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# New Perspectives on the Divide Between National and International Law

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## The Future of International Law is Domestic (or, The European Way of Law)

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International law has traditionally been just that—international. Consisting of a largely separate set of legal rules<sup>1</sup> and institutions, international law has long governed relationships among States. Under the traditional rules of international law, the claims of individuals could only reach the international plane when a State exercised diplomatic protection and espoused the claims of its nationals in an international forum.<sup>2</sup> More recently, international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between governments and their own citizens, particularly through the growing bodies of human rights law and international criminal law.<sup>3</sup> But even in these examples, international law has generally remained separate from and above the domestic sphere.

The classic model of international law as separate from the domestic realm fits closely with the traditional problems the international legal system sought to address, namely the facilitation of State-to-State cooperation. Whether regulating the immunities of diplomats or the rights of ships on the high seas, the traditional purposes of international law have been interstate, not intrastate.

This foundation of international law reflects the principles of Westphalian sovereignty, often seemingly made up of equal parts myth and rhetoric. In this

conception, the State is a defined physical territory ‘within which domestic political authorities are the sole arbiters of legitimate behavior’.<sup>4</sup> States could be part of the international legal system to the degree they chose by consenting to particular rules. Likewise, they could choose to remain apart, exerting their own sovereignty and preventing international involvement. Formally Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference. But it is also the right to be recognized as an autonomous agent in the international system, capable of interacting with other States and entering into international agreements. With these background understandings of sovereignty, an international legal system emerged, consisting of states and limited by the principle of State consent.

Today, however, the challenges facing States and the international community alike demand very different responses and, hence, new roles for the international legal system. The processes of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of States and harness national institutions in pursuit of global objectives.

In order to create desirable conditions in the international system, from peace to health to prosperity, international law must address the capacity and the will of domestic governments to respond to these issues at their source. The primary purpose of international law then shifts from providing independent regulation above the national state to interacting with, strengthening, and supporting domestic institutions. International law can perform this function in three principal ways: strengthening domestic institutions, backstopping them, and compelling them to act.

What makes this new function of international law a particular break from the past is that international law now seeks to influence political outcomes within sovereign States. Even in 1945 the drafters of the UN Charter still maintained the classical position that international law and institutions shall not ‘intervene in matters which are essentially within the domestic jurisdiction of any state’.<sup>5</sup> Today, however, the objectives of international law and the very stability of the international system itself depend critically on domestic choices previously left to the determination of national political processes—whether to enforce particular rules, establish

<sup>1</sup> Some perspectives on the monist-dualist debate assert that international legal rules exist in a unified continuum with domestic law. Monists argue that international law and domestic law are part of the same system, in which international law is hierarchically prior to domestic law. Dualists, in contrast, claim that international and domestic law are part of two distinct systems and that domestic law is generally prior to international law. JG Starke, ‘Monism and Dualism in the Theory of International Law’ (1936) 17 *Brit Ybk Int’l L* 66, 74–75. While both of these theories provide important linkages between international law and domestic law, for adherents of either approach the functions and institutions of international law remain largely at the international level. See *ibid*.

<sup>2</sup> *Mavromatis Palestine Concessions*, Judgment No 2, 1924, PCIJ, Series A, No 2. Yet, the decision of a state to espouse its citizen’s claim is one of domestic politics—the State has no obligation to do so. International law does, however, regulate the right of the state to espouse an individual claim, limiting such rights to cases of ‘close connection’ usually in the form of ‘real and effective nationality’ between the state and the citizen. Eg *Nottebohm Case* (Lichtensein v Guatemala) ICJ Rep 1955, 4.

<sup>3</sup> Anne-Marie Slaughter and William Burke-White, ‘An International Constitutional Moment’ (2002) 42 *Harvard J Int’l L* 1.

<sup>4</sup> Eg SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton UP, 1999) 20 (noting: ‘Westphalian sovereignty is violated when external actors influence or determine domestic authority structures. Domestic authority structures can be infiltrated through both coercive and voluntary actions, through intervention and invitation . . . . The fundamental norm of Westphalian sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior.’).

<sup>5</sup> Charter of the United Nations, at Art 2(7).

institutions, or even engage in effective governance. To ensure national governments actually function in pursuit of collective aims, international law is coming to play a far more active role in shaping these national political choices. Taken to an extreme, the future effectiveness of international law now turns on its ability to influence and alter domestic politics.

These functions of international law are already well known to the members of the European Union. Indeed, in extending membership to ten new countries over the course of the past decade, the EU has relied on EU law as its primary tool of reform and socialization. And even among the original member States, EU institutions continue to perform the types of backstopping, strengthening, and mandating functions described herein. Europeans themselves are coming to recognize these uses of law; a new generation of European policy thinkers has openly proclaimed the virtues of the European way of law.

Some may, of course, argue that these new functions of international law have no applicability outside the European context in which they were first embraced.<sup>6</sup> Part of what makes these functions of international law important is that they are now evident in contexts far more diverse than the EU. Each of the three means through which international law is coming to influence domestic outcomes—strengthening domestic institutions, backstopping national governance, and compelling domestic action—have now spread well beyond Europe. As we describe below, what began as the European way of law is quickly becoming the future of international law writ large.

While the new function of international law may be to transform domestic politics, these processes of interaction may well have a transformative impact on international law itself. Just as EU law has migrated from a thin set of agreements based on the functional needs<sup>7</sup> of States into a far more programmatic and comprehensive legal order,<sup>8</sup> international law may be moving in a more programmatic direction. International law will continue to reflect the will and practice of States. But, to the degree it depends upon the effective functioning of national institutions, getting those institutions to operate is quickly becoming a functional imperative

of the international legal order. Notably, we are not seeking to imbue international law with particular normative content, but rather to recognize that many international rules and indeed entire regimes are explicitly promoting effective—and preferably good—governance at the national level.

The outcome is not always so upbeat. As we emphasize in the conclusion, our vision of the principal future functions of international law assumes an intensive interaction between international law and domestic politics. But domestic politicians can manipulate international legal institutions and mandates to serve their own purposes, such as jailing political dissidents as part of complying with a Security Council resolution requiring domestic action against terrorism. More broadly, the basic positivist foundations of international law, requiring States to freely accept such interference in domestic politics, raises the possibility of manipulation and even imposition of such ‘acceptance’ as a result of power disparities.

Part I of this chapter identifies a new set of global threats and actual and potential responses, including the EU’s uses of law to transform new members ‘from the inside-out’. Part II argues that the future relevance, power, and potential of international law lie in its ability to backstop, strengthen, and compel domestic law and institutions. Part III examines the potential pitfalls and dangers of these new functions of international law. Finally, Part IV contrasts our analysis with other recent efforts to blur the boundaries between the international and domestic spheres, noting that what is distinctive about our claim is not the intermingling of two kinds of law, but rather the impact of international law on domestic politics and vice versa.

## 1. New threats, new responses

Rules can and often do reflect and embody aspirations for a better world. Alternatively, and equally likely, rules respond to concrete problems. The changing nature of international legal rules today responds to a new generation of worldwide problems. The most striking feature of these problems is that they arise from within States rather than from State actors themselves.

Examples abound. The terrorist attacks of September 11 were launched by a group of non-State actors operating from within the territory of Afghanistan.<sup>9</sup> The massive ethnic crimes in Rwanda, Congo and Sudan are, in large part, the product of rebel forces within States.<sup>10</sup> The most dangerous examples of nuclear proliferation can often be attributed to non-State criminal networks such as those of

<sup>9</sup> The 9/11 Commission Report (2004).

