

NATURALISM IN INTERNATIONAL ADJUDICATION

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INTRODUCTION

In the decentralized international legal system, how should legal norms be formed? The international system lacks a legislature with the authority to make law, an authoritative court with mandatory jurisdiction to articulate norms, an executive with delegated authority to make law or execute legal norms, or an international police force to enforce them. Rather, under conventional theory, substantive international law is largely consensual. International law is formed by express consent in the case of treaty law and implied consent in the case of customary international law (CIL).¹ A third source of law, general principles of law, provides procedural norms and doctrine to give effect to consensual norms.²

With the exponential increase in the movement of goods, services, capital, and people around the globe, there is ongoing pressure for predictable rules and regularized procedures to articulate norms and resolve disputes. Concomitant with this trend has been the rise of consensual treaty regimes such as the World Trade Organization (WTO) that polices access to markets, the Ozone Layer Treaty re-

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1. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3-4 (6th ed. 2003). For a brief summary of the history of the triumph of positivism over natural law, see STEPHEN C. MCCAFFREY, *UNDERSTANDING INTERNATIONAL LAW* 36-37 (2006).

2. For an extensive discussion of the sources of international law and their hierarchy, see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006). For an argument that general principles of law should be used to inject subjectivity into international law, see James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2030-34 (2000) (book review).

gime that regulates the use of certain chemicals that threaten the protective function of the ozone layer, and other regimes designed to solve collective action problems and mitigate transboundary harms.³ To what degree do these trends involve the mere application of prior agreed-upon positive norms and to what degree do these bodies articulate new norms not legitimized by consent?

International and domestic adjudicative bodies are increasingly turning away from consent as the basis of international legal norms and towards “Naturalism”⁴ to articulate binding legal norms. The primary forms of Naturalism include both the expansive use of CIL and creative treaty interpretation beyond prior agreed-upon norms.⁵ This turn toward Naturalism rather than consensual norms undermines fundamental values such as democratic legitimacy, national sovereignty, faithfulness in treaty interpretation⁶ and respect for local regulatory regimes and cultures.⁷

Further, this rise of Naturalism is not accidental. It reflects an underlying value struggle for dominance within the domestic politics of a few wealthy developed countries. The different strains of thought may be characterized into two visions: Progressive Internationalists and State Power Rationalists. Progressives are concerned that globalization, the pressure for efficiency, and regulatory competition among states have reduced the power of the State to implement social welfare legislation. They would use the forms of law to raise concerns for environmental, labor, and health regulation to the inter-

3. There is a significant literature demonstrating that international organizations are formed to solve collective action problems and produce more efficient outcomes. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 4-5 (1998); JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).

4. Here, “Naturalism” means the articulation of legal rules or principles extrinsic to positive enactment by the relevant political community. The forms of Naturalism include the use of natural law, fundamental rights, constructivist norms, or, as discussed below, customary international law in a manner beyond general state acceptance. For a discussion of natural law ideas and their many sources, see Brian H. Bix, *Natural Law: The Modern Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 61 (Jules Coleman & Scott Shapiro eds., 2002).

5. Dinah Shelton describes similar phenomena when she criticizes the tendency among writers and advocates to inflate the hierarchy of norms whereby “nonlaw becomes soft law, soft law becomes hard law.” Shelton, *supra* note 2, at 322.

6. The Vienna Convention requires a textual approach in light of object and purpose. Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331.

7. See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (proposing a pluralistic approach rather than territorial sovereigntism or universal harmonization to resolve normative conflicts).

national level. This view would internationalize the domestic regulatory and constitutional norms of secular, individualistic societies as international rights.⁸ It idealizes international law as a restraint on state power and as a limit on transnational corporations.

State Power Rationalists⁹ observe the rapid increase in globalization and international organizations, but are concerned about the inherent reduction of state sovereignty.¹⁰ They view states as atomized individuals operating in an anarchic world and following only those rules they perceive in their self-interest.¹¹ They idealize state power and see law as an instrumental mechanism to achieve their substantive values. For them, international law reflects the power of states and is facilitative, not restraining.

Both positions mirror the classical tension in international law's development of being both a reflection of western culture and an imperial project to universalize law regardless of participation or assent.¹² Naturalism is useful to each perspective. Naturalism bypasses

8. For examples, see the asserted transformation of U.S. tort law into international law in *Trail Smelters Arbitration*, *infra* notes 43-49 and accompanying text and the internationalization of the just compensation requirement of the 5th amendment of the U.S. Constitution through the Cordell Hull formulation of adequate, effective and prompt compensation for expropriation, *infra* note 37 and *Restatement (Third) of the Foreign Relations Law of the United States* § 712.

9. This term conflates at least two schools of thought asserting the primacy of state power over law. The New Haven School of policy-oriented jurisprudence views international law as an authoritative process of decision-making by which states and other actors implement their common interests. Claims by states with effective power create norms. Despite this emphasis on effective power, actions must be in pursuit of postulated values associated with liberal democracies in order to be authoritative. See Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 103, 106 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983). A second school of thought which might be characterized as rational self-interest consists of neo-realists using game theory and other tools to demonstrate that international legal norms are non-binding conveniences among nations pursuing their individual self-interests. See generally Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 *HARV. L. REV.* 1404 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

10. Antonia and Abram Chayes describe the redefinition of sovereignty that they view as inherent in membership and participation in international organizations. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27 (1995). This view clashes with the rational self-interest view of international law as non-binding conveniences among states that maximize state interests. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3-14 (2005) [hereinafter *LIMITS*].

11. See *LIMITS*, *supra* note 10, at 3-17; see also Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 *J. LEGAL STUD.* 115 (2002) (arguing that the presence of international legal and moral rhetoric is not inconsistent with states merely pursuing their own self-interest).

12. International law defined relationships among European countries and established their authority to interact with or conquer non-European states and territories. See generally

more democratic and difficult processes when success on policy is unlikely. The moral crusade of western universalism exhibited by the Bush administration's war for democracy in Iraq shares much with the human rights mission. Both forms of Naturalism bypass positive law in their pursuit of their own vision of the good. Both ignore the different values and perspectives of most nations of the world. Premature international legalism in calling domestic norms international 'rights' takes normative development and sensible tradeoffs out of the realm of both domestic and international politics. The premature touting of the values of a few wealthy western nations as international legal obligations rather than as part of a moral or policy discourse forces unattainable and, at times, inappropriate norms on developing countries.¹³

This article will illustrate this trend toward Naturalism and explain its implications by providing a tour through the thicket of CIL, describing several recent WTO Appellate Body decisions grappling with the problem of normative development and examining the ideology of human rights. Three central themes will emerge: the legitimacy of norm articulation, the presence of unresolved conflicts of values and interests finessed by Naturalism, and the inadequacy of international lawmaking processes.

