the ICOW project. Jennifer L. Bailey (1996) describes the violent history of the international fishing industry. These violent disputes often center on the right of nations to manage fisheries and the ecological and economic issues of fishery conservation. Bailey describes the escalating tensions in this area since World War II as the resources of the sea that

once seemed inexhaustible became progressively threatened. Bailey also characterizes the evolution of the Law of the Sea over this same period, noting that major conferences on the Law of the Sea occurred in 1958-1960 and 1974-1982 with the later conference concluding with the Law of the Sea Treaty in 1982. This article makes the connection between use of force in fishing boundaries and international legal regimes formed in response to the threat. That theme is a central component of the theoretical development of this chapter.

Studies of peace can focus on systemic (a world system with a lower probability of war) or interactive (political actors that have a lower probability of resorting to war) factors, (Vasquez 1993). Studies about maritime issues usually attempt to show that when a system that includes a prominent legal regime governing maritime issues, the result will be fewer disputes within that system. I anticipated that periods of peace would be characterized by the existence of a legitimate functional alternative to militarized force to settle issues and disputes and the alternatives in the case of maritime issues are the guidelines established by the Law of the Sea Treaties of 1958 and 1982. The Law of the Sea is most likely the oldest and best-established component of international law.

### History and Theory: The Law of the Sea

The Law of the Sea conventions in 1958 and 1982 were primarily focused on codifying rules already accepted in customary law and state practices. The conventions provided the forum for updating laws to include practices based upon new realities such as technological advancements. The Law of the Sea Treaties produced by the conventions were also accepted and ratified by states at different times and under different

circumstances. Therefore, it is not very useful to look at specific points in time for shifts in the patterns of fishing disputes. This study takes the approach that the Law of the Sea represents a legal order or regime that influenced the entire period 1949-1992 and even periods before that are not yet in my data set. The resulting tests of propositions and hypotheses derived from the study show that fishing motivated militarized interstate disputes between democracies are different from other militarized interstate disputes between democracies. I will show how they differ and attempt to offer theoretical reasons for the differences. These explanations will incorporate democratic peace propositions and also discuss the possible effect of issue salience on state behaviors.

This chapter contends that the 1982 Law of the Sea Treaty takes the progressive development approach. Technological changes and a proliferation of new states between the 1958 Law of the Sea Convention and the 1970's produced the need for a new regime for the high seas (Damrosch et al 2002, 1383-1390). These rapid changes meant that the customary laws of the sea no longer effectively governed the situations encountered at sea. Increased maritime trade, new fishing techniques and demands on fisheries, new types of ocean going vessels and other emerging factors impacted the effectiveness of existing rules. Therefore, the convention that produced the 1982 Law of the Sea Treaty could not rely on customary laws to solve these quickly emerging issues. The convention was forced to devise new rules to deal with new realities. Utilizing Luard's theory concerning the effectiveness of international norms, progressive development treaty law that does not represent established customary rules must be disseminated and instilled into the society of nations before it will be effective. These changes in the 1982 conference on the Law of the Sea reinforced and prolonged the international normative

order associated with international relations on the high seas. On this basis, I contend that the Law of the Sea has remained an influential international set of rules or norms that distinguish fishing disputes from other types of disputes not subject to a vibrant and continuous norm producing legal regime.

An interesting comment on the Law of the Sea Treaties in relation to international politics comes from Louis Henkin. Henkin (1979) sets out to defend international law's relevance to world politics and says the following about the law of the sea, "The process and politics of law-making in our time can be studied (and nearly understood) by this most ambitious, most populous, most extended, most complex law-making effort in international history" (212).

A final important factor in the formation phase of the treaty as norm is the action taken by the United States. As a major world power and maritime state, the United States would naturally have a greater influence on the perception of the normative value of the treaty. While the United States did not ratify the treaty, President Reagan did endorse important elements contained in the treaty on two occasions. In March 1983, the United States claimed the 200 mile exclusive economic zone (EEZ), and in December 1988, it accepted the 12 mile territorial sea provision.<sup>28</sup> The United States also abided largely by earlier conventions and norms of the Law of the Sea from the 1959 conference and before.

A large and emerging body of theory focuses on international relations between democratic states and their propensity to avoid interstate wars with other democratic states. This theory is often referred to as democratic peace. This project utilizes

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<sup>28</sup> Presidential Proclamation 5030, March 10, 1983 and Presidential Proclamation 5928, December, 1988.

democratic peace propositions to introduce the data set and basic characteristics of behaviors in fishing disputes between democratic states. Examples such as the absence of war illustrate how the findings across all democratic dyads in militarized interstate disputes are consistent with democratic peace theory. The purpose for establishing baseline explanations for similarities across the same regime type is to highlight areas that do not share behaviors characteristic with the regime-type theoretical explanations. If democratic states behavior differently across disputes types then a theory based on democratic variables cannot account for this variation. The literature on democratic peace is quite extensive, but it is only necessary to briefly establish some basic assertions for the purposes of this work.

The key finding from democratic peace studies in relation to the hypotheses used in this study is that democracies do not fight wars with each other. Bruce Russett and Harvey Starr (2000) remark, “We begin from the basic empirical observation that democracies very rarely—if at all—make war on each other.” “Understood as a strong probabilistic observation, rather than an absolute “law”, the finding is now generally but not universally accepted (93).” The assertion that democratic states do not fight wars with each other does have strong empirical support. In the Correlates of War data set of militarized interstate disputes, there are no cases of wars denoted by 1,000 battle deaths between democratic states. It is important to note that considerable debate exists about the best way to measure democracy. The measurement ranges from a simple dichotomous variable (yes/no) to the designation of a discrete ordinal scale of democracy or even a continuous variable measuring degrees of democracy. An often-used measurement for democracy is the Polity III scale that attempts to combine different characteristics of a

democratic government into one consolidated measurement on a scale from 1 to 10. A similar scale exists for measurements of autocracy. For the purposes of this work, I selected to use a democracy score of 7 to denote the cut-off of states to include in my data set. This score is not completely arbitrary because it is consistent with studies in the Issues Correlates of War project from which part of my data set was derived, and it represents for me a conservative estimate of the level of democracy needed to argue a level of homogeneity between the states assumed in the model.

In addition to the empirical finding that democracies rarely if ever fight wars with each other, there are other components of the democratic peace literature that focus on levels of cooperation. One study by Sara McLaughlin Mitchell and Brandon C. Prins that applies directly to the propositions in this work found that militarized interstate disputes between democracies have become shorter and less severe over time (Mitchell and Prins 1999). The difference between democratic dyads in militarized interstate disputes and fishing disputes is even more pronounced as illustrated in my findings.

A third relevant study in the democratic peace area that is directly applicable to this study is the article by Bruce Bueno de Mesquita and James Lee Ray (2004, 94-119). Their study notes that in the years 1816-1992, at least one state in a democratic dyad resorted to the use of force 67% of the time. It further states that this use of force seldom results in substantial battle deaths. This finding is consistent with the results in my data set from 1949-1992. Interestingly, fishing disputes resort to use of force 96% of the time. Secondly, their study posits that “democratic states should be significantly less likely to reciprocate when faced with dispute initiators that have chosen to “use force” against them, especially if the initiator is also democratic (2004).” They find that correlations

between democratic initiators that use force and the hostility level reached by a democratic target are not statistically significant. Again, it is interesting from my study that this condition is even more pronounced for fishing disputes. States in a democratic dyad reciprocate 55% in non-fishing militarized interstate disputes 1949-1992, but only 16% in fishing disputes.

Democratic peace theory helps explain several findings in my study of fishing disputes between democratic states, but it is important to recognize that the key findings concerning differences in duration and reciprocation between fishing disputes and other militarized interstate disputes between democratic states appear to be related to explanatory factors beyond regime type. The interesting intersection between democratic peace theory and my theory of norm producing international legal orders is the attitude of democratic regimes toward international law. This avenue of inquiry and theory enhancement will be a primary focus of future expansions upon this study. It would also supplement similar studies that look at interactions between democracy and trade for instance.<sup>29</sup>

The theoretical framework suggests that international treaty law once it has been disseminated and instilled in the minds of international political decision makers will create an expectation or norm of behavior that will influence their conduct in a crises or potential dispute. This theoretical perspective suggests that democratic states will avoid militarized escalation of maritime disputes and settle maritime disputes more expeditiously than other disputes because the international norms established in Law of the Sea treaties and international law more generally will provide alternative means of

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<sup>29</sup> A useful reference is the book; Triangulating Peace: Democracy, Interdependence, and International Organizations, (W.W. Norton and Company, 2000) by Bruce M. Russett and John Oneal.



dispute settlement. The relevant data available for fishing disputes between democratic states allows the statistical evaluation of two related hypotheses concerning reciprocal action and duration in fishing disputes. Militarized interstate disputes are disputes between sovereign nation states where there is at least a threat of the use of force. Use of force designations range from threat of force to joining an interstate war.