<sup>10</sup> Eg J Semujanga, *Origins of the Rwandan Genocide* (New York: Humanity Books Amherst, 2003); R Edgerton, *The Troubled Heart of Africa: A History of the Congo* (New York: St Martin’s Press, 2002); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, available at <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)>.

<sup>6</sup> Eg E Posner and J Yoo, ‘Reply to Helfer and Slaughter’ (2005) 93 California L Rev 957 (observing: ‘There is no reason to think that a court that works for Europe, where political and legal institutions in most countries are of high quality, would work for a world political community that lacks the same level of cohesion and integration. Whatever one thinks about the EU, it is nothing like the international community’).

<sup>7</sup> Eg EB Haas, *The Uniting of Europe* (Stanford: Stanford University Press, 1958); EB Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford: Stanford University Press, 1964) 6–7 (noting that functionalists ‘believe in the possibility of specifying technical and “non-controversial” aspects of governmental conduct, and of weaving an ever-spreading web of international institutional relationships on the basis of meeting such needs. They would concentrate on commonly experienced needs initially, expecting the circle of the non-controversial to expand at the expense of the political’).

<sup>8</sup> Eg Treaty Establishing a Constitution for Europe, available at <[http://europa.eu.int/constitution/en/lstoc1\\_en.htm](http://europa.eu.int/constitution/en/lstoc1_en.htm)>. For a discussion, G de Burca, ‘The Constitutional Challenge of New Governance in the European Union’ (2003) 28 ELR 814.

AQ Kahn.<sup>11</sup> The 2004 Report of the Secretary General's High Level Panel on Threats, Challenges and Change identifies problems of intra-State origin such as 'poverty, infectious disease and environmental degradation . . . civil war, genocide and other large scale atrocities . . . nuclear, chemical and biological weapons, terrorism, and transnational organized crime' as among the core threats facing the international community today.<sup>12</sup>

More often than not, the origins of these threats can only be addressed directly by domestic governments that have the jurisdictional entitlements, police power, and institutional capability to act directly against them. Arresting criminals or terrorists, securing nuclear materials, and preventing pollution are within the traditional province of domestic law. The result is that the external security of many nations depends on the ability of national governments to maintain internal security sufficient to establish and enforce national law.

Where states are strong enough to combat these threats directly, international law must play a critical coordination role to ensure that governments cooperate in addressing threats before they span borders. Far too frequently, however, domestic governments lack the will or the capacity to adequately respond to these challenges. Since the early 1990s, the number of states unable to effectively govern their territories has increased. As Francis Fukuyama affirms, 'Since the end of the Cold War, weak or failing states have arguably become the single most important problem for the international order . . . Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration, and attack their neighbors'.<sup>13</sup>

Where national governments are unable or unwilling to address the origins of these threats themselves, international law may step in to help build their capacity or stiffen their will. This use of international law moves well beyond both its classical definition, as 'the rights subsisting between nations',<sup>14</sup> and its more modern conception, as, in part, regulating the conduct of states toward their own citizens.<sup>15</sup> The conception of an international legal system as a means of enabling, enhancing, and compelling the behaviour of domestic governments and actors within States is far more invasive and potentially transformative.

For many nations, ranging from the United States to Russia, from the countries of the Middle East to those of Africa, it is also far more frightening. But this is a conception of international law spreading outward from Europe. The Treaty of Westphalia, ending the bloody Thirty Years War with the principle of *cuius principio*,

<sup>11</sup> WJ Broad and DE Sanger, *Pakistani's Nuclear Black Market Seen as Offering Deepest Secrets of Bomb Building*, The New York Times, 21 March 2005, p A7.

<sup>12</sup> A More Secure World: Our Shared Responsibility, 2004 Report of the Secretary General's High Level Panel on Threats, Challenges and Change, UN Doc A/59/565 (2004) 23.

<sup>13</sup> F Fukuyama, *State Building: Governance and World Order in the Twenty First Century* (London: Profile Books, 2004) 92–93.

<sup>14</sup> Emmerich de Vattel described international law in the 1750s, as 'the rights subsisting between nations or states, and the obligations correspondent to those rights'. Emmerich de Vattel, *The Law of Nations* (1758) 3.

<sup>15</sup> Slaughter and Burke-White (n 3 above) 1.

*eijus religio*, has given way to the Treaty of Rome, ending a century of bloody intra-European wars with a concept of pooled sovereignty that has steadily expanded and deepened in the contemporary European Union. As the EU's legal system has evolved, the prime purpose of the European Court of Justice and even of the Commission has been less to create and impose EU law as international law than to spur national courts and regulatory agencies to embrace and enforce EU law as national law.

Moreover, as Mark Leonard writes in his provocative new book *Why Europe Will Run the 21st Century*, 'Europe's weapon is the law'.<sup>16</sup> He describes Europe's power in the world as 'a transformative power',<sup>17</sup> rooted in a strategy of democratization that is based on requiring candidate countries to 'swallow all 80,000 pages of European laws and adapt their own legislation to accommodate them', as well as then accepting continual monitoring by EU officials to ensure that they are in fact living up to their new commitments.<sup>18</sup> The result has been a 'rebuilding [of] these countries from the bottom up'.<sup>19</sup> Indeed, 'The European model is the political equivalent of the strategy of the Jesuits: if you change the country at the beginning, you have it for life.'<sup>20</sup>

Note the precise way that European law works in this equation. For all the 80,000 pages of regulations, the EU Council of Ministers and the EU Commission issue directives that specify ends rather than means. It is up to national legislatures and courts to decide precisely how the member State in question will fulfil a particular directive. Once those laws are passed, EU institutions—the Court and the Commission—look over national shoulders to ensure that they actually do what they commit to do. This European way of law is precisely the role that we postulate for international law generally around the world.<sup>21</sup>

Espen Barth Eide, a former State Secretary in the Norwegian Foreign Ministry, writes that the 'EU's "soft intervention" in the "domestic affairs" of EU member states is almost an everyday experience'.<sup>22</sup> This is the hallmark of EU-style 'post-Westphalian sovereignty', described so memorably by Robert Cooper, a top aide to Javier Solana, in *The Breaking of Nations*.<sup>23</sup> Eide and other leading European security strategists openly call for the extension of regional 'integrative projects'

<sup>16</sup> M Leonard, *Why Europe Will Run the 21st Century* (New York: Perseus Book Group, 2005) 35.

<sup>17</sup> Ibid, 5, quoting R Youngs, *Sharpening European Engagement* (London: The Foreign Policy Centre, 2004).

<sup>18</sup> Ibid, 45.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 45–46.

<sup>21</sup> Beyond the EU system, the European Court of Human Rights has repeatedly forced European governments to change their domestic laws governing issues from prosecution of criminals to admitting homosexuals into the armed services. They are all entitled to a 'margin of discretion' in reconciling their domestic laws and practices with their treaty obligations, but the ECHR is there to ensure that the margin does not grow too wide.

<sup>22</sup> E Barth Eide, 'Introduction: the Role of the EU in Fostering "Effective Multilateralism"' in E Barth Eide (ed), *Effective Multilateralism: Europe, Regional Security and a Revitalized UN* (London: The Foreign Policy Centre, 2004) 1–10.

<sup>23</sup> R Cooper, *The Breaking of Nations: Order and Chaos in the 21st Century* (London: Atlantic Books, 2004).

based on the EU in Africa, Latin America, and Asia. The European Security Strategy (ESS), proposed by Javier Solana and passed by the European Council in December 2003,<sup>24</sup> fell short of openly embracing this vision, but recognized that ASEAN, MERCOSUR, and the African Union 'make an important contribution to a more orderly world'.<sup>25</sup>

Spreading the European way of law beyond Europe, a process that is already underway, requires a broader rethinking of the functions of international law. As in Europe, the focus of a growing number of international rules is no longer interstate relations. It is increasingly governments' capacity and will to act in prescribed ways toward their own peoples. The result is a growing interaction between international law and domestic politics, in ways that have lasting implications for both.