I. CUSTOMARY INTERNATIONAL LAW AS THE CLAY OF NORMATIVE JURISPRUDENCE

Customary international law has historically been the most important source of international norms. Custom's primacy is reflected in the understanding that treaties are considered binding because there is a prior customary norm, *pacta sunt servanda*, obligating nations to observe treaties.¹⁴ CIL is said to be consensual based on state practice generally accepted as law.¹⁵ States impliedly consent to norms by their participation in state practice and their demonstrated attitude of acceptance. Custom, then, consists of two elements: (1)

ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (describing the history of the European civilizing mission and its link to the international law concept of sovereignty and asking: who has sovereignty?, who grants it?, and who is denied it?).

13. See Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law*, 18 EUR. J. INT'L L. 379, 388-94 (2007).

14. HANS Kelsen, *PURE THEORY OF LAW* 216 (Max Knight trans., 1967); see J.L. Brierly, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 51-56 (6th ed. 1963).

15. BROWNIE, *supra* note 1, at 3, 6.

the practice of states as the material element that provides evidence of customary norms and (2) the general acceptance of a norm as a legal obligation by the world community as the attitudinal requirement.¹⁶ Yet much of international law is announced in books and articles with little input from nations. If one reads the international law literature, there is a rising tide of customary human right norms, environmental norms, and jurisdictional limitations without nations either accepting these norms as legal obligations or participating in relevant state practice.

Customary law, properly conceived, is empirical law. Customary norms are binding because they are, in fact, accepted by all normal members of a society and are observable.¹⁷ Empirical acceptance is the touchstone. Empirical acceptance, which has a certain popular democracy component, gives customary law its legitimacy. Mandatory customary practices are found in all societies. In traditional societies without separate legal institutions, longstanding practices are considered binding legal norms by its members and are enforced by informal means such as embarrassment, shunning, and, at times, exclusion which may result in death.¹⁸ In modern societies, customary norms may become part of the legal system as implied terms in contracts or may be considered mandatory social norms. Even in advanced developed societies, mandatory social norms are enforced in cohesive communities, such as gypsy communities or cooperative ranching communities, extra-legally through a variety of coercive means.¹⁹

CIL, however, has taken a different path. Rather than the accepted law observable in practice, much of CIL is law articulated by scholars, nongovernmental organizations (NGOs), and international jurists. CIL has become law deduced from principles and instruments

16. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 47-72 (1971).

17. Customary law is a social fact subject to observation that the relevant community invests with binding authority. See Ian Hamnett, *Introduction to SOCIAL ANTHROPOLOGY AND LAW* 7-8 (Ian Hamnett ed., 1977); MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 352 (1955).

18. See Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 *YALE L. J.* 323, 353, 358-60 (1993).

19. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBOR'S SETTLE DISPUTES* (1991) (describing practices of Shasta County cattle ranchers with strong social norms to solve disputes and police nonconformists).

rather than legal norms inducted from observable fact.²⁰ If the relevant members of international society are nation-states, few participate in the formation of CIL and few have affirmatively accepted such norms as binding legal obligations. Unlike traditional societies, nation-states are culturally diverse and have widely different histories, values, and interests. This heterogeneity makes the essential requirement of general acceptance, a necessity for custom's legality and legitimacy, both unlikely and difficult to determine. Nor is it clear that implicit law is either necessary or wise as a method of lawmaking in the 21st century when international conferences are now common place, transportation is easy, and the internet provides instantaneous information.

Nevertheless, there is considerable empirical evidence that nations believe that some behavioral regularities are legally required.²¹ The vast majority of nations have, for example, accepted the norm against torture as a binding legal obligation.²² Nations do not argue that torture is not a violation of international law, but rather they plead that a particular interrogation technique is not torture.²³

The modern paradigm of CIL is deceptively simple. CIL is formed by the general and consistent practices of states accepted by them as law.²⁴ CIL binds all states.²⁵ New members of the international community of states are bound by existing customary law.²⁶ However, an existing state is not bound by emerging customary law if it persistently objects.²⁷ All aspects of this paradigm are subject to de-

20. For a summary of custom theory and the move toward deductive processes, see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

21. For a list of examples, see ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 19-22 (1994). For a theoretical explanation of why CIL may affect state behavior, see George Norman & Joel P. Trachtman, *The Customary Law Game*, 99 AM. J. INT'L L. 541 (2005).

22. As of June, 2008 145 states were party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984), at <http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

23. The experience of the Department of State has been that no state asserts a right to torture. A state usually denies that it tortures or that the conduct is unauthorized or merely constitutes rough treatment not torture. See *Filartega v. Pena-Irala*, 630 F. 2d 876, 883-85 (2d Cir. 1980).

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

25. *Id.* § 102 cmt. d.

26. *Id.*

27. The major treatises, as well as the U.S. Restatement, agree on the formal elements of this paradigm. See, e.g., *id.*; BROWNLIE, *supra* note 1, at 6-12; OPPENHEIM'S INTERNATIONAL

bate.²⁸ There is no common understanding of how to determine CIL beyond the ritualistic words of “general state practice accepted as law.” There are several significant problems with applying this conception of law to international society.

First, international society is composed of states with widely different values, perspectives, and interests spread throughout the globe. With few states participating in the limited acts of state practice, generalizations are suspect and often inaccurate. Thus the few incidents of state practice relied on by theorists may reflect only a temporary convenience or a local custom rather than a generalized acceptance of a norm by an abstract international community.²⁹

Second, there is no agreement on what constitutes state practice. Do only physical actions such as repelling a ship from territorial waters count as state practice³⁰ or do formal protests count to help prevent the formation of CIL?³¹

Third, how does one know if a norm has been generally accepted, the touchstone of normativity? Does assent to a non-binding Declaration, such as the Stockholm or Rio Declarations, at an international conference or at the United Nations General Assembly indicate general acceptance of the norm as law, or does it suggest only a concern about a vague goal?

Fourth, is the source of CIL’s legal obligation common consent, i.e., consensus of states, or is it specific consent, express or implied? The reigning paradigm appears to bind new nations to prior customary norms because custom, once it is accepted by common consent, binds all universally. Is this the case when a norm no longer commands even a majority of states? There is a hidden conundrum in customary theory: is CIL based on common consensus or consent, express or implied? While custom has historically been considered universal, the paradigm, as recently described in the western literature, permits a nation that persistently objects during the process of forma-

LAW 25-31 (Robert Jennings & Arthur Watts eds., 9th ed. Addison Wesley Publ’g Co. 1996) (1905) [hereinafter OPPENHEIM’S].

28. For a fuller discussion of the problems with the CIL paradigm, see generally J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000).

29. For four case studies of rules, traditionally described as CIL, that are better described as conveniences among a few states rather than generally accepted, see LIMITS, *supra* note 10, at 45-78.