**Hypothesis 3:** Democratic states will refrain from reciprocating actions in fishing disputes more than in other types of militarized interstate disputes.

Table 4.

**The Likelihood of Reciprocating Action in Fishing Disputes between Democratic States (1949-1992)**

Reciprocating Action	Fishing Dispute		Total
	Yes	No	
Yes	4	24	25
No	21	20	41
Total	25	44	69

Chi2 = 9.82

Pr = 0.002

Table 5.

**Militarized Interstate Disputes between Democratic States (1949-1992)  
Reciprocating Action**

Logistic Regression for Fishing Disputes on Reciprocating Action  
 Reciprocating Action (dichotomous dependent variable)  
 Fishing Disputes (independent variable)

<u>Odds ratio</u>	<u>Standard error</u>	<u>Z-Score</u>	<u>P&gt; z </u>
.1587	.099	-2.95	.003

Table 4 illustrates another more pronounced difference between fishing disputes and other militarized interstate disputes between democratic states. This 2x2 table illustrates that fishing disputes are much less likely for reciprocation to use of force by the initiator. Reciprocating action refers to a use of force (at least threat) response by one nation to a use of force initiation by the other. The probability of reciprocation in a fishing dispute is only 16% compared to 55% in non-fishing militarized interstate disputes between democratic states.<sup>30</sup> The chi2 goodness of fit model is 9.8 with a statistical significance of  $p=.002$ . Table 5 provides an equally significant finding using logistic regression with an odds ratio for fishing disputes being reciprocated of .16. It is very unlikely from these statistics that this pattern is the result of random occurrences. I propose that states are more unlikely to reciprocate use of force in fishing disputes because the Law of the Sea provides a norm for dealing with such disputes and gives the target state an alternative option of recourse to use of force.

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<sup>30</sup> These results differ slightly from Mitchell and Prins (1999) that report 20% of fishing disputes between democracies are reciprocated.

**Hypothesis 2:** Fishing disputes between democratic states will have a shorter duration than other militarized interstate disputes between democratic states.

Table 6.

**Militarized Interstate Disputes between Democratic States (1949-1992)<sup>31</sup>  
Duration**

Average Duration of Militarized Interstate Disputes (Non-fishing)	112 days
Average Duration of Militarized Interstate Disputes (Fishing)	58 days

A major difference between fishing and non-fishing disputes between democratic states is the duration of the dispute. Table 6 shows that non-fishing militarized interstate disputes last nearly twice as long as fishing disputes. This finding is consistent with the Mitchell and Prins 1999 study in which they state, “The duration of fishing disputes also tended to be shorter on average than democratic disputes over other issues; 52 percent of fishing disputes lasted just one day, whereas 37.5 percent of nonfishing disputes lasted one day (175).” I propose that fishing disputes can be settled more quickly because an international legal order (Law of the Sea) exists that dictates the norms for resolving fishing disputes and not solely because of a democratic dyad.

While dictated by the constraint of available data, the use of democratic dyads as the unit of analyses in this study also served the purpose of limiting the comparison of state behaviors to one regime type. In this manner, I designed the study to differentiate

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<sup>31</sup> Linear regression models show that fishing disputes have a -51.3 coefficient in relation to the duration of a militarized interstate dispute between democratic states but this result is not statistically significant ( $p=.49$ ). The small number of cases (69) and the dominance of several key dyads (Non-fishing: Israel/Syria, Turkey/Greece, Fishing: New Zealand/United Kingdom) make it difficult to make statistically significant inferences across all dyads.

between the behaviors that were consistent across issue areas (that could be attributed to regime oriented explanations) and those that varied within the regime type across issue areas (unique to fishing disputes). The set of behaviors that were consistent such as restraint from going to war were fitted to the democratic peace theory as described in an earlier section. Those behaviors that were different between fishing disputes and other militarized interstate disputes between democratic states required a different theoretical explanation not based on regime type. It is these findings that support the norm-oriented theory of international legal orders or regimes that is advanced by this work.

A significant argument that might undermine this position is that fishing disputes are by nature less salient to states and therefore, subject to different behaviors regardless of the Law of the Sea norm. This is an opinion that is difficult to disprove empirically. When measuring a state behavior, it is not always clear what motivation is behind the action. States' leaders may refrain from reciprocating actions because fishing disputes are not worth risking war, or they may realize that recourse is available in the existing international law that makes reciprocation unnecessary or prohibitive. This problem of proving not only that norms exist but also that states' leaders are actually responding to the norm and not other factors such as risk or salience is characteristic of virtually all norm based research. One response is to argue that the correlation between norms and behaviors is valid if the norm comes before the behavior, there is a theoretical justification for the relationship and the relationship is statistically significant. Because there is no clear connection between issue salience and the norm, it is unlikely that there is a spurious relationship with salience as the confounding variable.

It is possible that democracies select fishing disputes because of low salience and low risk of war and that this selection effect accounts for the high percentage. It is also often the case that use of force in fishing disputes involve isolated cases of seizure that hardly equate to larger scale uses of force in many militarized disputes. However, these arguments are largely speculative and an in-depth case study of fishing disputes is required to adequately determine the issue of salience. As pointed out earlier from Jennifer Bailey's article "Hot Fish and (Bargaining) Chips", fishing disputes are highly contentious and taken very seriously by the disputants. I believe that a credible case from the data and theory exists for accepting the proposition that fishing disputes are different than other militarized disputes primarily because there are international norms regulating behavior on the high seas, and not primarily because states don't care about fishing disputes.

The results from this research project provide evidence that international legal orders and treaty law (Law of the Sea) are norm producing factors that change the behaviors of democratic states in militarized interstate disputes for a specific issue area. In this case, the long-standing Law of the Sea norm codified in the Treaties of 1958 and 1982 has a significant effect on the characteristics of fishing disputes compared to other militarized interstate disputes.

This chapter provides a basis for continued investigations of the effects of norm producing international legal orders or regimes. It builds on earlier findings by Sara McLaughlin Mitchell and Brandon Prins by expanding theoretically beyond the democratic peace to investigate more completely the role of international law. While Mitchell and Prins develop the connections between democratic forms of government and

propensities toward militarized maritime disputes, there study does not examine the impact of international conventions on maritime disputes. This study shifts the focus away from regime type as the independent variable to the Law of the Sea Agreements. There is evidence that regimes such as the Law of the Sea do have an impact on state behaviors in militarized interstate disputes. The continuation of this line of inquiry will involve expansion to include autocratic and mixed regimes, new issues areas beyond fishing disputes (i.e. territorial disputes), and further theoretical exploration of the relationship between democratic regimes and international norms.

Table 7.

**Fishing Disputes between Democratic States (1949-1992)**

Dyad	Date
United Kingdom/Iceland	1958
Republic of Korea/Japan	1960
United Kingdom/Iceland	1960
United Kingdom/Denmark	1961
United Kingdom/Denmark	1961
United States/Peru	1962
Norway/Denmark	1969
United Kingdom/Iceland	1972
German Federal Republic/Iceland	1974
United States/Canada	1974
United States/Canada	1975
United Kingdom/Iceland	1975
United States/Canada	1979
United States/Ecuador	1980
Norway/Denmark	1981
France/Spain	1984
Ireland/Spain	1984
Ireland/Spain	1985
Canada/France	1987
Argentina/Japan	1987
Malaysia/Philippines	1988
Japan/Papua New Guinea	1988
Canada/France	1988
United States/Canada	1989
United States/Canada	1991

\*Data derived from ICOW Project, Florida State University. (special thanks to Sara McLaughlin Mitchell)

## CHAPTER X

### INSTITUTIONS

#### International Court of Justice

The International Court of Justice (ICJ) is frequently mentioned in scientific studies dealing with international law, but it is rarely the main subject. More often, the ICJ is grouped into categories with the United Nations and other international institutions, or the broad classification of third party settlements. The ICJ or World Court is generally characterized on the fringe of mainstream world politics with relatively few cases that involve predominantly low salience issues. The process of adjudication conducted in the ICJ is dispute settlement between nations. Jurisdiction is limited to states recognized by the United Nations who consent to have a dispute settled by ICJ judges. The recourse to adjudication is one of many options for third party resolution of disputes among nations including mediation, arbitration, “good offices”, and the U.N. Security Council (Franck 1986, 54). The ICJ also influences international issues by issuing “advisory opinions” at the request of the United Nations (Peek 1997, 43). This role of the court has introduced many issues into the court’s realm that are not common disputes likely to be brought by contesting nations.