## 2. The future functions of international law

The all-too-often inadequate domestic response to transnational threats has three separate, but related causes—a lack of domestic governance capacity, a lack of domestic will to act, and the necessity of addressing new problems that exceed the ordinary ability of States to address. International law has key leverage points to help improve the response of domestic governments on each of these dimensions. International legal rules and institutions can enhance the capacity and effectiveness of domestic institutions. If properly designed and structured they can help backstop domestic political and legal groups trying to comply with international legal obligations. Finally, they can even compel or mandate action at the national level in response to a global threat.

These alternative functions of international law effectively flip the international legal system on its head. Traditionally, international law might be seen as regulating or even compelling interstate activity. The future purpose of international law, however, becomes to reach within States, permeating domestic institutions, governance structures, and even political fora so as to enhance their effectiveness.

### 2.1 Strengthening domestic institutions

A primary limitation of the international system is the weakness of government institutions in so many States all over the world. Due to violence, poverty, disease,

<sup>24</sup> Javier Solana is the Secretary-General of the Council of The European Union and the European Union High Representative for the Common Foreign and Security Policy. Upon entry into force of the new EU Constitution, he is to be appointed Foreign Minister of the European Union. The European Council is the 'main decision making body of the EU' and is composed of the ministers of the member states for any particular subject area. See Council of the European Union, <[http://ue.eu.int/cms3\\_fo/showPage.asp?id=242&lang=EN&mode=g](http://ue.eu.int/cms3_fo/showPage.asp?id=242&lang=EN&mode=g)>.

<sup>25</sup> A Secure Europe in a Better World—The European Security Strategy, 12 December 2003, available at <[http://ue.eu.int/cms3\\_fo/showPage.ASP?id=266&lang=EN&mode=g](http://ue.eu.int/cms3_fo/showPage.ASP?id=266&lang=EN&mode=g)>.

corruption, and lack of technology and training, national governments all too often lack the resources, skills, and ability to provide adequate solutions to local and transnational problems. Examples are numerous: State failure in Somalia in the early 1990s, devastation from natural catastrophes like the 2004 tsunami, civil wars such as that in Angola from 1998–2003, or the rampant corruption all too evident in Russia in the mid 1990s. A 2004 report of the Commission on Weak States and US National Security highlighted as a key national security concern the need to assist states 'whose governments are unable to do the things that their own citizens and the international community expect from them: offer protection from internal and external threats, deliver basic health services and education, and provide institutions that respond to the legitimate demands and needs of the population'.<sup>26</sup> Improving the capacity of government officials of all sorts—regulators, judges, and legislators—to actually govern is paramount.<sup>27</sup> Francis Fukuyama observes: 'For the post-September 11<sup>th</sup> period, the chief issue for global politics will not be how to cut back on stateness but how to build it up.'<sup>28</sup> International law has an important role to play in this process.

A critically important tool in strengthening the institutions of national governments is the formalization and inclusion of 'government networks' as mechanisms of global governance. A powerful illustration of both the new sovereignty and the new roles for international law can be found in the operation of these networks. Networks of national government officials of all kinds operate across borders to regulate individuals and corporations operating in a global economy, combat global crime, and address common problems on a global scale. As one of the co-authors has argued over the past decade, the State is not losing power so much as changing the way that it exercises its power.<sup>29</sup> As corporations, nongovernmental organizations (NGOs), and criminals have all begun to operate increasingly through global networks rather than nation-based hierarchies, so too have government officials. The result is an ever more dense web of government networks, allowing government officials to compensate for their decreasing territorial power by increasing their global reach.

Government networks perform a range of functions that allow them to enhance the effectiveness of domestic governance. They build trust and establish relationships among their participants that then create incentives to establish a good reputation and avoid a bad one. They exchange regular information about their own activities and develop databases of best practices, or, in the judicial case, different approaches to common legal issues. Finally, they offer technical assistance and

<sup>26</sup> JW Weinstein et al, *On The Brink, Weak States and US National Security: A Report of the Commission for Weak States and US National Security* (Centre for Global Development, Washington, 2004) 6.

<sup>27</sup> For a discussion of the importance of building state capacity, S Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia UP, 2001).

<sup>28</sup> Fukuyama (n 13 above) 120.

<sup>29</sup> AM Slaughter, *A New World Order* (Princeton: Princeton UP, 2004). This book synthesizes and builds on a series of articles dating back to 1994.



professional socialization to members from less developed nations—whether regulators, judges, or legislators.

Government networks are already doing a great deal to strengthen domestic governance and could still do far more. Building the basic capacity to govern in countries that often lack sufficient material and human resources to pass, implement, and apply laws effectively is itself an important and valuable consequence of government networks. Regulatory, judicial, and legislative networks all engage in capacity building directly, through training and technical assistance programs, and, indirectly, through their provision of information, coordinated policy solutions, and moral support to their members. In effect, government networks communicate to their members everywhere the message that the Zimbabwean Chief Justice understood when he was under siege: ‘You are not alone’.

The best examples of transnational networks strengthening domestic governance may be in the area of regulatory export. Kal Raustiala offers a number of examples of regulatory export in the securities, environmental, and antitrust areas. According to one securities regulator he interviewed, a prime outcome of the US Securities and Exchange Commission (SEC) networking is the dissemination of ‘the “regulatory gospel” of US securities law’, including: ‘strict insider trading rules; mandatory registration with a governmental agency of public securities issues; a mandatory disclosure system; issuer liability regarding registration statements and offering documents; broad antifraud provisions; and government oversight of brokers, dealers, exchanges, etc.’<sup>30</sup> In effect, US regulatory agencies offer technical assistance and training to their foreign counterparts to make their own jobs easier, in the sense that strong foreign authorities with compatible securities, environmental, and antitrust regimes will effectively extend the reach of US regulators.

The EU has enjoyed similar advantages through the International Competition Network (ICN). In fact, more countries, particularly in Eastern Europe, are copying the EU approach to competition policy, rather than the US model.<sup>31</sup> Although the United States originally pushed the idea of a global network of antitrust regulators under the Clinton administration, the Bush administration has proved less enthusiastic. The opening conference of the network was held in Italy in 2002 led by the head of the German competition agency. The network describes itself as:

A project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.<sup>32</sup>

<sup>30</sup> K Raustiala, ‘Rethinking the Sovereignty Debate in International Economic Law’ (2003) 6 J Int’l Econ L 841, 843.

<sup>31</sup> Slaughter (n 29) 175.

<sup>32</sup> Memorandum on the Establishment and Operation of the International Competition Network, available at <<http://www.internationalcompetitionnetwork.org/mou.pdf>>.

Other examples of such networks strengthening domestic capacity in the economic arena include the Basle Committee on Banking Supervision<sup>33</sup> and the International Organization of Securities Commissioners, which have been influential in enhancing the ability of national governments to regulate securities and maintain independent central banks.<sup>34</sup> The net result of these networks is twofold: first, convergence toward a set of standardized practices at the national level and, second, the creation of greater domestic regulatory capacity in participating nations.

It should not be assumed that regulatory expertise flows only from developed to developing countries. At least in the judicial arena, European and Canadian courts have learned as much from South African and Indian courts as vice versa.<sup>35</sup> Among regulators, local experience with a wide range of problems can count for a great deal in the exchange of best practices.