30. See D’AMATO, *supra* note 16, at 87-98.

31. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 40 (1977).

tion to opt out of norms, suggesting a consent theory.³² This persistent objector principle emerged after new nations became a majority at the United Nations and the west began to lose control over the development of customary legal regimes particularly the protection of foreign investment.³³ The effect of this incoherence is to make custom consensual for older nations and universally binding on new nations. States and advocates argue common consent to create norms and specific consent to opt out of norms.

The methodology of customary international law is so malleable and undefined that both the left and right portions of the political spectrum in wealthy developed countries have little difficulty in manipulating its elements to advance their own normative agenda.³⁴ Progressive internationalists, including judges of the International Court of Justice, the World Trade Organization, and the European Court of Human Rights, utilize general resolutions and treaties to promote their agenda of environmental and human rights norms.³⁵ On the right, scholars and unilateralists, operating under the theory that only physical acts count as state practice,³⁶ use custom theory to promote rules to protect foreign investment³⁷ and to promote a right

32. See OPPENHEIM'S, *supra* note 27, at 29.

33. See Kelly, *supra* note 28, at 508-16 (describing the history of the struggle between the consent and universal paradigms and the recent rise of the persistent objector principle).

34. For a summary of different perspectives, see Roberts, *supra* note 20.

35. See *e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241-43 (July 8).

36. For an application of this method to the claim of a unilateral right of the preemptive use of force, see W. Michael Reisman and Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-defense*, 100 AM. J. INT'L L. 525 (2006).

37. The norm of full compensation for expropriation is found in most treatises and the Restatement, but its pedigree is suspect. Latin American nations opposed it from the beginning, and it has never commanded a broad consensus of nations. In the classic incident in support of the principle of full compensation for expropriation, Mexico forcefully argued for national treatment in response to Secretary of State Cordell Hull's assertion that the international minimum standard required the payment of prompt, adequate and effective compensation. The correspondence between Secretary Hull and the Mexican Ambassador is reproduced in 19 Dep't of State, Press Releases 50-52, 136-37, 140, 143-44 (1938) For an extended discussion of the use of armed intervention and other strategies to impose the American and British view of the international minimum standard on Latin American countries despite contrary national laws and diplomatic protest, see CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* 37-64 (1985). See also *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 188-90 (1965). Within the domestic law of the United States, the protection of property has been characterized by a balancing of private compensation and public interest concerns. See A.J. VAN DER WALT, *THE CONSTITUTIONAL PROPERTY CLAUSE* 8-16 (1997); Carol Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 1 (2000).

of unilateral intervention, humanitarian or otherwise. Such a right is said to justify U.S. interventions in Iraq³⁸, Grenada and Panama³⁹ and Viet Nam's takeover of Cambodia,⁴⁰ all of which were contrary to the norm against the use of force in the U.N. Charter.⁴¹ Despite nearly unanimous condemnation by states, unilateral humanitarian intervention has considerable resonance within the academy by both scholars on the right and left for different reasons.⁴²

Progressives use the Declarative Model⁴³ of CIL to construct norms without their acceptance as legal norms by states. The repetitive iteration of norms such as the transboundary harm norm, originally articulated in the *Trail Smelter Arbitration*, in resolutions or declarations at international fora is considered by many to indicate its acceptance as a norm of CIL.⁴⁴ Confirmation of this point of view can be found in the U.S. Restatement of Foreign Relations and the recent jurisprudence of the International Court of Justice.⁴⁵ The theory is that state assent to non-binding declarations at international conferences or the United Nations General Assembly indicates acceptance of the norm as law and reinforces the arbitrator's conclusion.

38. Reisman & Armstrong, *supra* note 36, at 538-44.

39. See Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 516, 523-24 (1990) (justifying the invasion of both Panama and Grenada arguing that although there is no principle of international law permitting intervention to impose democracy on another state, international human rights law demands intervention against tyranny).

40. See FERNANDO TESON, HUMANITARIAN INTERVENTION 158, 199-200 (3d ed. 2005).

41. See INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 4, 8-9 (W. Michael Reisman & Andrew Williard eds., 1988). The Yale policy-oriented school of jurisprudence associates authority with effective power and has had significant influence at the U.S. Department of State. See W. Michael Reisman, Siegfried Wiessner, & Andrew R. Williard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 580 (2007). For a critique of this school as an apology for U.S. foreign policy, see MARTTI KOSKENNIEI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 173-78 (1989).

42. See, e.g., *id.*; TESON, *supra* note 40; W. Michael Reisman, *Haiti and the Validity of International Action*, 89 AM. J. INT'L L. 82 (1995). But see ANTHONY CLARK AREND & ROBERT C. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 135-36 (1993). For a view from a third world perspective criticizing the intervention in Haiti for conditions that limit its humanitarian character, see Gathii, *supra* note 2, at 2051-53.

43. Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L. L.J. 87, 89-90 (1991).

44. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 109 (2d ed. 2002) ("It is beyond serious argument that states are required by international law to take adequate steps to control and regulate sources of . . . transboundary harm within their territory").

45. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 601 (1987); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243-44 (July 8).

The Declarative approach to normativity is suspect both from the empirical point of view and from the perspective of democratic legitimacy. By what authority does the repetition of non-binding norms, such as sustainable development, the precautionary principle, or the transboundary harm norm, in several declarations mutate into binding norms? The arbitrator in *Trail Smelter* found no evidence of international state practice.⁴⁶ Rather, he chose to assume that the international law of transboundary air pollution was the same as United States law and then applied that law.⁴⁷ The Stockholm Declaration and the subsequent Rio Declaration, which might be seen to reinforce the transboundary harm norm, are non-binding instruments that contain qualifying and, indeed, contradictory language declaring that “States have . . . the sovereign right to exploit their own resources” according to their own environmental and developmental policies.⁴⁸ Indeed, there is little empirical evidence that states accept it as norm. The Trail Smelter in Canada, itself, continues to pour sulfur dioxide into the atmosphere.⁴⁹ The United States produces acid rain that drifts into Canada. If nations, in fact, accept them as binding, then one would expect nations to have the political will to enter a binding treaty.

Similarly, the universalizing of limited incidents of state practice of powerful nations by scholars on the right and the Bush administration reifies power at the expense of democratic legitimacy.⁵⁰ A few incidents of highly contested state practice are treated as creating new exceptions to general norms despite widespread protest.⁵¹ This methodology redefines customary law in a manner that minimizes the essential legitimizing element of custom, the general acceptance of the community. It encourages confrontation and the unilateral use of

46. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905, 1963-64 (Mixed Arb. Trib. 1938, 1941).

47. *Id.*

48. Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev. 1 (June 14, 1992).