Key to understanding the court in relation to international politics is the optional clause and principle of reciprocity in the court’s jurisdiction. State may accept the compulsory jurisdiction of the ICJ for dispute settlement of certain issues or they may chose the optional clause. States that choose the optional clause are not required to accept



the jurisdiction of the court except as consent is given to adjudicate a dispute before the court. However, states that have accepted compulsory jurisdiction are legally bound to the jurisdiction of the court as long as the opposing state has also accepted compulsory jurisdiction. This is the principle of reciprocity (Damrosch et al 2002, 82-99).

Another important aspect of the ICJ in international relations is the purpose of the Court. The functional purpose of the court is to settle disputes between states, but this has a larger purpose of promoting peaceful relations between states through non-military settlements of disputes. Some original supporters of the court had even purposed the court to “place international relations on a legal basis (Meyer 2002, 209).” This agenda would certainly turn international politics on its head if realized. However, this idea was dismissed by the United States by act of the Senate and never found large-scale support in the international community. Without compulsory jurisdiction or authority to legalize international relations, the court has been viewed as an instrument for dispute settlement rather than arbitrator of international conflict.

### Literature Review

Mohamed Amr (2003) categories the role of the court in an advisory role to the UN, interpreter of institutional law at the UN, adjudicator of contentious cases, constitutional court of judicial review for the UN, and court of appeal. He emphasizes the court’s special relationship to the United Nations in his descriptions but views the relationship as limited in scope. He believes that the ICJ has not adjusted to the changing demands on the institution of the UN and therefore, not exercised its full potential in these roles (377). This research project focuses on the role of the court in contentious cases

between nations, but acknowledges that the role of the court within the institution of the UN is a potential subject for future inquiry.

Richard Falk (1986) characterizes the role of the court as part of the general struggle over normative values in international society. He recognizes the pluralistic character of society especially in the realm of cultural and ideological diversity, and suggests that the court must move away from the conventional restraints of jurisprudence to consider social and political factors in its deliberations. This view accepts that disputes are often deeply embedded in cultural and political circumstances that extend beyond legal principles.

Thomas Bodie (1995) describes how the court has confronted the political realities of adjudicating disputes over time. He concludes that the court has been cautious not to embroil itself in political issues while at the same time not shied away from cases with political overtones (89). By focusing on the rule of law and restricting its deliberations to principles of international law, the court has found a way to apply legal resolutions even in political disputes. This view is an interesting contrast to Falk's suggestion that the court must indulge in political matters in order to be relevant in solving disputes of a political nature.

This chapter examines the ICJ by looking specifically at the impact of ICJ cases on militarized disputes. Because use of force is the most significant political action by a state, it is a good testing ground for the efficacy of the court in difficult political situations. This approach does not test whether Falk or Bodie is correct concerning the effectiveness of court based on its willingness to consider politics. It does however test whether the court has been influential in settling disputes of a political nature. The

analyses also address related criticisms that the court is used infrequently and for low salience issues. The analyses involving militarized interstate disputes (MIDs) from the Correlates of War Project (COW) constitute only the first phase in a study of the ICJ. The second phase will include data from the Issues Correlates of War Project (ICOW) and focus more broadly on the Court's effectiveness at issues resolutions and long-term dispute settlements.

International law generally has a high profile in media coverage of international politics and international political discourse. Inter-governmental institutions such as the United Nations regularly refer to international law, and many non-governmental organizations rely on international law for political legitimacy and action. There is however much debate concerning its actual impact on international politics and states' behaviors. This chapter approaches international law from an integrated perspective utilizing scientific methods to examine measurable impact and outcomes while also taking seriously the claims and potentialities of international law in designing the research agenda. Anne-Marie Slaughter (1998) expresses this sentiment arguing that both disciplines [international law and political science] share a common set of assumptions about interstate relations and rules of behavior. These assumptions include such foundational concepts as state sovereignty, self-determination and self-defense. Slaughter like many other scholars recognizes however that inter-disciplinary discourse has been relatively infrequent and selective with a more competitive than cooperative tone.

This chapter also attempts to utilize scholarship from international law and politics in a balanced way by taking into account the claims and theoretical perspectives of both disciplines. While my methods of inquiry are scientific in nature relying on

observations and measurements of events and outcomes, the purposes and designs of my hypotheses are based on an integrated theory of international law and politics. In this chapter, I direct my theoretical perspective toward one particular subject of inquiry, the ICJ or World Court. I chose the ICJ because it is an institution based solely on the principles of international law, and focuses on contentious issues between states and demonstrates characteristics of conflict and issues between states that are important to both law and politics such as territorial boundaries and the use of force. The purpose of this chapter in the context of the larger research project is to address how international law impacts states' behaviors in conflict situations and contentious issues, and to measure this impact as systematically as possible.

There are numerous perspectives on international law from legal as well as political scholarship. This work has summarized a few of the ideas that represent the core of my theoretical assumptions. They include a range of approaches including natural law, realism, structuralism, and constructivism as well as ideas that focus on trust, community, and raising and resolving issues. The common theme that emerges from these ideas is the basic assertion that international law exists for the self-interests of states. The theory used to direct this research project expands on this fundamental idea by acknowledging the great diversity of self-interests and the complexity of customary international law, and anticipating the need for a more progressive codification and institutionalization of international law. This includes an expanded role for international courts such as the ICJ, criminal tribunals and the newly formed International Criminal Court. This concept also applies to more comprehensive multi-national treaties and agreements such as the Law of the Sea and the World Trade Organization. In this chapter, I examine information

gathered from cases brought before the ICJ looking for evidence concerning the impact of the Court on the militarization of international conflict.

Thirty years ago, William Coplin and Martin Rochester published an article in *The American Political Science Review* that examined empirically the ICJ and its predecessor Permanent Court of International Justice along with the League of Nations and United Nations (Coplin and Rochester 1972). They attempted to move away from normative and prescriptive analyses of the Court and focus on compiling data that could be used by researcher for statistical evaluation. Their study examines issues such as who participates in the court and how frequently, as well as attributes of participants and their relationships to one another. The variables examined and subsequent analyses of factors affecting participation and outcomes were instrumental in designing the data set for this research project. By replicating and updating the ICJ cases to include data from 1968 to 2005 merging the data where appropriate with the COW Project through 2001 in order to expand the analyses beyond the Court and its participants' attributes, this project examines more directly the relationship of the Court to international conflict.

#### Replication and Update: Coplin and Rochester (1978)

In the process of updating information for the past 37 years, I attempted to replicate Coplin and Rochester's study as closely as possible for purposes of comparison. It would be particularly useful to observe distinct changes in the usage of the ICJ and characteristics of its participants. This requires comparing apples to apples in the quantitative comparisons between the Coplin and Rochester article and this research project. In several cases, the data categories and sources are identical, but other cases

required substitutions or modifications to include updated data sets. These changes are noted in the subsequent tables. The quantitative analyses are however very similar and reveal significant changes in trends and characteristics. These transitions are directly relevant to the theses of this project in several ways. The most striking contrast is the change in characteristics of the participants. The evidence clearly shows a tendency for greater power nations to reduce their use of the court and lesser power nations to increase. These findings coupled with related transitions over time are discussed with each table and in the conclusion of this section.

The tabular formats and designation follow those used in the original Coplin and Rochester study. The primary differences are the omission of cases submitted to the Permanent Court of Justice, League of Nations and United Nations and the analyses of types and outcomes in the ICJ that are included in their study. The focus on the International Court of Justice was intentional to stay within the scope of this research project and concentrate on the contemporary legal institution and legal issues. The issues involving types of cases, duration and actions are either outside the research questions in this project or they are discussed in this project's subsequent empirical analysis for the ICJ.

Table 8.

**Frequency Distribution of Participation in the International Court of Justice**  
(Number and Percentage of States Using the Institution per Frequency)

	Frequency of Usage per State (Number of States and Percentage of Total States)					
	1	2	3	4	5	6+
ICJ N=80 (Total current study)	38 (48%)	14 (18%)	12 (15%)	6 (8%)	3 (4%)	7 (9%)
ICJ N=32 (Total Coplin/Rochester study)	23 (72%)	4 (13%)	1 (3%)	1 (3%)	0	3 (9%)

The frequency distribution of states usage does not provide too much additional information from the original study except to note the increase in percentage of states that have used the court more than once. This may just be a factor of passing time allowing states more time and opportunity to utilize the court. It may however demonstrate that states have found the court useful and are willing to use it a second or third time. It also shows a slight trend over time for more states giving the court another try at resolving problems. Participation refers to a state being party to a case accepted on the docket of the Court.

Table 9.