Governments can do much more to strengthen domestic governance through government networks. For example: creating a Global Justice Network of justice ministers; expanding and strengthening the International Network for Environmental Cooperation and Enforcement (INECE), composed of environmental officials; creating a Global Human Rights Network of the government officials responsible for human rights conditions; bringing networks of legislators together under the auspices of the UN and other international institutions, and expanding the inclusivity and representativeness of global financial and leadership networks (such as expanding the G-8 to the G-20). Such networks must be provided with both concrete tasks and the resources to accomplish them, largely by working together to strengthen both collective and individual governing capacity.

In addition, international law itself can both support and be supported by transgovernmental networks with the shared goal of strengthening domestic governments. Transgovernmental networks are already being used to harness the existing power of national governments in pursuit of international objectives. As the front line of authority, national government officials exercise an array of coercive and persuasive powers largely unmatched by international institutions. Operating through government networks, national governments can bring these same powers to bear on behalf of international legal obligations. They can coerce, cajole, fine, order, regulate, legislate, horse-trade, bully, or use whatever other methods that produce results within their political system. They are not subject to coercion at the transgovernmental level; on the contrary, they are likely to perceive themselves as choosing a specific course of action freely and deliberately. Yet, having decided, for whatever reasons, to adopt a particular code of best practices, to coordinate policy in a particular way, to accept the decision of a supranational tribunal, or even simply to join what seems to be an emerging international consensus on a

<sup>33</sup> D Zaring, *Informal Procedure, Hard and Soft*, In *International Administration* (2005) 5 Chi J Int’l L 547, 595.

<sup>34</sup> *Ibid*, 561; IOSCO, 2002 Annual Report 22 (2002), available at <[http://dev.iosco.org/annual\\_report/PDF/IOSCO\\_2002.pdf](http://dev.iosco.org/annual_report/PDF/IOSCO_2002.pdf)>.

<sup>35</sup> For a discussion, Slaughter (n 29 above) 65–103.

particular issue, they can implement that decision within the limits of their own domestic power.

The international legal system could harness the power of transgovernmental networks much more effectively. For example, international law could more explicitly recognize the role of such networks and the soft regulations they often produce. Hard legal instruments could mandate or facilitate the creation of transnational networks in a range of areas of critical State weakness such as justice or human rights. Where the weakness of a particular government in a functional area poses a threat to international order, the Security Council could require state participation in such a network. The international legal system should look to government networks as an important tool in improving state capacity and should build partnerships with government networks that help integrate them into larger international legal frameworks.

Once again, the international legal system would be taking a leaf from the EU's book in this regard. Most EU law gets made and implemented through transgovernmental networks of EU officials, from ministers on down. Indeed, Mark Leonard describes the EU as 'a decentralized network that is owned by its member-states'.<sup>36</sup> And beyond EU members themselves, the EU has sought to extend the network model to the Middle East and North Africa through the Barcelona Process and the Euro-Mediterranean Partnership.<sup>37</sup>

Beyond government networks, Stephen Krasner suggests that international law and institutions can strengthen State capacity by engaging in processes of shared sovereignty with national governments. Such shared sovereignty, 'involves the creation of institutions for governing specific issue areas within a state—areas over which external and internal actors voluntarily share authority'.<sup>38</sup> Examples of these arrangements include the creation of special hybrid courts in Sierra Leone, East Timor and, possibly, Cambodia, involving a mix of international and domestic law and judges. Similarly, a proposed oil pipeline agreement between Chad and the World Bank would involve shared control and governance.<sup>39</sup> Such shared sovereignty, Krasner claims, can 'gird new political structures with more expertise, better-crafted policies, and guarantees against abuses of power' onto weak or failing states.<sup>40</sup>

Even within a more traditional framework, the international legal system can employ a range of mechanisms to strengthen the hand of domestic governments. Legal instruments and codes of international best practices can set standards to

<sup>36</sup> Leonard, *Why Europe Will Run the 21st Century* (New York: Perseus Book Group, 2005) 23, citing Manuel Castells, *The End of Millennium* (Oxford: Blackwell, 2000).

<sup>37</sup> The Euro-Mediterranean Partnership, also known as the Barcelona Process, is 'wide framework of political, economic and social relations between the Member States of the European Union and Partners of the Southern Mediterranean' launched in Barcelona in 1995. For a discussion <[http://europa.eu.int/comm/external\\_relations/euromed/](http://europa.eu.int/comm/external_relations/euromed/)>.

<sup>38</sup> SD Krasner, 'Building Democracy After Conflict: The Case for Shared Sovereignty' (2005) 16:1 *Journal of Democracy* 69, 76.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 70.

give national governments benchmarks for enhancing their own capability.<sup>41</sup> International institutions can provide aid and assistance specifically targeted for the domestic institutions of the recipient State.

International financial institutions such as the IMF and the World Bank may have a particularly powerful role to play in building domestic capacity. Conditionality requirements give these bodies strong influence over domestic outcomes. The IMF's success in enhancing the capabilities of domestic governments is much debated.<sup>42</sup> The World Bank may have a better track record.<sup>43</sup> Part of the Bank's strategy in Africa has been to 'put countries in the driver's seat' with a 'platform of strong public capacity: capacity to formulate policies; capacity to build consensus; capacity to implement reform; and capacity to monitor results, learn lessons, and adapt accordingly'.<sup>44</sup> Whatever their successes and failures to date, the IMF and the World Bank have significant leverage to enhance domestic government capacity. The key issue is for them to find effective and just policies aimed at achieving this goal.

Building various mechanisms into future legal regimes as a means of promoting domestic capacity building must be an on-going priority. These mechanisms include government networks, technical assistance, benchmarks and standards, or other forms of cooperation. Abraham and Antonia Chayes have provided a model for how this can be done through 'managerial compliance'.<sup>45</sup> From this perspective, the task of maximizing compliance with a given set of international rules is a task more of management than enforcement, ensuring that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance.

More broadly, the success of many policies at the international level depends on political choices at the national level; for example, choices concerning the allocation of resources or the establishment of particular institutions. The effectiveness of international law may thus depend on its ability to shape political outcomes and institutional structures within States. At the same time, however, a feedback loop from domestic institutions to international institutions becomes crucial for both accountability and effectiveness. Thus the various mechanisms canvassed above to strengthen domestic government institutions must be carefully designed.

<sup>41</sup> In the field of judicial independence, the International Covenant on Civil and Political Rights (ICCPR) provides a set of such benchmarks. ICCPR, Arts 9–11. Additionally, the Rome Statute of the International Criminal Court offers further clarification and a potential legal testing ground. Rome Statute of the International Criminal Court, Art 17.

<sup>42</sup> For two sides of this debate, J Vreeland, *The IMF and Economic Development* (Cambridge: CUP, 2003) 160–65 (suggesting that IMF conditionality may retard domestic development); R Stone, *Lending Credibility: The International Monetary Fund and the Post-Communist Transition* (Princeton NJ: Princeton University Press, 2002) 233–34 (arguing that IMF conditionality is appropriate and beneficial).

<sup>43</sup> B Levy and S Kpundeh (eds), *Building State Capacity in Africa: New Approaches, Emerging Lessons* (Washington DC: WBI Development Studies, DC 2004).

<sup>44</sup> *Ibid.*, cited on the World Bank Website <<http://web.worldbank.org/WBSITE/EXTERNAL/WBI/0,,contentMDK:20112038~menuPK:556286~pagePK:209023~piPK:207535~theSitePK:213799,00.html>>.

<sup>45</sup> A Chayes and AH Chayes, *The New Sovereignty* (Cambridge: CUP, 1999) 4.