49. For a description of the history, see DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 504-11 (2d ed. 2002).

50. One example of a universalized limited incident is the humanitarian intervention by NATO to halt “ethnic cleansing” in the former Yugoslavia. See Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828 (1999) (discussing NATO’s humanitarian intervention in Yugoslavia).

51. For an example of such a contested state practice, see ABA Committee on Grenada, *International Law and the United States Action in Grenada*, 18 INT’L LAW. 331, 375 n.107 (1984) (describing formal votes against intervention at both the United Nations Security Council and General Assembly).

force rather than political and legal processes to solve disputes, making international law an undemocratic exercise with little persuasive authority.

Consider that there is a class of CIL norms that exhibit regularity of behavior and are asserted by nearly all nations as legally required. The list, while a short one, provides a narrative through the painful journey of our civilization's attempt to confront its own inhumanity. The prohibitions against genocide, slavery, ethnic cleansing, torture and, arguably, the juvenile death penalty are nearly universally accepted as legal norms.⁵² The norm against the use of force in Article 2(4) of the United Nations Charter⁵³ is both universally accepted and its violation challenged.⁵⁴ The bombing in Kosovo, the invasions of Afghanistan and Iraq, and the genocide in Darfur challenge legal theory precisely because the norm against the use of force is necessary for civilization and its prosperity. Yet exceptions may be necessary to secure the values of life and human dignity that are fundamental to civilization.⁵⁵

If much of CIL scholarship promises too much through premature legalism, the new rational self-interest school promises too little. In the *Limits of International Law*,⁵⁶ Professors Goldsmith and Posner challenge the more classical accounts of international lawmaking. They argue that CIL, which they describe as behavioral regularity among states, is better explained by rational self-interest than fidelity to legal obligation.⁵⁷ Their descriptive account of four models of rational self-interest is then used to support their normative project of eliminating legal restraints on state behavior. In this view, international norms, whether customary or treaty norms, are not restraints, but mere conveniences for pursuing self-interest. State power is idealized and will is reified by eliminating law. Violations of CIL, such as the norm against torture, or of treaties, such as the U.N. Charter or

52. See David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 11-13 (2006) (noting the Supreme Court's decision in *Roper v. Simmons*, which made the juvenile death penalty unconstitutional based, in part, on international law and state practice).

53. U.N. Charter art. 2, para. 4.

54. In the *Nicaragua* case, the United States argued that this norm was *jus cogens*. Counter-Memorial of the United States of America, Military and Paramilitary Activities (Nicar. v. U.S.), 2 I.C.J. Pleadings 95 (Aug. 17, 1984).

55. For one attempt to explain actions that are accepted by a majority of states, even though they are contrary to Article 2(4), as illegal but legitimate, see Wedgwood, *supra* note 50, at 829.

56. LIMITS, *supra* note 10.

57. *Id.* at 26, 39.

the WTO Agreement, are justified because such norms do not create binding legal obligations, only opportunities to coordinate self-interest.

This “minimalist realist” approach⁵⁸ does provide a powerful, and at times compelling, description of state behavior in international relations and of state motivation in entering CIL and treaty regimes. Detailed case studies do demonstrate that many custom regimes involve relatively few players and were not, in fact, universal at the time. Treatises written in English, for example, created a simplified view of the law of the territorial sea because of unfamiliarity with the practice and the literature of non-English speaking cultures or perhaps out of sympathy for the policy positions of Great Britain and the United States.⁵⁹

There is no necessary relationship, however, between Goldsmith and Posner’s descriptive account and their normative view that international law is not binding. Their assessment that several CIL norms are best seen as temporary conveniences between a few states for a period of time would lend support to an entirely different assessment that few putative norms of CIL have been generally accepted, not that no norms are legally binding.⁶⁰ Whether a particular norm is accepted and universally binding is a question of fact.

Goldsmith and Posner view self-interest as an alternative to legal obligation rather than its explanation. But these are not mutually exclusive.⁶¹ Self-interest does not negate obligation. It explains why it is undertaken. The centripetal forces encouraging participation in the WTO regime include long-term reciprocity and wealth maximization as well as a short term political agenda to respond to lobbying from pharmaceuticals and other high technology firms to preserve their intellectual property.

Self-interest, whether narrow and short-term or long-term based on mutual reciprocity, may be the primary explanation for entering binding commitments. In creating the WTO, nations negotiated binding agreements and developed a mandatory adjudicatory system with sanctioned retaliation as a remedy, in part, because the payoffs from long-term reciprocal limits on their behavior would maximize their

58. Hathaway & Lavinbuk, *supra* note 9, at 1421 n.41.

59. *See, e.g.*, LIMITS, *supra* note 10, at 59-66.

60. For an attempt to demonstrate that, even under rational theory, CIL does affect state behavior through self-interest, see Norman & Trachtman, *supra* note 21.

61. “[I]n international law . . . the law is primarily consent-based and therefore utility seeking and law-abiding behavior is often identical.” Hathaway & Lavinbuk, *supra* note 9, at 1442.

mutual interest over time.⁶² Binding obligations that restrain state behavior are a necessary part of achieving state goals.⁶³ The normative conclusion that international law is a temporary convenience when applied to treaty regimes, rather than preserving self-interest, would severely undermine the ability of the United States to achieve longer term goals of open markets, protection for intellectual property rights, and nuclear non-proliferation, all of which require collective action. Without a sense of obligation these goals are fragile.

All of these approaches to CIL have some resonance because there is little agreement on how to construct CIL norms. Much of CIL is 'Naturalist' lawmaking, not empirical law. If we take the general acceptance requirement seriously, it will be quite difficult to form legitimate substantive customary norms in a world of many different cultures, values, and perspectives. General acceptance must be taken seriously because without it, CIL lacks authority and legitimacy. This norm inflation problem is not confined to CIL. To paraphrase Dinah Shelton, looking at the literature and claims by states and advocates, non-law becomes soft law, soft law becomes hard CIL, and CIL and treaty norms become *jus cogens*.⁶⁴

Moreover, the creative approaches to CIL are not necessary in an era of rapid transportation and communications. If there is, in fact, the political will to accept international legal norms, then binding treaties are possible. If there is not the political will, then the imperial project is recast with little understanding of its implications. CIL is the preferred technique for normative scholars and judges precisely because there are unresolved conflicts over values that cannot be bridged.

II. NATURALISM IN WTO ADJUDICATION

The second form of "Naturalism" in international law formation that is inhibiting political debate and wise policy-making is norm expansion through judicial activism within treaty regimes. The formation of the World Trade Organization (WTO)⁶⁵ in 1995 inaugurated a new era of compulsory judicial-like settlement of trade disputes.

62. For the position that WTO rules help governments resist domestic political pressure for protectionism and thereby promote freer trade and democracy, see John McGiness & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 515 (2000).