**Distribution of Cases According to Method of Introduction  
for the International Court of Justice**

	Numbers (Percentages)	
	Joint Submission	Nonjoint Submission
ICJ N=78 (Later era 1969-2005)	13 (17%)	65 (83%)
ICJ (C/R) N=31 (Early era Coplin/Rochester 1945-1968)	3 (10%)	28 (90%)

There is again no significant change in findings from the original study on the issue of whether state jointly submit a case to the court or one party brings a case against another. There was a slight increase from 10 to 17 percent for joint submissions that provides some evidence for the argument that states are viewing the court more as an effective problem solving institution and thus, willing to jointly submit cases for resolution.

An alternative tabular format to the Coplin and Rochester study that better illustrates the relationship and provides more information on statistical significance is below. It shows that the change from the early era to the later is not statistically significant.

The Relationship between the Different Eras for the ICJ and the Method of Introduction  
of Cases to the Court

Joint Submission	Early Era (1945-1968)	Later Era (1969-2005)
No	28 90%	93 85%
Yes	3 10%	16 15%
N = 140   Chi2 = .515   P < .18		



Table 10.

**Frequency Distributions of Economic Development  
for Participation in the International Court of Justice**

	Under- developed	Numbers (Percentages)	
		Intermediate	Developed
ICJ N=156 (Later era 1969-2005)	70 (45%)	12 (8%)	74 (47%)
ICJ (C/R) N=62 (Early era Coplin/Rochester 1945-1968)	5 (8%)	12 (19%)	45 (73%)

Source: Coplin and Rochester (cited *World Handbook of Political and Social Indicators* (New Haven: Yale University Press 1964) Categories defined as Under-developed (traditional and pre-take-off) Intermediate (Take-off) and Developed (maturity and high mass consumption) Updated identifications used by applying these descriptors to estimates of economic development during periods 1969-2005.

The increase from 8 to 45 percent in the proportion of underdeveloped states using the court is substantial. It also counters the argument cited in the original study that the court is too expensive for poorer countries to use. One potential explanation of this finding is that less developed states recognize the Court as a means to reach legal parity with developed (presumably wealthier and more powerful states). The finding is statistically significant ( $p \leq .01$ ).

	<u>Early Era</u>	<u>Later Era</u>
Underdeveloped	5	70
Intermediate	12	12
Developed	45	74
N = 218	Chi2 = 28.09	$p \leq .01$

Table 11.

**Frequency Distribution of Geocultural Regions  
for Participation in the International Court of Justice**

	Percentages			
	Western Community	Latin America	Eastern Europe	Other
ICJ N=156 (Later era 1969-2005)	62 (40%)	20 (13%)	20 (13%)	54 (34%)
ICJ (C/R) N=62 (Early era Coplin/Rochester 1945-1968)	36 (58%)	8 (13%)	10 (16%)	8 (13%)

The fall of communism and rapid transformation of former Eastern Bloc countries renders this table less useful for analysis because of its choice of classifications. However, it is interesting to note a shift from Western Community to the other category. Africa, Asia and the Middle East comprise the “other” category and represent much of the developing world as well as political and cultural systems with different bases than the West and even Latin America. This shift makes another inference about the states view of the effectiveness of the court. Assuming that basic values and economic development change slowly, there must be another explanation besides costs or legal philosophy for the increased usage. Although certain Asian countries have rapidly increased in economic development such as Japan and South Korea, it is not these countries that are using the courts. In fact states with very contentious histories such as Pakistan, India, Iran and Libya are included in the group indicating a willingness to use the court in place of traditional conflict and use of force options.

Table 12.

**Political, Economic and Geocultural Similarities Between the Disputants  
in Each International Court of Justice Case**

Political sameness based on Table 12 Political Competitiveness  
 Economic sameness based on Table 13 Economic Development  
 Geocultural sameness based on Table 14 Regions

	Political		Percentages Economic		Geocultural	
	<u>Same</u>	<u>Different</u>	<u>Same</u>	<u>Different</u>	<u>Same</u>	<u>Different</u>
ICJ N=78 (Later era 1969-2005)	23(29)	55(71)	49(63)	29(37)	56(72)	22(28)
ICJ N=31 (Early era Coplin/Rochester 1945-1968)	22(35)	40(65)	38(61)	24(39)	24(39)	38(61)
	Chi2=.57 Not significant		Chi2=.44 Not significant		Chi2=12.06 p<=.001 significant	

The findings on sameness and difference between disputants is much the same from the original to the updated on the issue of polity and economic development. However, the swing in percentages on the issue of geocultural issues is marked. A reversal from 40/60 to 70/30 in states that are geographically close and culturally similar is important. (significant at  $p \leq .001$ ) One probable explanation is that territorial disputes between contiguous states have traditionally been very contentious issues resulting in militarized conflicts (Vasquez and Henehan 1992). If states view the court as increasingly effective at resolving disputes, then the result of increased usage by contiguous and proximate states would be expected. Because such cases have been particularly contentious in the past, the submission of high salience issues to adjudicated settlement is

more significant. This change is evident in specific cases such as the Central American and African border disputes brought to the court since 1968.

Table 13.

**Economic Interdependence Between Disputants  
in Each International Court of Justice Case**

	Numbers (Percentages)		
	Heavy	Moderate	None
ICJ N=42 (Later era 1969-2005)	16 (38%)	9 (22%)	17(40%)
ICJ N=31 (Early era Coplin/Rochester 1945-1968)	8(26%)	9 (29%)	15 (45%)

Chi2 = 1.47 (Not significant at  $p > .05$ )

Source:

Coplin and Rochester: Roughly approximated based on international trade information in *Statesmen's Yearbook*. None if neither state mentioned as trade partners, Moderate if one state mentioned in one source as principle trade partner of the other, Heavy if both states were named as principle trade partners of the other.

Updated information: COW dataset: International Trade Database

Barbieri, Katherine. 1996. *Economic Interdependence and Militarized Interstate Conflict, 1870-1985*, Ph.D. Dissertation. Binghamton University, Binghamton, NY.

Barbieri, Katherine 1998. "Trade and Conflict: Assessing the Impact of Interdependence on Militarized Conflict." Unpublished manuscript. Calculated as percentage of dyadic trade versus total trade.

There is little contrast between the original study and update on the issue of economic interdependence between participants in the ICJ. This finding is somewhat surprising given the increase in world trade and economic interdependence, but indicates

that economic interdependence between states continues to show little distinguishable influence on decisions to submit cases to the ICJ.

Table 14.

**Geographic Distance Between Disputants  
in Each International Court of Justice Case**

	Common Border	Percentages 1 to 500 Miles	More Than 500 miles
ICJ N=78 (Later era 1969-2005)	38 (49%)	15 (19%)	25 (32%)
ICJ N=31 (Early era 1945-1968)	6 (20%)	6 (20%)	19 (60%)

Chi2 = 9.44    p <= .01

This finding is a reinforcement to the previous table on geocultural sameness indicating that proximity and common borders represent a significant shift in the usage of the court. More than doubling from 20 to 49 percent the number of cases between states that share a common border, this is further evidence that high salience issues traditionally resolved by use of force are being submitted to adjudication at an increasing rate.<sup>32</sup> At p<=.01, it is very unlikely that the change is random.

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<sup>32</sup> Paul Diehl found in his article “Contiguity and Military Escalation in Major Power Rivalries, 1816-1980” published in the *Journal of Politics* 47 (4):1203 that disputes involving territorial contiguity are much more likely to escalate than militarily than other types of disputes. (Vasquez, 1999)

Table 15.

**GNP Rankings (2005 Material Capabilities) Between Disputants in Unilaterally Initiated Cases Before the International Court of Justice**

	Same Rank	Percentages	
		Initiator 25% larger	Initiator 25% smaller
ICJ (material capabilities) N=93 (Later era 1969-2005)	3 (3%)	34 (37%)	56 (60%)
ICJ (C/R) (GNP) N=28 (Early era 1945-1969)	4 (14%)	18 (64%)	6 (22%)

Chi2 = 14.7                      p <= .001

Source: Singer, J. David, Stuart Bremer, and John Stuckey. (1972). "Capability Distribution, Uncertainty, and Major Power War, 1820-1965." in Bruce Russett (ed) *Peace, War, and Numbers*, Beverly Hills: Sage, 19-48. National Material Capabilities v. 3.0, COW2. Calculation in original Coplin/Rochester study used Gross National Product. The updated analysis uses the Composite Index of National Capabilities (CINC) as the measurement of power. It is a composite of military expenditures, military personnel, energy consumption, total population, urban population and production of steel. This measurement is a more precise estimation of national material capabilities.