## 2.2 Backstopping domestic government

A second means through which international law can promote domestic government is by backstopping domestic institutions where they fail to act. In some ways, this idea is not new at all; it follows from a long intellectual tradition. As early as 1625, Hugo Grotius recognized that the domestic courts of various States could backstop one another. Referring to an early form of the prosecute or extradite requirement, Grotius observed: 'it is necessary that the power, in whose kingdom an offender resides, should upon the complaint of the aggrieved party, either punish him itself, or deliver him up to the discretion of that party'.<sup>46</sup> In other words, cooperation among the criminal justice mechanisms of States would allow them to back one another up.

Similarly, in the early 1920s, M Maurice Travers developed the concept of 'la superposition des compétences législatives concurrentes', suggesting that the layering of overlapping jurisdiction of a number of States would allow national courts to reinforce one another.<sup>47</sup> What is new, however, is that international institutions—rather than the national courts of third States—are making a conscious effort to backstop their national counterparts. Structural rules that explicitly seek to further this backstopping function are now embedded in the very statutes of international tribunals and institutions.

The most obvious example of international law as a backstop is the complementarity provisions of the Rome Statute of the International Criminal Court. The ICC is designed to operate only where national courts fail to act as a first line means of prosecution. Article 17 of the Rome Statute provides that the court shall determine a case is inadmissible if 'the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>48</sup> Either in cases where a domestic institutions fail 'due to a total or substantial collapse or unavailability of its national judicial system',<sup>49</sup> or where a State is unwilling to prosecute 'independently or impartially', the ICC can step in and provide a second line of defence.<sup>50</sup> In other words, if the US were a member of the ICC and proved unable or unwilling to prosecute fully *all* those members of the military involved in the abuses at Abu Ghraib, the ICC would have jurisdiction.

Other forms of international institutional design may similarly result in a backstopping function. In various human rights courts, the requirement that individuals exhaust local remedies first may have a similar result by giving States—and particularly their domestic courts—an incentive to reach conclusions acceptable to the international institution so the international court need not intervene to

<sup>46</sup> H Grotius, *De Jure Belli ac Pacis* (1625) II c.21 sec.4.

<sup>47</sup> M Maurice Travers, *Le Droit Pénal International et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre* (Paris: Librairie de la Société du Recueil Sirey, 1922).

<sup>48</sup> Rome Statute of the International Criminal Court, Art 17(1).

<sup>49</sup> Ibid, Art 17(3).

<sup>50</sup> Ibid, Art 17(2).

review the case.<sup>51</sup> Similarly, the dispute resolution mechanisms of NAFTA have served as an international backstop for domestic resolution of anti-dumping cases.<sup>52</sup> Under NAFTA, international arbitral panels are given the authority to review domestic administrative decisions and can remand decisions back to the issuing agency with guidance on acceptable outcomes. If the agency issues an acceptable ruling, no further action is taken. But, if the panels remain unsatisfied with the agency's response, they can issue a further ruling and remand the case yet again.<sup>53</sup> Like the Rome Statute's complementarity regime, this remand procedure gives domestic institutions within NAFTA countries an incentive to act first and to get it right. Where they fail to do so, the international process provides a backstop.

The actual effect of such backstopping provisions in international institutional design is two-fold. First, and most obviously is to provide a second line of defense when national institutions fail. Second, and potentially more powerfully, is the ability of the international process to catalyze action at the national level. This second effect most often occurs when a domestic legal or political process exists that could be utilized should the domestic government decide to do so, but government officials, or at least some powerful group of such officials, deem that the costs of domestic action outweigh the benefits. In such cases, the existence of an international tribunal with concurrent jurisdiction can provide structural incentives that shift the cost-benefit calculation and result in the use of a domestic process that would have otherwise been neglected. As States will often prefer to adjudicate matters domestically rather than give jurisdiction to an international tribunal over which they have little or no control, they are likely to have new incentives to act locally.

The International Criminal Court already appears to be having such a catalytic effect in two of the first situations it is investigating—the Democratic Republic of Congo and the Darfur region of Sudan. In the wake of the ICC Prosecutor's 2003 announcement of an investigation in Congo, a range of efforts were initiated by certain elements within the Congolese government to reform the Congolese judiciary so as to be able to assert primacy over the ICC and undertake national

<sup>51</sup> Art 35 of the European Convention on Human Rights provides that 'The Court may only deal with the matter after all domestic remedies have been exhausted'. Similarly, the court can only hear cases referred by the Commission when the Commission has acknowledged a failure to reach a friendly settlement of the dispute. ECHR, Art 47.

<sup>52</sup> The 1988 Canadian-American Free Trade Agreement (CAFTA) and the more recent North American Free Trade Agreement both contain provisions for the creation of international panels to review the legality of administrative decisions with respect to antidumping and countervailing duty obligations. Canada-US Free Trade Agreement (1988) Chapter 19; North-American Free Trade Agreement, Art 1904, providing that 'each Party shall replace judicial review of final antidumping and countervailing duty determinations with bi-national panel review'. Though not a traditional international court or arbitration, these panels act in a judicial capacity and issue decisions binding on States parties. Certain non-traditional aspects of the panels include the fact that domestic judicial review was not completely foreclosed. J Goldstein, 'International Law and Domestic Institutions: Reconciling North-American Unfair Trade Laws' (Autumn 1996) 50 *Int'l Org* 541, 546.

<sup>53</sup> Goldstein (n 52 above) 551.

proceedings.<sup>54</sup> Similarly, after the Prosecutor opened an investigation in the Darfur region of Sudan, local courts, though of questionable legitimacy, were established to initiate domestic proceedings.<sup>55</sup> The ICC Prosecutor has himself suggested that complementarity may encourage domestic prosecutions. As he puts it, 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.<sup>56</sup>

International legal institutions operating as a backstop need not be limited to purely international courts. Domestic adjudication may likewise enhance the willingness of the judiciaries of third states to act themselves. The recent successes of the Chilean courts in prosecuting Augusto Pinochet is, in part, due to the international community—acting largely through the Spanish judiciary—getting serious about ensuring accountability for his crimes.<sup>57</sup> The prosecution by Spain and the proceedings in England<sup>58</sup>—though they did not result in a conviction—made

<sup>54</sup> Reform efforts to date have included attempts to reunify the divided judiciary through nationwide judicial conferences, establishing commissions on legislative reform, and launching a Truth and Reconciliation Commission. Personal Interview Mr Honorius Kisimba-Ngoy, Minister of Justice, Kinshasa, 29 October 2003, (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez). According to the Director of the Cabinet to the Minister of Human Rights, one 'local commission [is] studying how to adapt the ICC to the DRC'. Personal Interview, Director of the Cabinet to the Minister of Human Rights, Ms Olela Okondji, Kinshasa, 29 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema, and Adrian Alvarez). Similarly, 'a permanent committee within the Ministry [of Justice has been established] for reforming the domestic law' and is 'learning how to implement the ICC' crimes into domestic law. The Commission's formal name is The Commission Permanente de Réforme du Droit Congolais. Personal Interview, Director of the Cabinet to the Minister of Human Rights, Ms Olela Okondji, Kinshasa, 29 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema, and Adrian Alvarez). The Congolese TRC grew out of the Inter-Congolese Dialogue and is written into the new interim constitution. Constitution De La Transition, Journal Officiel de la République Démocratique du Congo, 44 année, 5 Avril 2003, at Art 54 (noting: '*Les Institutions d'appui à la démocratie sont: ... La Commission vérité et réconciliation*'). Despite the consideration of a number of draft laws, as of early 2004, an organic law for the commission has yet to be adopted. Personal Interview, Dr Kuye Wadonda, President of the Truth and Reconciliation Commission, Kinshasa, DR Congo, 27 October 2003. For a more detailed discussion, see WW Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden J Int'l L* 557.

<sup>55</sup> *Sudan Renews Rejection to Bringing Any Sudanese Before International Criminal Court*, Sudan News Agency, 17 October 2005.