63. *See id.*

64. Shelton, *supra* note 2, at 322.

65. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

Prior to the WTO's establishment, disputes were solved by diplomatic negotiation or the submission of disputes to GATT panels where participation was voluntary.⁶⁶ The GATT agreement itself contained a detailed set of rules that required reciprocal access to markets,⁶⁷ national treatment for imported products⁶⁸ and a series of exceptions to permit legitimate health and safety laws.⁶⁹ Under the new WTO system, participation in GATT panels is mandatory and a new Appellate Body (AB) is empowered to review decisions of expert panels for fidelity to WTO law.⁷⁰ This creates the opportunity for AB judges to make law through interpretation, even though the Dispute Settlement Understanding (DSU), the agreement regulating the authority and process of dispute settlement, severely curtails the discretion of the AB in lawmaking.⁷¹

The debate at the WTO, however, has been between those who view the regime as essentially contractual, and those who would incorporate other norms—including a wider body of CIL norms such as the putative precautionary principle—to trump previously negotiated treaty norms.⁷² Environmentalists and progressives would expand the range of social policies that might justify limits on the treaty right to market access.⁷³ This debate may be seen as a struggle between different interest groups in the west—environmental and labor activists on the one hand, and multilateral corporations on the other—for policy dominance.⁷⁴ This debate, however, has generally ignored the

66. See General Agreement on Tariffs and Trade of 1947, art. XXII, XXIII, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187.

67. *Id.* art. I.

68. *Id.* art. III.

69. *Id.* art. XX.

70. See Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 17, 19, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

71. The DSU cautions the AB in Art. 3.2 that the purpose of the dispute settlement system is “to *preserve* the rights and obligations of Members under the covered agreements” and that rulings “cannot add to or diminish the rights and obligations provided in the covered agreements.” DSU, *supra* note 70 art. 3.2 (emphasis added).

72. See David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 406-7 (1998).

73. See, e.g., Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998).

74. A two-level intergovernmentalist approach sees the preferences of domestic interest groups affecting state positions in international negotiations. See GARETH PORTER, JANET WALSH BROWN & PAMELA S. CHASEK, *GLOBAL ENVIRONMENTAL POLITICS* 37-40 (3d ed. 2000).

DSU requirement that dispute settlement interpretation must not modify rights nor “impair benefits accruing to . . . member[s] under [the] agreements.”⁷⁵ From the perspective of democratic legitimacy, it also marginalizes the views and interests of developing countries and, at times, even developed countries.

This battle has been fought on two fronts. In some cases, there has been a direct attempt to introduce a non-GATT norm as a rule of decision into adjudication to modify a GATT right. Advocates of Naturalist interpretations have been more successful introducing extrinsic norms as interpretive material illuminating the “ordinary meaning” of provisions in the agreements. In the *European Beef Hormones* case,⁷⁶ the European Community (EC) had banned the import of meat and meat products from farm animals treated with certain growth hormones.⁷⁷ In order to ban food products, the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) requires that member nations must do a risk assessment⁷⁸ and base any restriction on scientific evidence.⁷⁹ The rationale for the EC Hormone Directive had been that consumption of meat from such animals was dangerous.⁸⁰ The World Health Organization, however, had determined that such hormones were safe for human consumption, and the European Community could offer no scientific evidence of harm.⁸¹ The EC also argued that the Directive was based on the precautionary principle, which it termed to be a rule of customary international law that justified the measure despite the requirements of the SPS.⁸² The AB made no judgment about the status of the precautionary principle as CIL, but did conclude that since it was not written

75. DSU, *supra* note 70 art. 3.5.

76. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) [hereinafter *Beef Hormone Report*].

77. *Id.* ¶¶ 2-6.

78. *Id.* ¶ 179 (citing Agreement on Sanitary and Phytosanitary Measures, art. 5.1, Apr. 4, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 493, 33 I.L.M. 1128 (1994) [hereinafter *SPS Agreement*]).

79. *Id.* ¶ 173 (citing *SPS Agreement*, *supra* note 78 art. 3.3); *see also id.* ¶ 187 (citing *SPS Agreement*, *supra* note 78 art. 5.2).

80. *Id.* ¶¶ 26-29.

81. *Id.* ¶¶ 206-08.

82. *Id.* ¶ 121. The EC argument was that the precautionary principle permitted members to evaluate risk in a variety of ways.

into the SPS Agreement, it did not override the negotiated principles requiring a risk assessment and scientific evidence.⁸³

While at a formal level extrinsic norms have been excluded, CIL and extrinsic treaty norms have been used to interpret WTO terms, infusing them with new meaning. The limits of consent have been tested in a series of environmental conservation cases beginning with the *Tuna/Dolphin* litigation⁸⁴ under the more voluntary GATT dispute settlement system and culminating with the *Shrimp/Sea Turtle* litigation⁸⁵ under the mandatory WTO dispute system. In the *Tuna/Dolphin* cases, GATT panels had found that U.S. regulations that prohibited the importation of tuna captured beyond the territorial waters of the U.S. in a manner that killed more dolphin than permitted violated Article XI as a non-tariff barrier to imports.⁸⁶ In doing so, they held that the general exception in Articles XX(b) for measures “necessary to protect human, animal or plant life or health,” and in XX(g), “relating to the conservation of exhaustible natural resources” did not apply.⁸⁷ The measure was not ‘necessary’ because there were other methods more consistent with GATT obligations such as multilateral negotiations and labeling that could be used to resolve the problem.⁸⁸ The GATT panel also found that the measures did not qualify under XX(g) because it was primarily aimed at conservation and such measures could not be applied extraterritorially.⁸⁹ A nation may regulate the products that enter its jurisdiction, but, according to the decision, not how they are caught or produced abroad—the so-called process/production distinction.⁹⁰ The cases engendered much critical comment from environmentalists and led to massive demonstrations and riots at WTO ministerial meetings plac-

83. *Id.* ¶¶ 123-25.

84. Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155 (Sept. 3, 1991) (not adopted) [hereinafter *Tuna Report*]; Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) (not adopted).

85. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Appellate Report*].

86. *Tuna Report*, *supra* note 84, ¶ 7.1(a).

87. *Id.* ¶¶ 5.29, 5.34.

88. *Id.* ¶ 5.28.

89. *Id.* ¶¶ 5.30-5.34.