This table provides the strongest evidence for a shift in use of the ICJ by major powers. The data shows that prior to the Coplin and Rochester study in 1972 the majority (64%) of initiating states were at least 25% larger than the target state. By 2005, the percentage had fallen to 37%. The increase came primarily in smaller states initiating cases against states at least 25% larger (up from 22% to 60%). The inference from this finding is that the ICJ was initially viewed as an instrument for major states to exert their will on smaller states. This would align with the fact that major power states led in establishing the Court through the UN after World War II during a time when U.S. and Ally interests were dominant in reshaping the international community. The reversal in

use of the Court infers that smaller states began to view the Court as an equalizer with more powerful states. The Court was expected to act to bring the claims of smaller states against larger states. This shift from using the Court as a reinforcement of major power influence to an alternative dispute settlement for smaller states is a significant finding. The scale of the shift underscores the statistical significance of the trend with a p value of  $\leq .001$  indicating a very small chance that the finding is random.

### Militarized Disputes and the Impact of the ICJ

This section examines the relationship between the Court and militarized interstate disputes specifically. Militarized interstate disputes are disputes between nation states that exhibit at least the threat of force. Dyads refer to pairs of states as referenced in dyadic conflicts. In addition to a brief description of the theoretical foundations for asserting that international law in general and the ICJ in particular should have an impact on reducing the militarization of conflicts, this section provides empirical analyses to demonstrate this relationship. The conclusions reached in these analyses are that the number of cases brought before the ICJ is inversely correlated with the number of militarized interstate disputes (MIDs) at the system level and state level, but this correlation is evident only in the increased or decreased direction of the relationship and does not explain very much about the specific relationship between frequency in use of the Court and number of MIDs. This study suggests that more research is needed into the dynamics of the Court's actions and specific dyadic conflicts including more detailed case studies and specificity in the data set concerning the initiation and cessation of contentious issues.

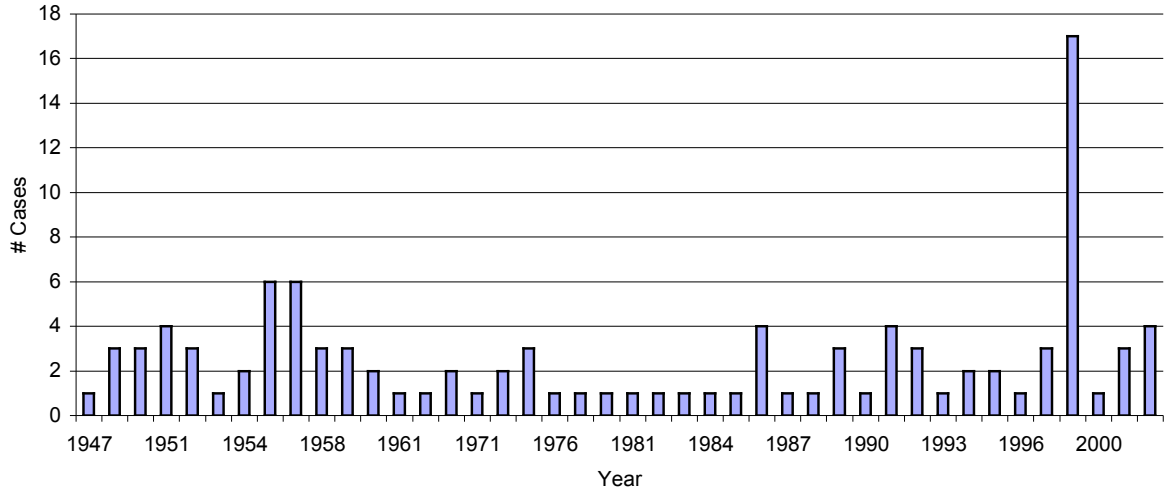
Table 21 lists the cases submitted to the ICJ since its inception in 1946. There have been 109 cases involving 75 different nations. Cases have focused on issues such as rights of nationals, aerial incidents, territorial disputes, use of force, fisheries and nuclear testing. The issues brought before the Court cannot really be characterized as non-salient or insignificant. For example, Hensel (1996) shows that territorial MIDs are more likely to escalate to war than non-territorial disputes. Even fishing disputes can be very contentious often leading to the use of force short of war. It is beyond the scope of this work to analyze the long-term outcome of every contentious issue brought before the Court, but examples such as Nicaragua's case against the United States in 1984 indicate that the ICJ has adjudicated issues of significant importance to the parties involved and the world community. In that case involving support by the United States for military interventions in Nicaragua, the United States considered the matter so politically charged that it boycotted the proceedings (Falk 1986, xvi).

A key question in the theoretical framework of this study is whether the Court's impact is increasing over time. One useful measurement is the change in number of cases brought before the ICJ. The graph in Table 20 shows the frequency of ICJ cases from 1947 to 2004. After an initial decade of high activity that came with the enthusiasm for a new institution and increased cooperation after World War II, the number of cases dropped off rapidly during the 1960's and 1970's. There was however a gradual rise in cases in the last quarter of the century. From 1947 to 1974, the ICJ received 47 cases compared to 62 after 1974. The ICJ received cases in 18 of the 28 years before 1974 and 26 of the 30 years since.



Table 16.

**Number of Cases Per Year - International Court of Justice**



Number of Cases 1946-1974	47	Number of Years with Case 1946-1974	18/28
Number of Cases 1974-2004	62	Number of Years with Case 1974-2004	26/31

In order to address the specific question of the ICJ’s impact on conflict, it is necessary to examine the occurrences of militarized interstate disputes. Using information available from the COW-MID data set, I compared at the system level and state level through 2001 whether a correlation exists between activity in the ICJ and frequency of MIDs. The results in Tables 17 show somewhat surprisingly that periods of increased use of the Court are correlated with periods of fewer MIDs.

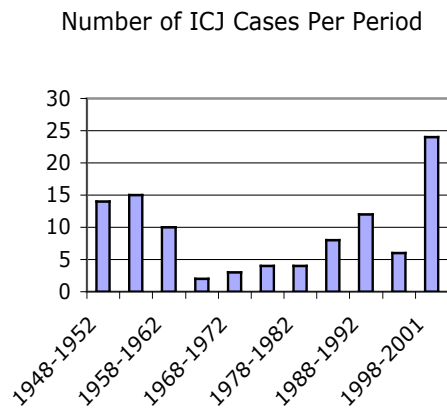
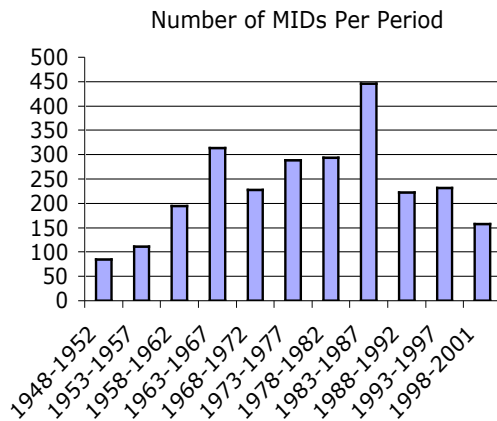
It is a somewhat surprising result because the relatively few ICJ cases compared to militarized disputes suggests that resolution through the Court would not directly impact the occurrences of militarized disputes. There are simply many more militarized disputes than ICJ cases, However, it is reasonable to conclude that the correlation of increased ICJ cases to decreased militarized disputes indicates a system level norm to

more toward non-militarized dispute settlements such as the ICJ. The assumption that ICJ case submissions are also indicators of corresponding system level norms suggests the simultaneous influence of norms throughout the system including ICJ cases and MID's. For this reason I chose to use periods of five years because clustering of activities in periods are more representative of trends than individual year fluctuations that may depend on timeliness of case filings or series of interconnected cases brought in a short time span. The patterns were similar for ten year periods as well. The graphs in Table 17 illustrate the inverse relationship between number of ICJ cases and MIDs. In the eleven transitions between periods, the MIDs and ICJ cases move in opposite directions five times indicating that more of the time MIDs increase when ICJ cases decrease, or conversely MIDs decrease when ICJ cases increase. It is easy to visualize this relationship by imagining turning one of the graphs over on the top of the other graph and seeing that they almost fit together like two puzzle pieces.

Table 17.

**The Correlation Between No. ICJ Cases and MIDs**  
*(system level for five-year periods)*

<u>Periods</u>	<u>MIDs</u>	<u>ICJ Cases</u>
1948-1952	84	14
1953-1957	111	15
1958-1962	195	10
1963-1967	314	2
1968-1972	228	3
1973-1977	288	4
1978-1982	294	4
1983-1987	446	8
1988-1992	222	12
1993-1997	231	6
1998-2001	157	24



In Table 18, a regression analysis shows that the number of cases brought before the ICJ in a given five-year period is actually negatively correlated with the number of MIDs in the period. The relationship is inverted as expected indicating that each additional ICJ case in a period corresponds to a drop of fourteen in the number of MIDs in that period (slope = -9.12). The probability of this finding being the result of randomness is only about 2.7% ( $p = 0.027$ ). The number of ICJ cases in a period actually explains about 40% of the variation in MIDs for that period ( $r^2 = 0.36$ ) which suggests that the number of ICJ cases is a variable that should be considered in the complex

factors explaining the frequencies of MIDs. This finding shows that the rate of submission of cases to the ICJ at a system level is correlated at the system level with militarized disputes, but it is not clear whether the ICJ has a direct influence on the occurrences of MIDs, or a system level norm of peaceful settlement impacts both the number of cases brought before the ICJ (increasing) and MIDs (decreasing). Given that the number of MIDs and states involved in MIDs is far greater than involvement in ICJ cases, it is likely that the ICJ is primarily an indicator of a wider spread factor that is influencing peaceful settlements. The ICJ may however have an influence as one means of peaceful settlement that has a direct impact on a subset of interstate disputes.