<sup>56</sup> Luis Moreno-Ocampo, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, June 16, 2003, available at <[http://www.icc-cpi.int/otp/otp\\_ceremony.html](http://www.icc-cpi.int/otp/otp_ceremony.html)> (visited 18 October 2003). Similarly an expert paper published by the Office of the Prosecutor notes: 'The complementary regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes'. Informal Expert Paper: The Principle of Complementarity in Practice, available at <<http://www.iccpi.int/library/organs/otp/complementarity.pdf>>.

<sup>57</sup> The Chilean Supreme Court has ruled that Pinochet may stand trial domestically for international crimes against Chilean citizens committed during his rule. D Sugarman, 'Will Pinochet Ever Answer to the People of Chile?', *The Times* (London), 14 September 2004, available at <<http://www.timesonline.co.uk/article/0,,200-1257033,00.html>> (Editor's note: by the time this book went to print, Pinochet had died and would no longer be prosecuted).

<sup>58</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 248 (HL).

clear to the Chileans that other options existed if they themselves refused to prosecute and may have bolstered the willingness of Chilean courts to hold Pinochet accountable.

The backstopping effect of international institutions will take different forms and often be case specific. Sometimes, the international institution will provide maximum incentives for domestic governmental authorities to act. Other times, the international institution may alter the balance in a domestic power struggle, strengthening the hand of those national officials who want to act. Alternatively, where the domestic government truly lacks the capacity to act, the international institution could backstop domestic courts by genuinely providing another forum. In any case, the international institution directly affects domestic government decisions, changing the incentives for domestic action and providing a second, international, mechanism of action. In so doing, the international institution becomes a tacit actor in domestic political processes, pressuring national governments to reach political outcomes that would not have otherwise been available.

### 2.3 Compelling action by national governments

The effectiveness of international law in responding to new transnational threats will, to an ever greater degree, require the use of national institutions. Despite the proliferation of international courts and tribunals,<sup>59</sup> national governments have retained the nearly exclusive use of their instruments of compulsive authority. In most cases, national governments alone can use the police power, the instruments of a national judiciary, or the military. These are the most effective tools available to address transnational threats before they grow and spread. In many cases, backstopping and strengthening domestic institutions will be sufficient to ensure that national governments use their power to address present and potential dangers. At times, however, domestic governments may be unwilling to use these institutions, either due to differing perceptions of national interest, a lack of political will, or infighting within governments themselves. In addition to backstopping and strengthening domestic institutions, international law must find new ways to ensure that, even in these cases, national governments do, in fact, use the tools at their disposal to address such threats before they spread.

In some ways, using international legal rules to compel state action might be said to fit within a classical vision of the international legal system. After all, such rules have long sought to constrain or mandate the behaviour of States. However, as described here, compulsion takes a very different form from traditional international legal obligations. Whereas classical international law generated obligations on states qua states, the new compulsion function of international law seeks to compel sub-state institutions to act in particular ways. Though these obligations may

<sup>59</sup> Christian Tomuschat, 'International Courts and Tribunals', 1 *Encyclopedia of Public International Law* 92–99 (Rudolph Dolzer et al. eds, 1981).

still be directed at States themselves, they specifically reference the affirmative duties of states to utilize their domestic institutions to further international objectives.

Where compulsion is necessary, binding international instruments of all kinds—from Security Council resolutions to customary law doctrines—must shift from requiring particular State behaviour vis-à-vis other States to ensuring that the domestic institutions of national governments take specific actions within their own jurisdictions. International treaties have long required national governments to enact domestic legislation of various sorts, such as the domestic criminalization of certain transnational acts.<sup>60</sup> International law must go still further and ensure that domestic legislation is not only passed but also used, that domestic institutions not only exist, but also work.

The use of international law to combat terrorism immediately after September 11 is a prime example of how specific obligations can be imposed on UN member states that they can fulfill only by acting at the national level and deploying domestic institutions. UN Security Council Resolution 1373, for example, requires states to ‘prevent the commission of terrorist acts’ and ‘deny safe haven to those who finance [or] plan... terrorist acts’.<sup>61</sup> The resolution demands, among other things, domestic criminalization of the financing of terrorism, freezing of terrorist assets by national authorities, use of domestic courts to bring to justice those involved in terrorist acts, and ratification by domestic authorities of relevant anti-terrorism conventions.<sup>62</sup>

The White House describes Resolution 1373 as setting ‘new, strict standards for all states to meet in the global war against terrorism’.<sup>63</sup> Likewise, the International Convention for the Suppression of the Financing of Terrorism (Financing Convention) and the International Convention for the Suppression of Terrorist Bombing (Bombing Convention) require states to take concrete domestic action. The Financing Convention obliges states to ‘take appropriate measures... for the... seizure of funds used or allocated for’ the financing of terrorism,<sup>64</sup> while the Bombing Convention requires domestic criminalization of terrorist acts and the affirmative use of national judicial institutions to bring to justice the perpetrators of terrorist acts.<sup>65</sup>

Resolution 1373 links both the compelling and strengthening functions of the international legal system. Beyond merely mandating domestic action, the resolution establishes a Counter-Terrorism Committee that is tasked with monitoring the implementation of the resolution and increasing the ‘capability of States to

<sup>60</sup> For example, many treaties in the area of international criminal law require criminalization of certain behaviour at the national level. Eg Convention on the Suppression and Punishment of the Crime of Genocide; Convention Against Torture and Other Inhuman and Degrading Treatment.

<sup>61</sup> UN Security Council Resolution 1373 S/RES/1373 (2001) at 2(c) and 2(d). <sup>62</sup> Ibid.

<sup>63</sup> The White House, National Strategy for Combating Terrorism 13 (2003), available at <[http://www.whitehouse.gov/news/releases/2003/02/counter\\_terrorism/counter\\_terrorism\\_strategy.pdf](http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf)>.

<sup>64</sup> International Convention for the Suppression of the Financing of Terrorism, at Art 8 (1999).

<sup>65</sup> International Convention for the Suppression of Terrorist Bombings, at Arts 5–7 (1998).

fight terrorism’.<sup>66</sup> The Committee requires regular reporting by States of steps taken to comply with Resolution 1373 and provides expert advice on issues ranging from legislative drafting to customs requirements and policing.<sup>67</sup> Working jointly with international, regional, and sub-regional organizations, the Committee shares ‘codes, standards and best practices in their areas of competence’.<sup>68</sup> In addition, the Committee makes available a database of technical assistance and a team of expert advisors to assist states in compliance.<sup>69</sup> By April 2005, at least one report had been received from all 191 member States; the Secretary General has described State cooperation with the Committee to date as ‘unprecedented and exemplary’.<sup>70</sup>

The Security Council’s recent initiatives in the area of non-proliferation have imposed similar obligations on national governments to take affirmative domestic action. Security Council Resolution 1540, for example, requires States to adopt national legislation prohibiting the manufacture or possession of weapons of mass destruction by non-State actors and to establish export control regulations and physical protection regimes for weapons and related technologies.<sup>71</sup> While not going as far as the creation of the Counter-Terrorism Committee, the Security Council again recognized the importance of capacity building in ensuring domestic action and invited States to offer assistance and resources.<sup>72</sup> Likewise, functional international organizations such as the International Atomic Energy Agency (IAEA) have compelled States to act through their own institutions. IAEA Safeguards Agreements with nuclear States, for example, require a national system of materials controls and the use of particular accounting mechanisms.<sup>73</sup>

This is again the future of international law. To respond effectively to new international threats, international rules must penetrate the surface of the sovereign State, requiring governments to take specific domestic actions to meet specified targets. Sometimes simple backstopping of national institutions may be sufficient to accomplish this task. In other circumstances, assistance and the bolstering of weak State capacity may be an essential prerequisite. At yet other times, international law may have to actively compel State action. When it does so, it once again seeks to alter the political choices of national governments and to compel States to utilize their national institutions in ways they might not otherwise.