90. *Id.* ¶¶ 5.9-5.16.

ing considerable pressure on the organization and several state members.⁹¹

In the *Shrimp/Sea Turtle* case, the new Appellate Body (AB) of the WTO reexamined these issues and used an “evolutionary methodology” to expand the conservation exception for “exhaustible natural resources” in Article XX(g) to include living as well as inanimate resources.⁹² There is considerable evidence that at the time natural resources referred to inanimate minerals and commodities, such as oil, that could not reproduce in distinction to living creatures that were protected under the Article XX(b) human, animal or plant life or health exception.⁹³ Rather than seek to determine the meaning of the text at the time or the intent of the negotiators, the AB said that Article XX(g) must be interpreted in light of the contemporary concerns of the international community.⁹⁴ It upheld a unilateral U.S. ban on imported shrimp caught in foreign waters in a manner contrary to U.S. law, but found that the measure was applied in a discriminatory manner.⁹⁵ It is important to understand that the United States was banning a product, not because of defects in the product itself, which would be permissible, but because it objected to how the shrimp were caught within the territorial waters of Thailand. That is, the United States was using the lever of market access to prescribe environmental policy within Thailand. While the goal of the Marine Mammal Protection Act is the laudatory one of preserving threatened species, it was not a health or safety issue for consumers in the United States.

The decision appears to be quite broad, permitting unilateral bans of products produced in a manner contrary to one nation’s environmental policy. In many ways, the AB should be applauded for their candor in openly using an “evolutionary” method of interpreta-

91. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENV. L. REV. 1, 1 nn1-2 (2001).

92. Shrimp Appellate Report, *supra* note 85, ¶¶ 129-30.

93. See J. Patrick Kelly, *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance*, 38 CORNELL INT'L L.J. 459, 478-80 (2005).

94. Shrimp Appellate Report, *supra* note 85, ¶ 129.

95. *Id.* ¶¶ 184-87. The United States subsequently modified its procedure to eliminate the discriminatory treatment, and the AB upheld the measure and its application as consistent with the agreements. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 3, 153-54, WT/DSS8/AB/RW (Oct. 22, 2001).

tion⁹⁶ rather than hiding their policy choice, as is often done, behind opaque textualism. Nevertheless, it ignored the original meaning of the parties as expressed in the documents, past GATT decisions and the declared positions of the vast majority of nations.

Objections to this decision are discussed in depth elsewhere.⁹⁷ The core concerns are, first, that the “evolutionary methodology” the AB utilized is inconsistent with the structure of governance in the WTO agreements and the interpretive methodology of the Vienna Convention on the Law of Treaties that is required by the DSU.⁹⁸ The WTO is essentially a contractual regime where nations negotiate specific norms and standards. The agreement establishing the WTO describes a state-centered contractual treaty regime with lawmaking authority residing in the Ministerial Council, not the AB.⁹⁹ Second, the original meaning of the Article XX(g) exception was to protect commodities such as oil that could be depleted, not living creatures which were protected under the Article XX(b) exception for human, animal or plant life or health.¹⁰⁰ Article XX(b) wisely contains a “necessary” requirement as a filter for protectionist uses of this exception. Third, nearly all nations, including the United States, had opposed a broad conservation exception and had voted at the Uruguay Round to move a similar proposal to the Committee on Trade and Environment (CTE) to die a quiet death, which it did.¹⁰¹

96. For the AB’s discussion of its evolutionary methodology, see Shrimp Appellate Report, *supra* note 85, ¶¶ 129-30.

97. Kelly, *supra* note 93, at 486-87. Recognizing that the AB is unlikely to fully reverse its position, the author proposes that article XX(g) be limited to an emergency exception for endangered species.

98. DSU Article 3.2 directs the settlement bodies to both preserve the rights and obligations of members under the various covered agreements and “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” The Appellate Body has interpreted “customary rules of public international law” to refer to the interpretive rules of the Vienna Convention on Treaties. *See* WTO Appellate Body Report, *Japan- Taxes on Alcoholic Beverages*, WT/DS 8,10,11/AB/R, at 9 (Oct. 4, 1996) (concluding that the rules of interpretation in Arts. 31 and 32 of the Vienna Convention had attained the status of rules of customary international law and would be applied). The DSU, establishing the terms of WTO mandatory dispute settlement, further cautions the AB that “[a]ll solutions to matters formally raised under the . . . dispute settlement provisions of the covered agreements . . . shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements.” DSU, *supra* note 70 art. 3.5.

99. *See* Final Act, *supra* note 65 arts. IX and X.

100. Kelly, *supra* note 93, at 478-80.

101. For the history of the CTE’s creation and its usefulness in deferring a broad conservation exception, *see* Gregory C. Shaffer, “*If only we were Elephants*”: *The Political Economy of the WTO’s Treatment of Trade and Environment Matters*, in *THE POLITICAL ECONOMY OF*

More importantly, even if we assume, contrary to the DSU, that the AB does have the authority to engage in this type of broad “evolutionary” interpretation, it is apparent that this methodology was being used as a form of the Naturalist approach to lawmaking, not a search for community consensus. The AB did not engage in an empirical or even systematic investigation to determine the contemporary community’s concerns about this issue.

In determining the contemporary concerns of the international community about the conservation of endangered species, the AB did not rely on the most relevant treaty, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), for guidance.¹⁰² CITES seriously limits international regulation of how a nation treats endangered species within its own territory, leaving such regulation to the sovereign prerogative of each nation.¹⁰³ Rather, the AB placed great reliance on non-WTO sources¹⁰⁴ and the preamble of the 1994 WTO Agreement, explicitly acknowledging the broad, undefined norm of sustainable development as one of the many objectives of the WTO regime.¹⁰⁵ The preamble of the WTO Agreement, for example, does not raise environmental concerns above others.¹⁰⁶ The Preamble actually includes primarily economic objectives, such as raising living standards in developing countries and growth in income, production and employment.¹⁰⁷ The one-

INTERNATIONAL TRADE LAW 349, 357-59 AND 386-87 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

102. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES] (entered into force July 1, 1975). There are 172 parties to CITES as of 2008. See CITES Secretariat, List of Parties, <http://www.cites.org/eng/disc/parties/index.shtml> (last visited Mar. 24, 2008).

103. See CITES, *supra* note 102, arts. II-IV, XIII.

104. For a similar, although more technical, use of non-WTO materials to inform the meaning of WTO terms in the WTO Biotech Panel Report, see Margaret A. Young, *The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case*, 56 INT'L & COMP. L.Q. 907 (2007).

105. Shrimp Appellate Report, *supra* note 85, ¶¶ 129-131.

106. See Final Act, *supra* note 65 pmbl.

107. *Id.*, cl. 1. The relevant clause states:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . .

hundred word, internally inconsistent preamble gives no guidance on how these general and conflicting mass of goals and concerns are to be reconciled.¹⁰⁸

The AB's selective use of a small portion of the preamble provides it with the unfettered discretion to choose the policy concern in the preamble that supported its policy choice. It could just as well have referred to language in the preamble to justify the opposite conclusion because the measure would close members' borders to developing countries' products, shrink employment and economic growth in the Thai shrimp industry, and interfere with rather than preserve the objectives of the trading system.¹⁰⁹

The AB's misuse of the "evolutionary" interpretation methodology illustrates the dangers of the Naturalist approach. The "evolutionary interpretation" methodology provides the means for judges to expand exceptions and other norms when there is no community agreement or consensus. The AB's interpretive methodology raises fundamental issues of global governance. Implicit is the premise that major substantive policy issues not negotiated by Member States in treaty regimes may, nevertheless, be decided by judicial panels beyond state consent.