Table 18.

**Correlation Between Number of MIDs  
and Number of ICJ Cases in a Period**  
*(system level for five-year periods)*

Variable	Estimate	S.E.	P-value
Intercept	318.2		
# ICJ	-9.13	4.09	0.027

Dependent variable: Number of MIDs  
R<sub>2</sub> = (.36)

Shifting to the state level of analysis in Table 19, I found that 21% of the MIDs involved two states that had both submitted cases to the ICJ. The expected percentage based upon the number of states involved in ICJ cases and MIDs overall is 12%. This is evidence that some states are contentious and get involved more often in both MIDs and cases before the ICJ. The results were similar for a two by two table tabulating states with

and without an MID or ICJ case. The relationship between having an ICJ case and MID was positive and significant with a Yule's Q = +0.89 and p-value <.0001.

While individual states may have a propensity toward having contentious issues with other states and thus higher numbers of both MIDs and ICJ cases, this characteristic should remain relatively constant over time. Therefore, I looked at dyads that had an ICJ case with each other. I found that these dyads had only 49 MIDs in the ten years after they were involved together in an ICJ case compared to 68 MIDs in the ten years prior to the ICJ case (decrease of 28%).

Table 19.

**The Impact of ICJ Cases on Dyadic Conflicts**

*MIDs between states in ICJ cases*

Number of MIDs in the 10 years prior*	68
Number of MIDs in the 10 years after*	49

**28% decrease in dyadic MIDs after ICJ cases**

"Only includes MIDs that occur 10 years before, and ten years after, the submission of a case to the ICJ."

Using five-year periods again to measure changes over time, I looked at whether the inverse relationship between changes in MIDs and ICJ cases demonstrated at the system level also held at the state level. Table 20 uses a two by two table to record the increases and decreases in number of ICJ cases and MIDs from one five-year period to another for each state. Only periods with at least one MID or ICJ case and that reflect a change from the previous period are included. It is important to note that the analysis shifts from Table 19 to Table 20 by looking at the change for individual states rather than dyads. The measurement is now focused on changes in the ratio between cases and MIDs

for each state. The key indicator is not number of cases and number of MIDs, but the changing ratio of cases to MIDs for each state. Therefore, a state could have a large number of MIDs and small number of cases in absolute terms, but if the subsequent period shows an increase in cases and decrease in MIDs, then the change in ratio is an indicator of an increased impact of the Court on disputes. The Yule's Q score for this table is - 0.45 indicating that the relationship is inverted (increase in ICJ cases = decrease in MIDS, etc.) and strong. The  $X^2$  value is 5.2 with only a 2% chance of being a random result ( $p = 0.0225$ ). The evidence at the state and system levels indicate that as ICJ cases increase MIDs decrease and vice versa. The state level changes in involvement in militarized disputes and ICJ cases is recorded by five year periods for the same reason as the system level analysis because I am arguing that states are not directly settling all disputes through the Court. During a given five year period, states are making choices to avoid militarized disputes and submit cases to the ICJ or vice versa. The correlation of increases ICJ cases to decreases MIDs is an indicator of a simultaneous and periodic influence on decisions concerning militarized versus non-militarized dispute settlement. A future extension of this research finding is to observe other non-militarized methods of dispute settlement for similar periods. Another avenue of additional inquiry is discovery of potential causal variables that influence states choices to use non-militarized methods of dispute settlement. The evidence suggests that the ICJ as an alternative form of dispute settlement is an indicator of normative behavior at the system level.

Table 20.

**Relationship Between Number of ICJ Cases & MIDs  
for States from Period to Period  
(five-year periods)**

ICJ Cases	MIDs	
	Increase	Decrease
Increase	20	24
Decrease	35	16

$X_{\chi^2} = 5.2; p = .0225; \text{Yule's } Q = -0.45$

The ICJ does appear to have an expanding role in the settlement of disputes and has dealt with highly salient issues as evidenced by the increasing number of cases and participants over time. However, the number of contentious issues and disputes submitted to the Court is still relatively small compared to other peaceful settlements, or to militarized responses to interstate conflicts. This study suggests that the relationship between ICJ cases and militarized disputes is more likely the result of broader norms or other factors impacting states' decisions to use peaceful means of resolution instead of force. However, the measurements of correlations between ICJ cases and MIDs are useful because they demonstrate that the ICJ can be an accurate indicator of states' attitudes toward pacific settlements of disputes.

It is also evident from the analyses that particular dyads show a decrease in use of force once they have been involved in an ICJ case together. Therefore, it is probable that the ICJ does have an impact on states' decisions in specific dyadic situations and relationships. The empirical analyses demonstrate further that the inverse relationship between the number of ICJ cases and number of MIDs from one five-year period to the

next is significant at the system and state levels. This finding suggests that it is important to understand changes in the system during different periods that explain the shift toward pacific settlement methods such as the ICJ and away from use of force. It is also important to examine specific states, dyads and issues in order to identify the characteristics that favor adjudication over militarization in disputes.

Finally, this study lays the foundation for integrating the impact of the ICJ into the broader framework of international law and conflict by examining issues such as international law functioning as an alternative to force in settling disputes, the complexity and expanding role of customary international law, and the increased codification and institutionalization of international law through adjudication and *opinio juris*.



**Table 21.**

**International Court of Justice**  
Cases 1946-2002

<u>State A - Initiator</u>	<u>State B</u>	<u>Issue</u>	<u>Date</u>
United Kingdom	Albania	Corfu Channel Incident	1947
United Kingdom	Norway	Fisheries	1949
France	Egypt	Protected Persons	1949
Colombia	Peru	Asylum	1949
France	United States	Rights of Nationals in Morocco	1950
Colombia	Peru	Interpretation of Ruling	1950
Colombia	Peru	Asylum	1950
Greece	United Kingdom	Arbitration	1951
United Kingdom	Iran	Nationalization of Assets	1951
France	United Kingdom	Territorial Sovereignty	1951
Liechtenstein	Guatemala	Rights of Nationals	1951
Italy	France	Property	1952
Italy	United Kingdom	Property	1952
Italy	United States	Property	1952
France	Lebanon	Company	1953
United States	USSR	Rights of Nationals	1954
United States	Hungary	Rights of Nationals	1954
United States	Czechoslovakia	Aerial Incident	1955
United Kingdom	Argentina	Antarctica	1955
United Kingdom	Chile	Antarctica	1955
United States	USSR	Aerial Incident	1955
France	Norway	Loans	1955
Portugal	India	Right of Passage	1955
Netherlands	Sweden	Convention 1902	1957
Switzerland	United States	Company Assets	1957
Israel	Bulgaria	Aerial Incident	1957
United States	Bulgaria	Aerial Incident	1957
United Kingdom	Bulgaria	Aerial Incident	1957
Belgium	Netherlands	Territorial Sovereignty	1957
Honduras	Nicaragua	Territorial Sovereignty-Arbitration	1958
United States	USSR	Aerial Incident	1958
Belgium	Spain	Company	1958
France	Lebanon	Company	1959
United States	USSR	Aerial Incident	1959
Cambodia	Thailand	Territorial Sovereignty-Temple	1959
Ethiopia	South Africa	South West Africa	1960
Liberia	South Africa	South West Africa	1960
Cameroon	United Kingdom	Northern Cameroons	1961
Belgium	Spain	Company	1962
Federal Republic of Germany	Denmark	North Sea Continental Shelf	1967
Federal Republic of Germany	Netherlands	North Sea Continental Shelf	1967
India	Pakistan	Appeal	1971
Federal Republic of Germany	Iceland	Fisheries	1972
United Kingdom	Iceland	Fisheries	1972
New Zealand	France	Nuclear Tests	1973
Australia	France	Nuclear Tests	1973
Pakistan	India	Prisoners of War	1973
Greece	Turkey	Aegean Sea Continental Shelf	1976
Tunisia	Libyan Arab Jamahiriya	Continental Shelf	1978
United States	Iran	Diplomats	1979
Canada	United States	Maritime Boundary	1981