The most effective approach will often involve some combination of all three functions. Leaders and legislators should then be held accountable by both their peers and their publics for whether and how they and their governments respond.

<sup>66</sup> UN Counter-Terrorism Committee Homepage, available at <<http://www.un.org/Docs/sc/committees/1373/>>.

<sup>67</sup> UN Counter-Terrorism Committee, How Does the CTC Work With States?, available at <<http://www.un.org/Docs/sc/committees/1373/work.html>>.

<sup>68</sup> UN Counter-Terrorism Committee, Working Together to Raise State Capacity, <<http://www.un.org/Docs/sc/committees/1373/capacity.html>>.

<sup>69</sup> UN Counter-Terrorism Committee, How Can the CTC Help States? (n 67 above).

<sup>70</sup> Ibid. <sup>71</sup> UN Security Council Resolution 1540, S/RES/1540 (2004).

<sup>72</sup> Ibid, 7.

<sup>73</sup> Eg, Agreement Between The United States of America and The International Atomic Energy Agency for the Application of Safeguards in the United States (and Protocol Thereto), 8 December 1980.

### 3. The dangers of using international law to shape and influence domestic politics

On one level, using international law to build the will and capacity of States to act domestically offers great opportunities to enhance the effectiveness of the international legal system. National governments will have new incentives to act. Domestic institutions will grow stronger. They can be harnessed in pursuit of international objectives. Transnational threats can be responded to more effectively and efficiently.

Yet each of the functions of the international system suggested here—backstopping, strengthening, and compelling—is a double-edged sword. Backstopping national institutions can be counterproductive to the degree States defer to an international forum as a less politically and financially costly alternative to national action.<sup>74</sup> Well-intentioned efforts to help, often through NGOs as well as international institutions, can end up weakening local government actors by siphoning off both funds and personnel. The process of strengthening domestic institutions, if not properly designed and implemented, can also squeeze out local domestic capacity.<sup>75</sup> Finally, and most dangerously, by compelling national action the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches.<sup>76</sup>

The most significant danger inherent in these new functions of international law, however, lies in the potential of national governments to co-opt the force of international law to serve their own objectives. By strengthening State capacity, international law may actually make States more effective at the very repression and abuse the interference challenge seeks to overcome. Similarly, by compelling State action, international law may give national governments new license to undertake otherwise illegal or unjust policies. Where critical values such as human rights and state security are seen to be in conflict, international legal compulsion of policies that favour one value may come at the expense of the other. This problem is particularly grave where a repressive regime is able to use compulsion at the international level as a cover or excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.

<sup>74</sup> One of the co-authors has described this as a moral hazard problem. William W Burke-White, *Double-Edged Tribunals: Embracing The Domestic Political Effects of International Judicial Bodies*, working paper (2004). The most obvious example of this is the self-referral to the ICC by the government of Uganda of the situation with the Lords Resistance Army. *President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC*, The Hague, 29 January 2004, available at <<http://www.icc-cpi.int/php/index.php>>. In all likelihood, the Ugandan government could have addressed this situation domestically if it did not have the option of referring the situation to the ICC.

<sup>75</sup> Fukuyama argues that 'The international community, including the vast numbers of NGOs that are an intimate part of it, comes so richly endowed and full of capabilities that it tends to crowd out rather than complement the extremely weak state capacities of the targeted countries', Fukuyama (n 13 above) 103.

<sup>76</sup> For a discussion of the importance of such domestic experimentation, MC Dorf and CF Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia L Rev* 267.

Nowhere is this danger more apparent than in the legal compulsion of counter-terrorism activity. Mary Robinson, former UN High Commissioner for Human Rights, observes: 'Repressive new laws and detention practices have been introduced in a significant number of countries, all broadly justified by the new international war on terrorism.'<sup>77</sup> Similarly, Kim Scheppele has documented the number of exceptions to international and domestic legal protections states have invoked under the cover of fighting terrorism.<sup>78</sup> Among the worst offenders, according to Human Rights First, are Tanzania, Indonesia, Russia, Pakistan, and Uzbekistan, each of which has undertaken 'draconian anti-terrorism laws' that compromise human rights and strengthen the hand of government vis-à-vis opposition groups.<sup>79</sup>

If these new purposes of international law are to be both effective and just, the goal must be to maximize the benefits of the backstopping, strengthening, and compelling functions while avoiding the dangers evident in the counter-terrorism case. The theoretical base of these new functions of international law is that domestic institutions can be used to further international legal objectives. Yet it is these same institutions that can become sources of abuse by national governments. The challenge, then, is to differentiate between domestic institutional structures capable of furthering the international system and those most likely to be abusive and repressive.

One way of making such distinctions is for international law to directly consider the quality of domestic institutions. States with robust, independent institutions, strong constitutional frameworks, transparent political processes, and embedded systems of checks and balances are least likely to appropriate international law for their own purposes and engage or abuse their newfound power. In these states, domestic legal protections and other institutions within the national government can prevent abuse or counter-balance the strength of other institutions. Abuses may still occur in States with good institutional frameworks. However, the assumption built into institutions like the ICC is that when abuses do occur in a well-governed State, that State's own domestic system will provide an internal correction mechanism. It is these States with independent and transparent domestic institutions that may be most receptive to the new functions of the international legal system.

The problem, of course, is that it is often the states that lack institutional independence and embedded checks and balances that are most in need of capacity building or compulsion to address threats and challenges at home, before they spread. Where international law does target such states, international rules, regimes, and institutions will have to be designed to address both the capacity and quality of domestic governance. Checks and balances will have to be embedded into the

<sup>77</sup> M Robinson, 'Shaping Globalization: The Role of Human Rights' (2003) 19 *Am U Int'l L Rev* 1, 12.

<sup>78</sup> Kim L Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2000) 6 *U Pa J Const L* 1001.

<sup>79</sup> Human Rights First, *Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties* (2003) 76–79.



system itself, pushing not only for particular substantive outcomes but also for legitimate domestic processes to achieve those goals. Similarly, international regimes themselves will have to balance a range of competing values—such as human rights and national security—rather than focus on one particular goal when compelling state action.

Finally, as is already becoming apparent, both this overall conception of international law and the specific functions described here will meet with fierce resistance from states with very strong domestic legal systems, such as the United States, and many states with very weak legal systems but strong political rulers. European states, as noted above, are accustomed to daily ‘soft intervention’. Other states, however, will be far less comfortable with such intervention. The US will not be alone here, but it may well find itself with a number of unsavory bedfellows. On the other hand, many European powers may find it more difficult than they expect to promote an EU-inspired model of pooled sovereignty among wary former colonies.

#### 4. International law, domestic politics

International lawyers and political scientists alike have long been fascinated with the blurring of the boundaries between domestic and international rules and institutions. In 1956 Philip Jessup made a hegemonic move, claiming for international lawyers not only the classic domain of international law, but also ‘all law which regulates actions or events that transcend national frontiers’, which he dubbed ‘transnational law’.<sup>80</sup> Forty-five years later, Justice Sandra Day O’Connor, a relative newcomer to the world of international law, observed: ‘international law is no longer confined in relevance to a few treaties and business agreements. Rather, it . . . regulates actions or events that transcend national frontiers.’<sup>81</sup>

In political science, James Rosenau has popularized the concept of the ‘domestic-foreign frontier’.<sup>82</sup> On this frontier, ‘domestic and foreign issues converge, intermesh, or otherwise become indistinguishable’.<sup>83</sup> In his conception, whereas a boundary is an imaginary line, a frontier is ‘a new and wide political space . . . continuously shifting, widening, and narrowing, erosion with respect to many issues and reinforcement with respect to others’.<sup>84</sup> What Rosenau finds striking about relations along this frontier is that individuals work out a wide range of solutions

<sup>80</sup> P Jessup, *Transnational Law* (New Haven: Yale UP, 1956) 2.