The AB's judicial activism not only disenfranchises developing countries from important international policymaking; it also, as a practical matter, diminishes the ability of least developed countries (LDCs) to determine their own environmental policies within their territory. A treaty designed to promote market access by reducing tariffs and eliminating non-tariff barriers was interpreted by its own judicial body to permit a nation to unilaterally deny access to its market and increase the production costs of competitor nations unless such nations adopt their preferred environmental policies.

Id. (emphasis added).

108. *See id.*

109. *See id.*, cl. 1. :

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development

Id. (emphasis added).

The decision and its use of the evolutionary methodology removed environmental and potentially other social policy from both international and domestic politics where costs and benefits could be debated. Instead, in a world of many different interests and levels of economic development, important policy decisions on the appropriate balance of environmental protection and economic development are left to the vagaries of the domestic political arena of those nations with the market power to impose their view.

III. HUMAN RIGHTS AS IDEOLOGY

While many international human rights norms are legally binding norms to be celebrated, there is imbedded in recent international legal theory the view that international norms are an expression of universal rights that apply regardless of national boundaries or political choice by domestic majorities.¹¹⁰ These norms are said to be binding without state consent or domestic democratic processes. Jed Rubenfeld terms this conception “international constitutionalism” because these rights are determined by international judges or experts irrespective of democratic politics.¹¹¹ This underlying normative structure is then expressed by the use of traditional sources that reveal these fundamental norms. Sometimes this argument is made as a form of CIL, as discussed above, such as the claim by scholars that many of the norms in the non-binding Universal Declaration of Human Rights are now generally accepted as CIL.¹¹²

Universal norms are also revealed through interpretation of consensual treaties in a manner that expands the norms beyond any intended bargain. Article 7 of the International Covenant on Civil and Political Rights (ICCPR), for example, which prohibits “cruel, inhuman or degrading treatment or punishment” has been declared to prohibit the death penalty, caning, and other forms of physical punishment even though these punishments are widely permitted within domestic legal systems and many, if not a majority of nations in the

110. For a discussion of this approach, see Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *REALIZING HUMAN RIGHTS* 3, 5, 11 (Samantha Power & Graham Allison eds., 2000). For an argument that fundamental human rights are general principles of law to be applied by courts, see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT'L L.* 82, 102-06 (1988-89).

111. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. REV.* 1971, 1999 (2004).

112. See e.g., Hurst Hannam, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *GA. J. INT'L & COMP. L.* 287, 289, 322-32 (1995-96).

case of the death penalty, would not accept such limits on their prerogatives. What a given society considers as “cruel or inhuman” may, in some circumstances, be a question of perception affected by culture and religious beliefs. Agreement on the interpretation of a general standard of human rights like “cruel or inhuman” is unlikely without an extended dialogue among cultures.¹¹³

Similarly, Article 1 of The Convention on the Elimination of all Forms of Discrimination Against Women prohibits discrimination that “has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms.”¹¹⁴ The Committee on the Elimination of Discrimination against Women (CEDAW), the treaty body established to review national reports and make recommendations, declared that female circumcision was a gender-based form of violence and that states may be responsible even for private acts if they fail to act with due diligence.¹¹⁵ The Committee determined that reservations based on traditional, cultural or religious practices are incompatible with the convention and should be withdrawn.¹¹⁶ Even though female genital mutilation (FGM) or female circumcision may be abhorrent and injurious to health, it is not clear that it is a form of discrimination that violates the Convention when the participants (women and young girls) believe that this traditional practice is a constituent part of their culture.¹¹⁷ Nor is it necessarily either a treaty or customary norm when fifty-three nations that did sign the Convention entered reservations for religious or cultural reasons.¹¹⁸

113. Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 37, 37-39 (1992).

114. Convention on the Elimination of All Forms of Discrimination against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.

115. Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 19: Violence against Women*, ¶¶ 9, 11, U.N. Doc. A/47/38 (1992).

116. The Secretary-General, *Report of the Secretary-General on the Status of the Convention on the Elimination of All Forms of Discrimination against Women*, Annex X, U.N. Doc. A/53/318 (1998) [hereinafter *Secretary-General Report*].

117. For a survey of the diversity of views on this controversial subject, see Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

118. The CEDAW Committee in analyzing the many reservations indicated that traditional or religious beliefs do not justify violations and offered its view that such reservations were incompatible with the Convention and should be withdrawn. *Secretary-General Report*, *supra* note 116, Annex X, ¶¶ 11, 24.

Similarly, the Human Rights Committee of the United Nations has on several occasions demonstrated that it views human rights as universal beyond state consent. One may observe that the U.S. government uses the ICCPR as a sword against other countries while submitting reservations, declarations, and understandings to its ratification that effectively preclude undertaking any significant international legal obligation.¹¹⁹ Nevertheless, the Human Rights Committee, in rejecting the U.S. reservations as unacceptable, revealed that it regarded human rights as universal obligations beyond the normal exchange of obligations through consensual treaty law.¹²⁰

These techniques of universalizing rights beyond politics are, of course, not just the province of progressives. The *Restatement of the Foreign Relations Law of the United States*, for example, proclaims that the standard of full compensation for expropriation of foreign investment is not subject to change by a majority of nations.¹²¹ The Bush administration propounds a right to democracy as justification for selective military intervention to vindicate this right. Both the pedigree and content of such a right are open to question.¹²²

The point is not to approve or disapprove of the death penalty, female genital mutilation, a right to democracy or any specific norm, but to raise the issue of which system of law, international or domestic, should make these determinations and by what processes. The universal theory of human rights applied by many judges and practitioners is, in many circumstances, inconsistent with the consent theory of international law and democratic governance within domestic societies. Indeed, it precludes pluralism in normative development. Many societies, for example, are already moving to prohibit or modify FGM.

119. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM J. INT'L L. 341, 342 (1995).

120. Human Rights Comm., *Report of the Human Rights Committee*, ¶ 279, U.N. Doc. A/50/40 (Oct. 3, 1995).

121. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 711-13 (1987).

122. For a summary of the arguments for and against a right to democracy, see Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 1, 6-16 (Gregory H. Fox & Brad R. Roth eds., 2000). Even in his classic argument for a right to a democratic form of government, Thomas Franck warns that such a democratic entitlement should be de-linked from the unilateral use of military force to compel compliance. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 84 (1992).