Libyan Arab Jamahiriya	Malta	Continental Shelf	1982
Burkina Faso	Republic of Mali	Frontier Dispute	1983
Nicaragua	United States	Military	1984
Tunisia	Libyan Arab Jamahiriya	Continental Shelf	1985
Nicaragua	Costa Rica	Border Armed Action	1986
Nicaragua	Honduras	Border Armed Action	1986
El Salvador	Nicaragua	Intervention Frontier Dispute	1986
Honduras	Nicaragua	Intervention Frontier Dispute	1986
United States	Italy	Company	1987
Denmark	Norway	Maritime Boundary	1988
Iran	United States	Aerial Incident	1989
Nauru	Australia	Land	1989
Guinea-Bissau	Senegal	Arbitration	1989
Libyan Arab Jamahiriya	Chad	Territorial Dispute	1990
Portugal	Australia	East Timor	1991
Guinea-Bissau	Senegal	Maritime Boundary	1991
Finland	Denmark	Passage	1991
Qatar	Bahrain	Maritime Boundary	1991
Libyan Arab Jamahiriya	United States	Aerial Incident	1992
Libyan Arab Jamahiriya	United Kingdom	Aerial Incident	1992
Iran	United States	Oil Platforms	1992
Bosnia/Herzegovina	Yugoslavia	Genocide	1993
Hungary	Slovakia	System of Locks	1994
Cameroon	Nigeria	Land/Maritime Boundaries	1994
Spain	Canada	Fisheries	1995
New Zealand	France	Nuclear Tests	1995
Botswana	Namibia	Island	1996
Paraguay	United States	Consular Relations	1998
Nigeria	Cameroon	Land/Maritime Boundaries	1998
Republic of Guinea	Democratic Republic of the Congo	Rights of Nationals	1998
Germany	United States	Consular Relations	1999
Yugoslavia	United States	Use of Force	1999
Yugoslavia	Spain	Use of Force	1999
Yugoslavia	United Kingdom	Use of Force	1999
Yugoslavia	Portugal	Use of Force	1999
Yugoslavia	Netherlands	Use of Force	1999
Yugoslavia	Italy	Use of Force	1999
Yugoslavia	Germany	Use of Force	1999
Yugoslavia	France	Use of Force	1999
Yugoslavia	Canada	Use of Force	1999
Yugoslavia	Belgium	Use of Force	1999
Democratic Republic of the Congo	Uganda	Armed Activities	1999
Democratic Republic of the Congo	Rwanda	Armed Activities	1999
Democratic Republic of the Congo	Burundi	Armed Activities	1999
Pakistan	India	Aerial Incident	1999
Croatia	Yugoslavia	Genocide	1999
Nicaragua	Honduras	Maritime Boundary	1999
Democratic Republic of the Congo	Belgium	Arrest Warrant	2000
Bosnia/Herzegovina	Yugoslavia	Genocide	2001
Liechtenstein	Germany	Property	2001
Nicaragua	Colombia	Territorial/Maritime Dispute	2001
Benin	Nigeria	Frontier Dispute	2002
Democratic Republic of the Congo	Rwanda	Armed Activities	2002
El Salvador	Honduras	Frontier Dispute	2002
Mexico	United States	Rights of Nationals	2002
Malaysia	Singapore	Sovereignty	2003
Republic of the Congo	France	Criminal Proceedings	2003
Romania	Ukraine	Maritime Boundary	2004

Source: Website of the International Court of Justice ([www.icj-cij.org](http://www.icj-cij.org))

## CHAPTER XI

### CONCLUSIONS

Bringing together the pieces of this work in a coherent set of observations and conclusions is difficult but it is also the most rewarding part of the research project. This work is the culmination of four years of exploration in two complex fields of study. Sometimes it seemed as though I was drifting around in two different and vastly separated oceans. I believed however that the passages that connected them were wider and more numerous than the scholarly maps indicated. The final two years of my research demonstrated the point as several extensive studies and academic books were published with a cross-disciplinary focus. My work benefited greatly from the syntheses these books offered. In my concluding statements, I want to provide some my own contribution, evaluation and synthesis to a subject. As the rule of law and political integration expands within the European framework, international institutions and networks proliferate, international courts increase their caseloads, and globalization continues to reshape international affairs, the overlap between the disciplines of international law and politics will grow exponentially. Efforts to capitalize on this crossover with intentional and collaborative research programs will contribute significantly to our understanding of world society.

The work thesis that international law and politics will become increasingly interdependent and collaborative is admittedly a subjective and normative proposition. It is however a legitimate question to pose because it is the foundation on which the research design is built. This work has attempted to demonstrate the manner and

usefulness of collaboration. Several of the prominent researchers that share this assumption are featured in this work. Their findings and contributions are the primary case for my assertion. I also believe that this work builds on their contributions with additional evidence and insight.

One area of interaction that is particularly cumbersome is the use of language and terminology. Historical surveys, definitional clarifications and genealogies of concepts and terms are scattered throughout this work. They are intended to illustrate both the problems and opportunities that cross-disciplinary dialogue creates. The words and language of discourse in law and politics are crucial to collaborative research. The chapters on sovereignty and human rights address this issue most directly.

The historical development of the concept of sovereignty is prominent in both political theory and legal principles. This history illustrates how widespread and influential the idea of state sovereignty has become. My analysis of the development and contestation over the term sovereignty makes several key conclusions. First, the concept of state-oriented sovereignty is deeply engrained on the levels of practice and theory in both law and politics. It is not likely to disappear quickly. The dichotomous relations described in my chapter are organizing principles in both disciplines. It is actually one of the most well-developed areas of crossover with legal and political forces reinforcing the dominance of the state in international affairs. However, the eroding of this concept by changes in world social realities and emerging competitive theories is also clearly evident. The theoretical questions posed by strengthening transnational associations and groups, and regional cooperative arrangements combined with the diversity created by increasing globalization are redefining sovereignty. Beyond the conventional ideas of

sovereign individuals and states, the world is parsing sovereign power and authority in a variety of new ways. The idea of disaggregated sovereignty proposed by Anne-Marie Slaughter and closely related to other theoretical perspectives also discussed in this work is an interesting and potentially powerful re-conception of sovereignty. While maintaining the definitional meaning of authoritative influence, it describes many of the observed trends in world affairs. The emergence of networks based on interests and goals, transnational policy groups, geopolitical affiliations across national borders, and many other entities claiming or exercising some forms of sovereignty are all vying for both legal and political recognition. Observing and documenting who gets influence and where it is posited is a component of this research design that will continue for some time. The theoretical suppositions and schematic analysis developed in this work is one basis on which to conduct such research.

In the area of human rights, the debate over terms and concepts has a more concise history. Since World War II, the issue of human rights has emerged as a major contest between the competing schools of thought that dominate the legal and political arenas. Realists and liberals contend over the significance of human rights in world politics while particularists and universalists struggle to frame the issue in a specific legal context. Human rights issues will remain prominent as long as human suffering is broadcasted across worldwide media outlets and as long as it is contested in courts and governments around the world. This research focuses first on the theoretical divisions in human rights issues. If human rights law is going to achieve a significant impact on policies and practices, it must deal with the issue of state autonomy. Cultural relativism,

political independence, non-intervention, and other traditions in both law and politics stand in the way of a systemic solution to the problem of human rights violations.

Even with comprehensive agreement such as the Universal Declaration of Human Rights, a universal norm against such violations that truly influences states behaviors and policies has not materialized. In the comparative analysis of Donnelly and Anna'im, I develop the contrast between two notions of a universal human rights regime. Donnelly describes a universal scheme that emerges from a Western ideal. Building an international consensus around these ideals produces universally meaningful norms. Anna'im begins with the universal assuming that human rights exist at the level of all humanity, and the path to an international consensus on such rights is through the contextualization of human rights in cultural traditions and norms. This contrast is useful for analyzing human rights issues in both law and politics in several ways.

Past effective prosecutions of human rights violators cannot be characterized as universal. The Nuremberg Trials after World War II were conducted by a small group of victor states, and other criminal tribunals such as the International Criminal Tribunal for Rwanda (ICTR) have been conducted in limited jurisdictions for specific events. Political actions such as the NATO use of force in Kosovo and the United Nations intervention in East Timor were equally specified and limited. However, the theoretical predictions in the much of the literature and as developed in this work emphasize the necessity of a universal perspective in order to address the widespread problem of human rights abuses. Enforcement within the confines of state autonomy and conventional legal and political norms such as non-intervention and voluntary jurisdiction has failed to alleviate the

problem. The concept of interconnectedness or the contingent universal<sup>33</sup> recognizes the tension between the conventional statist view, cultural relativism, and the claims of universalism. Universal norms that garner widespread political support and therefore can build consensus and muster force or pressure is one essential component of an effective human rights regime. However, it must also command legitimacy in the cultural and national arena to affect actions on the ground where human rights abuses occur.