<sup>81</sup> Sandra Day O’Connor, ‘Keynote Address’ (2002) 96 ASIL PROC 348, 350.

<sup>82</sup> As Rosenau observes: ‘we can no longer allow the domestic-foreign boundary to confound our understanding of world affairs . . . domestic and foreign affairs have always formed a seamless web’. J N Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: CUP, 1997) 4.

<sup>84</sup> *Ibid.*, 4.

<sup>83</sup> *Ibid.*, 5.

to various problems through a mix of domestic and international rules, rather than ‘through the nation-state system’.<sup>85</sup>

Our proposition is actually quite different. We endorse the division between domestic and international affairs, at least conceptually. Although it is quite possible, indeed likely, that international law is expanding to include all sorts of rules and institutions that have a hybrid domestic-international character, as well as those domestic rules that reach beyond borders, we suggest that traditional public international law, meaning treaties and custom operating among nations in their mutual relations, has a distinct identity and a distinct set of functions. We are simply arguing that those functions are changing fast.

Our claim ‘that the future of international law is domestic’ refers not to domestic *law* but to domestic *politics*. More precisely, the future of international law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors, actions, and outcome in domestic politics. International rules and institutions will and should be designed as a set of spurs and checks on domestic political actors to ensure that they do what they should be doing anyway—eg what they have already committed to do in their domestic constitutions and laws and through their treaty and customary law obligations.

In this conception, it is perfectly fine to continue to distinguish quite concretely between an ‘international’ and a ‘domestic’ sphere, even as we recognize that the boundary between them has blurred and that they intersect and even conflict in growing ways. Indeed, it is valuable for domestic political actors—the prosecutors trying to bring a former government official to justice, the judges seeking to resist executive pressure to decide a case a particular way, the parliamentary faction trying to fight global warming—to be able to point to a mandate or a spur from a distinct and separate political space. The result will be ever more elaborate two-level games, but each game will remain on its own board, no matter how complex and dense the links between them.

What must change profoundly, however, is the legitimacy of allowing the architects of international rules and institutions to look within the domestic political sphere of all states actually and hypothetically subject to the rule or institution in question. This scrutiny cannot be done with reference to specific parties and actors in actual states, but must be based on data culled from history and across the social sciences about the likely incentives of those parties and actors in varying circumstances. The critical question must be how the content of specific rules and of the processes and procedures of institutions is likely to interact with, influence, or even change these incentives.

In short, the very concept of sovereignty itself must adapt and evolve to focus on inclusion—rather than exclusion—and to embrace—rather than reject—the influence of international rules and institutions on domestic political processes.

<sup>85</sup> *Ibid.*, 5–6. Also M Albert and L Brock, *Debordering the World of States: New Spaces in International Relations*, Working Paper 2 (Frankfurt: World Society Research Group, 1995).

This shift may well be best illustrated by the new doctrine of the responsibility to protect. The responsibility to protect first emerged from the International Commission on Intervention and State Sovereignty (ICISS), headed by former Australian Foreign Minister Gareth Evans and Special Advisor to the UN Secretary General Mohamed Sahnoun, who were in turn responding to an appeal from Kofi Annan himself.<sup>86</sup> In December 2001 the ICISS issued an important and influential report entitled 'The Responsibility to Protect', which essentially called for updating the UN Charter to incorporate a new understanding of sovereignty.<sup>87</sup>

In the Commission's conception, the core meaning of UN membership has shifted from 'the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations',<sup>88</sup> to recognition of a State 'as a responsible member of the community of nations'.<sup>89</sup> Nations are free to choose whether or not to sign the Charter; if they do, however, they must accept the 'responsibilities of membership' flowing from their signature.<sup>90</sup> According to the ICISS, 'There is no transfer or dilution of State sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties'.<sup>91</sup> Internally, a government has a responsibility to respect the dignity and basic rights of its citizens; externally, it has a responsibility to respect the sovereignty of other States.

Further, the ICISS places the responsibility to protect on both the State and on the international community as a whole. The ICISS insists that an individual state has the primary responsibility to protect the individuals within it.<sup>92</sup> However, where the State fails in that responsibility, a secondary responsibility falls on the international community acting through the UN. Thus, 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect'.<sup>93</sup>

These shifts may seem dramatic; they are certainly bold. But in the view of a group of leading European policy thinkers asked to consider how the EU should

<sup>86</sup> In September 1999 Kofi Annan called on all UN members at the opening of the General Assembly to 'reach consensus—not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom'. Kofi Annan, 'Two Concepts of Sovereignty' available at <<http://www.un.org/News/ossg/sg/stories/kaecon.html>>.

<sup>87</sup> The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (2001). The International Commission on Intervention and State Sovereignty (ICISS) began from the premise that 'in key respects . . . the mandates and capacity of international institutions have not kept pace with international needs or modern expectations'. *Ibid.* at 1.11. More specifically, the ICISS argued that the intense debate over military protection for humanitarian purposes flowed from a 'critical gap' between the immense and unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order. At the same time, it noted a widening gap between the rules and the principles of the Charter regarding non-interference in the domestic affairs of member nations and actual state practice as it has evolved since 1945. It frames the 'responsibility to protect' as an 'emerging principle' of customary international law—not yet existing as law but already supported both by State practice and a wide variety of legal sources. *Ibid.* at 2.24–2.27.

<sup>89</sup> *Ibid.*, 2.14.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 2.29.

<sup>93</sup> *Ibid.*, xi.

respond to the UN Secretary General's High Level Panel Report on Threats, Challenges, and Change, EU States should go considerably further. They should: 'Promote "the Responsibility to Protect", while also reframing the sovereignty debate to cover a principle of both *enhancing* effective and legitimate sovereignty of weak states, (through international assistance) and *conditioning* sovereignty on state behaviour'.<sup>94</sup>

International law and the international community itself is thus coming to have not only the right, but perhaps also the obligation to intervene in and influence what was previously the exclusive jurisdiction and political processes of national governments. By strengthening, backstopping, and compelling action at the national level, the international legal system has powerful tools at its disposal to alter domestic political outcomes.

This line of argument raises yet another (friendly, we hope) division between European and American international lawyers. Noted European (and some American) international lawyers have denounced the entire enterprise of linking international law to the systematic study of international relations as a blind for extending American power, just as we suspect some readers will interpret some of the arguments set forth here.<sup>95</sup>

Once again, however, it is European policy thinkers drawing on a distinctly European set of experiences who are pushing the transformative power of law. They emphasize that EU treaties are, in the end, simply international law that EU members have chosen to accept and to embed in their domestic political systems,<sup>96</sup> and draw corresponding conclusions about the potential power and functions of international law as a whole. We have sought to explicate those functions here. But in the end, if the future of international law is domestic, as we predict, it will be the European way of law.

<sup>94</sup> Eide (n 22 above) 9.

<sup>95</sup> For a number of perspectives on this point, 'Unilateralism in International Law: Its Role and Its Limits: A United States European Symposium' (2000) EJIL 10–11. Also Martin Koskenniemi, *From Apology to Utopia* (Cambridge: CUP, 1989); M Koskenniemi, S Ratner, and V Rittberger 'Comments on Chapters 1 and 2' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: CUP, 2003).

<sup>96</sup> Leonard (n 16 above) 46.