One of the manifestations of Naturalism in human rights development is found in the rise of transnational litigation of human rights in domestic courts under the notions of universal jurisdiction or transitory torts.¹²³ Litigation under the Alien Torts Claims Act (ATCA)¹²⁴ of the United States permits claims and decisions based on a universal jurisprudence beyond state consent or democratic choice. The U.S. Supreme Court faced this problem of human rights overreach in *Sosa v. Alvarez-Machain*¹²⁵ and decided to limit cognizable claims to norms accepted by the civilized world and defined with specificity.¹²⁶ This decision appears to limit ATCA claims to a narrow class of clear consensus human rights claims that is more reflective of a positivist rather than universalist framework.¹²⁷

An interesting example that may portend a move toward positivist norms in human rights litigation is the ongoing litigation in New York to collect damages from businesses profiting from doing business with South Africa during the *apartheid* era.¹²⁸ While there may be a compelling moral basis to at least some claims in the suit, the independent South Africa government strenuously opposes the suit because it undermines their domestic process of reconciliation. After the Second Circuit Court of Appeals reversed the district court's dismissal of the complaint, the Republic of South Africa issued a statement stating that the case impinged on its sovereignty and should be resolved through South Africa's own democratic process.¹²⁹ The Court of Appeals significantly trimmed back the claims before remanding to the district court indicating a new attitude to the more creative claims and leaving open the possibility that all claims will be dismissed as involving a non-justiciable political question involving

123. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 132-33 (2000).

124. 28 U.S.C. § 1350 (2000).

125. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

126. *Id.* at 725.

127. *Id.* at 729, 731-33. The court appeared to adopt a consensual rather than universal framework when it said, "courts should require any [ATCA] claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigm[]." *Id.* at 725.

128. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); see also *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

129. See *Khulumani v. Barclay Nat'l Bank Ltd.*, 509 F.3d 148, 154-55 (2d Cir. 2007) (Korman, J. dissenting).

significant foreign policy considerations that require deference to the political branches.¹³⁰

Expanding human rights in a manner contrary to non-western cultural values, or undermining domestic solutions to promote social cohesion in a divided South Africa, raises issues both of the legitimacy of the project and its practical utility when it engenders widespread opposition rather than compliance. Differences in values, in many circumstances, might better be characterized as moral dialogue rather than as legal imperatives. In labeling traditional practices as illegal, rather than a moral issue within a social context, shuts down dialogue that could inform both perspectives. The FGM debate conflates harm with ritual. A more pluralistic and modest approach might encourage an evolution away from practices that produce undesirable health effects and personal autonomy concerns and toward a more symbolic ritual. Any expansion beyond a core of negative freedoms (freedom from government interference with personal autonomy and the electoral process) has and may continue to degenerate into cultural imperialism.¹³¹

CONCLUSION: TOWARD DEMOCRATIC LEGITIMACY

The link between state consent and international norm development is increasingly attenuated. As international institutions proliferate and judicial bodies expand their province, international obligations are being created and authoritative decisions being made beyond domestic democratic processes. All forms of “Naturalism” discussed above (the misuse of malleable CIL, norm inflation, “evolutionary” or expansive interpretation of treaty regimes, and the adoption of a universal ideology of rights by domestic and international tribunals) diminish democratic decision-making and politics. This lack of democratic legitimacy is particularly true with regard to LDCs who may have little input into norm development and lack the power or influence to significantly affect the outcome.

Democratic values will be enhanced by decreasing reliance on CIL as a legitimate source of substantive legal norms. Few substantive CIL norms have a legitimate pedigree as law. Environmental principles, such as sustainable development or the precautionary principle, articulated as law in much of the literature, may be wise

130. *Id.* at 152-53; *see also* *Khulumani*, 504 F.3d at 259-60; *Sosa*, 542 U.S. at 733.

131. For an extended argument for this position, *see* MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001).

policy guides, but they are inappropriate as legal norms. Sustainable development is a useful concept for organizing one's thinking about how to allocate resources to minimize harm and maximize the availability of resources for the future; however, policy actions to implement sustainable development inherently impose costs and require tradeoffs with other worthy goals that should be the province of the legislative processes of international legal regimes and domestic legislatures rather than jurists.¹³² The *Shrimp/Sea Turtle* case, for example, illustrates how broad, undefined norms such as sustainable development could be used by the judiciary to trump democratic compromises between environmental concerns and economic development.

The legitimacy of international law would be improved by greater use of consensual treaties and treaty regimes. Treaty regimes, as a general matter, permit greater participation, more efficient solutions, and a level of commitment to norms. Participation and commitment will enhance compliance and permit a wider variety of policy tools and more efficient, less costly outcomes.¹³³ There is nascent framework of policy instruments both domestically and internationally to expand economic opportunity rather than rely only on traditional welfare approaches and command and control regulation. In the United States, there is, as a matter of fiscal necessity, a rise of market-based environmental tools, such as the cap-and-trade system for SO₂, which stimulate innovation and encourage efficient production. The WTO, the Montreal Protocols, and the Kyoto Protocols all, to some degree, utilize market-based regulatory techniques to achieve better, more efficient solutions to transboundary harms or benefits.

The substantive values of democracy, individual rights and secularism are western in origin and may have limited resonance in many societies. Other cultures do value and respect a measure of individual autonomy, but may give primacy or balance with communitarian values. When environmental and human values are conceived of as rights, there is little room for pluralism. The attempt in Iraq to im-

132. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 223-28 (1999) (explaining that all rights have costs in terms of government supervision and private remedial costs and are inherently limited, not absolute).

133. See Andrew T. Guzman, *The Design of International Agreements*, 16 *EUR. J. INT'L L.* 579, 581-82 (2005) (arguing that design elements—hard law, dispute settlement mechanisms and monitoring—increase the costs of treaty violations enhancing the probability of compliance); see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469, 493 (2005) (arguing that treaty commitments increase the likelihood of compliance and *vice versa*); see also Oona A. Hathaway, *The Cost of Commitment*, 55 *STAN. L. REV.* 1821 (2003).

pose formal democracy on people with different values and loyalties is reminiscent of an earlier era of American adventurism justified by abstract values. In *Shrimp/Sea Turtle*, the AB interpreted a consensual agreement to take away the fundamental right of market access by permitting wealthy nations to impose their environmental values on poorer societies if they want to sell their products. Premature international legalism¹³⁴ takes normative development and sensible trade-offs out of the realm of both international and domestic politics without the necessary political deliberation. Environmental and even human rights have costs both in financial resources and political resources that should be assessed along with competing claims in the political arena.

The move away from consent reduces the legitimacy of international law, which is already handicapped by inadequate enforcement. Normative policy-making diminishes acceptance and may discourage compliance. International law has been a means of domination; through greater use of ongoing treaty regimes, it has the capacity to be a mechanism for cooperation and greater respect for other values and perspectives.

134. See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).