This work looks at two examples that illustrate this dynamic. The International Criminal Court is too new for empirical analysis or even the study of case history. However, it was included in this work both to identify its salience as a topic for future examination and because its creation is unique to international law and politics. As the first court with permanent standing, international scope and human rights jurisdiction, the ICC has the support of a majority of states (98) in the international system. However, major powers such as the United States, China and Japan have not signed on. The United States has even taken a posture of opposition to the Court. This division between the United States and Europe (a primary supporter of the ICC) is also evident in the second case example, the Belgium Statute on Universal Jurisdiction. These two cases demonstrate that human rights law at the universal or system wide level is weak. The lack of support from the world's superpower and a large number of other significant states undermines universal consensus. If Donnelly's model of a Western human rights agenda is correct, then the divide between the United States and Europe stands in the way of universal acceptance. Anna'im's model is equally threatened because the lack of consensus even within Western culture undermines his argument for the existence of a

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<sup>33</sup> See note on Ackerly page 70.

universal human rights norm that permeates all cultures. The ICC and the Belgium cases provide compelling evidence for the second thesis in this work, international law has a limited impact on political actions toward human rights and other universal or system wide norms.

If a change occurs in U.S. policy that aligns human rights policies along universal interpretations and in harmony with European policies, the picture could be very different. A Western coalition on human rights issues would apply pressure for other additional countries to join the ICC and accept its universal standards and applications. Reputation and status in the international community would influence resisters much greater if a consensus formed between the U.S., Europe and the ninety-eight supporters of the ICC.

The chapter on compliance and the case comparisons of the European Court of Justice has the broadest application to the three theses statements in this work. The one qualifying element of this application is the fact that the European Union and the ECJ are supranational but not fully international institutions. However, the shared characteristics of competition as well as cooperation between autonomous states and the application of many facets of international law make this study relevant and informative. The strongest finding in this case study is all three cases argue that the ECJ has a profound impact on European politics. From the establishment of a rule of law in Europe argued by Karen Alter to the practical utility argued by Anthony Arnall, the ECJ plays a significant role in the EU.

The second thesis statement also refers to the increased role of international law in areas of cooperation and institutionalization of politics. This relates directly to the role



of the ECJ in Europe. There is also a strong reference to the redefinition of sovereignty. The EU is clearly putting tremendous pressure on conventional ideas of sovereignty. However, the cases also show that these conventional ideas have not given way entirely. From the change in posture by French Courts in order to increase their influence on the ECJ and the increasing role of political pressure on ECJ success argued by Lisa Conant, the evidence from these cases is mixed.

The ECJ also relates directly to the third thesis concerning the proliferation of international legal regimes and institutions. The EU has created a vast array of supranational institutions. The rule of law and the role of the ECJ have also increased the legitimacy of international law at the political level. Increased legitimacy coupled with expanded jurisdiction and increased caseloads has greatly enhanced the influence of law on politics in the EU. The view of many politicians and academics that the EU represents a model for international integration makes the increased effectiveness and influence of the ECJ even more relevant to this study. As the EU absorbs new members, continues to economically integrate and develops Community politics, the ability of law to influence these processes will be closely watched. The influence of law in the political realm will be related to its ability to adapt to the challenges of increased integration. An ongoing research topic will be the tendency of Community Law to facilitate and even accelerate integration measured against the necessity of political integration as a necessary condition for the establishment of the rule of law. It is the archetypal chicken or egg dilemma. The evidence from this study is that the two forces (similar to universalist and particularist concepts) are interconnected. The rule of law relies on integration for

political legitimacy and support and integration is facilitated and accelerated by the efficient and effective rule of law.

This recurring theme of interconnectedness applies in the case study of the Law of the Sea. Treaty law relies heavily on states as the actors who exercise and enforce international agreements. Bi-lateral, multi-lateral and international (system wide) treaties are all the product of state commitments and actions. The treaties that form the EU are examples of regional treaties with specific political agendas. The Law of the Sea is an example of a system wide treaty endorsed by an overwhelming majority of states. It is based on customary law and represents an area that has developed over centuries of states practices. The Law of the Sea Treaties codify existing customary law and provide clarification and explication of specific agreements to manage the international exploitation of the seas and states maritime interactions. This study focused on the Law of the Sea Treaties as norm reinforcing events with states sanctions. In contrast to the agreement that created the ICC, the United States was hesitant but antagonistic toward the treaties. The empirical findings show that maritime disputes during periods when the Law of the Sea is in force are significantly different than other contentious disputes during those periods. Because maritime dispute data are not available for periods prior to the first Law of the Sea Conventions, it is not possible to conduct a comparative evaluation on the specific changes in states behavior. However, the study provides substantial evidence that fishing and maritime disputes are historically contentious issues that often involve a show or use of force. The expected outcome was that maritime disputes would be prone to higher degrees of conflict and longer duration. The findings were reversed with maritime issues (between the same regime type, democracies) were

less likely to have reciprocating hostile actions and were settled more quickly than other types of disputes. The inference is that the Law of the Sea provides normative expectations that influence states behavior and also provides norms for deciding contentious disputes over maritime claims. These conclusions support the second thesis that international law has an impact on institutional cooperation and dispute settlement issues in the political realm.

This thesis is also supported by the empirical findings for the ICJ and militarized disputes. The analysis shows a relationship between use of the ICJ and a decrease in the use of force in disputes between nations. Increased usage of the ICJ also supports the third thesis's contention that proliferation and usage of legal institutions is increasing the effectiveness of international law in political affairs. The ICJ and its basis in international law is a functional substitute for resolution of disputes by force. The evidence for this assertion is a decrease in use of force between countries after those countries have participated in an ICJ case, and the system wide inverse relationship between the number of militarized disputes and the number of cases submitted to the ICJ. The evidence is largely circumstantial for the direct influence of the ICJ on use of force decisions, and more likely the correlations are related to other influences that push states away from armed conflict and toward institutionalized resolutions of disputes. These findings are still informative because they underscore the interconnectedness of legal and political relationships and reinforce the influence of norm formation and diffusion theories resident in both legal and political arenas.

An unexpectedly strong finding from the ICJ came from the replication of the Coplin and Rochester study. Their study conducted in the early 1970's focused on the

uses of the Court and states characteristics of participants. The descriptions and classifications their study produced were interesting information and worthwhile to reproduce up-to-date. However, the more relevant finding to the thesis of this work was the significant shifts that have occurred in the intervening thirty plus years. The finding that fewer major powers brought cases against smaller states while many more smaller states used the Court to make claims against stronger states stood out as a significant finding. The scale of the shift was the first unusual characteristic. The percentages shifted from 64% to 37% and 22% to 60% with states with parity making up the remainders. The second distinguishing feature was the inference that can be drawn from this shift. Factors such as ability to pay the costs of Court actions and changing demographics of developing countries may contribute some explanation, but the more logical inference is that the use of the Court is viewed more as a power equalizer than power enforcement mechanism in the international community. This shift applies directly to the first thesis concerning the evolution of international law from a creation and tool for the interests of powerful states to a force for justice and equity. As conventional principles such as state sovereignty, non-intervention and states practices in customary law are challenged by competing principles of universal human rights, fairness and equity in international relations, and democratic reforms with the rule of law, there is likely to be more examples of similar shifts in the perception and usage of legal institutions in political affairs.

Prominent scholar Christopher Joyner (2005) writes, “International law remains the best touchstone and the only consistent guide for state conduct in an increasingly complex, multicultural, globalizing world (294).” Joyner explains his view that law

provides proven ways and methods of conducting collaborative efforts “accommodating national interests with international priorities (295).” The forces applying pressure to change conventional ideas of the state and world politics, and attempt solutions to international problems may indeed find a strong ally in international law, but the deeply engrained patterns have a role to play in shaping international law as well.

The two directional influences of law and politics and interconnectedness of legal and political theoretical conceptions within the framework of international affairs is the unifying theme of this work. The necessity of state adherence and political support to the establishment of a rule of law in the international arena remains prevalent just as political legitimacy, cooperative utility and dispute settlement are increasingly connected to and dependent upon a legal framework of international relations. The illustrations included in this work have reinforced this relationship. I believe that this situation demands a greater degree of collaboration between legal and political scholarship as well as further integration of discourse and policy. The impact of international law on interstate relations is an issue of must be evaluated from both directions. The recognition that law and politics influence each other at the academic, policy and communicative levels is the place I have chosen to start my inquiry. Trends such as globalization and integration intermixed with longstanding practices and principles will be the proving grounds for this collaboration in transitions. The research opportunities abound.

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