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## NEWS FROM THE CO-CHAIRS

Welcome to the first electronic ‘Review’ of the ASIL International Organizations Interest Group. Anatoly Vlasov, our editor, has put together an extraordinarily rich combination of articles, book reviews and abstracts of published work in the field of international organizations. Together this material provides an indication of how vibrant our field has become and how diverse is the scholarly literature. Indeed the compilation is so rich that we have decided that this publication is more than a newsletter and so is called the ASIL IO Interest Group Review.

Many thanks to ASIL members and others who submitted to this issue. We hope others follow. This is a useful vehicle for keeping up with each others’ scholarly and professional activities, as well as broader developments in the IO field. In addition to articles and abstracts, we would like to include announcements of conferences, workshops, jobs and other information that would be of interest to IG members. If you would like to make a submission or have any feedback on this issue, please contact Anatoly at [anatoly.vlasov@utoronto.ca](mailto:anatoly.vlasov@utoronto.ca).

As for other Interest Group news, the flagship ASIL Reports on International Organizations (ASIL RIO) has expanded under the able leadership of Richard Burchill and Tarcisio Hardman Reis. The impetus for ASIL RIO was the realization that most international lawyers lack easy access to information about current developments in most international organizations. The work of high profile IOs like the UN, the EU and the WTO is well-known of course, but this leaves dozens, if not hundreds of other IOs laboring in relative obscurity. ASIL RIO is an effort to close this information gap. The latest round of reports is up on the website (<http://www.asil.org/rio/index.html>), where a total of 30 reports are now posted covering 25 organizations. We encourage you to visit the website. If you are willing to report on an un-reported organization, please contact Richard or Tarcisio.

Another recent initiative of the Interest Group is an annual conference co-sponsored with other organizations. The first of these was held in November 2008, a symposium entitled Perspectives on International Criminal Justice at the Fletcher School of Law and Diplomacy, co-sponsored by the Centre Thucydide (at Paris II). The keynote speaker, John Bellinger (Legal Adviser to the US Secretary of State at the time), was joined by lawyers, diplomats and scholars from around the world – including seven IO Interest Group members – in a series of panels on the evolution of international criminal justice and the challenges facing international tribunals.

Following that successful event, we plan to hold a workshop this October (2009) on the Responsibility of International Organizations. In an age when most important questions of inter-state relations appear on the agendas of international organizations, the legal responsibility of IOs for their acts is an underexplored and under-theorized area of international law. Since 2000 the International Law Commission (ILC) has been working to codify this responsibility in a series of draft articles – building on the influential Articles on State Responsibility, which the General Assembly “took note” of in 2001 and

commended them to the attention of governments. The new topic considers the nature of internationally wrongful acts committed by IOs and what can be done to hold organizations accountable. Can IOs violate international law in the same manner as states? If not, are they bound by a subset of the norms governing state conduct? These, and the many subsidiary questions that flow from them, have generated a good deal of controversy. Some scholars take the position that the ILC should not attempt to replicate principles of responsibility for IOs that it codified for states, given the vast differences between the two entities. Others argue that, given the power IOs now wield, codification of responsibility principles is essential to avoid their acting with impunity.

The Interest Group will contribute to this debate by co-sponsoring an “experts” workshop on the afternoon of Friday, 30 October 2009, along with Seton Hall Law School and the NYU Center on International Cooperation. The date was selected to coincide with the UN General Assembly Sixth Committee deliberations on the topic. The ILC Special Rapporteur, Giorgio Gaja will participate in the workshop, as will leading scholars and representatives of international organizations, including the UN, IMF and World Bank. In addition to 20-25 invited experts, IO Interest Group members are welcome to attend as observers. The meeting will take place at New York University’s Torch Club.

Finally, at next year’s ASIL meeting, the IO Interest Group Business meeting will be devoted partially to a panel on Cuba’s reinsertion into the inter-American system. We expect panelists to include senior figures in the Organization of American States, the Pan-American Health Organization, the Inter-American Development Bank, and the Inter-American Commission on Human Rights.

We look forward to continue working with you in these fascinating and turbulent times for international organizations.

Kristen Boon and Ian Johnstone  
Co-Chairs

## ASEAN ADOPTS AND RATIFIES A NEW CHARTER FOR REGIONAL INTEGRATION

**Richard Burchill**

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In November 2007 ASEAN celebrated its 40<sup>th</sup> anniversary by adopting the ASEAN Charter.<sup>1</sup> The Charter is a unique document for the regional organisation as it sets out in a legally constituted document the structure, processes, purposes and principles for future regional integration.<sup>2</sup> The Charter has been ratified by all member states and entered into force in December 2008.<sup>3</sup> The Charter marks a substantial change in the form and content of regional organisation for ASEAN. From its creation in 1967 ASEAN's approach to regional organisation has been a loose association of non-binding agreements that emphasised adherence to principles such as mutual respect of independence and sovereignty, non-interference in domestic affairs and the settlement of disputes by peaceful means. There has been a conspicuous absence of formal legal institutions or structures, with less formal methods of interaction, primarily between heads of state and government, being preferred. The ASEAN Charter heralds a new era for the region as there is an express commitment to work towards the development of an ASEAN Community and ultimately, ASEAN Union. This Insight will consider the significance of the new ASEAN Charter by looking at two particular themes highly relevant to the future of regional organisation among the member states of ASEAN – the move towards greater legalisation in the process of regional integration and the establishment of principles concerning domestic and regional governance.

### *Background*

The movement towards the ASEAN Charter began in 1997 with the adoption of ASEAN Vision 2020 where member-states agreed to develop the necessary institutions for responding to future challenges and for the creation of an ASEAN Union.<sup>4</sup> This was

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<sup>1</sup> Charter of the Association of Southeast Asian Nations, 20 November 2007, (entered into force 15 December 2008), online: <<http://www.aseansec.org/AC.htm>> [ASEAN Charter].

<sup>2</sup> Full text of the ASEAN Charter, along with other documents relevant to the Charter process, may be found at <<http://www.aseansec.org/AC.htm>> (last visited 9 December 2008).

<sup>3</sup> ASEAN Charter, Article 47 (4) 'This Charter shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the Secretary-General of ASEAN.' Thailand entered the tenth instrument of ratification on 15 November, See ASEAN Press Release "ASEAN Charter Enters into Force Next Month", available at <<http://www.aseansec.org/22072.htm>> (last visited 9 December 2008).

<sup>4</sup> "ASEAN Vision 2020", available at <<http://www.aseansec.org/1814.htm>> (last visited 9 December 2008).

followed by further agreements such as the 2003 Declaration of ASEAN Concord II and the 2004 Vientiane Action Program calling for ‘comprehensive integration’ in the region and to this end the adoption of an ASEAN Charter.<sup>5</sup> In December 2005 an Eminent Persons Group for the ASEAN Charter was established and mandated to come up with ‘bold and visionary recommendations’ for the drafting of an ASEAN Charter.<sup>6</sup> The EPG Report made several suggestions, significantly altering the nature of regional cooperation. In particular, the Report emphasised the need for legal structures and a more active role for the regional body including the need for the creation of membership obligations along with enforcement machinery; demonstrating a move away from strict adherence to non-intervention in domestic affairs. It also articulated a number of principles and purposes regarding governance with prominence being given to areas such as democracy and human rights, often contentious issues in the region. The EPG Report makes clear that future regional integration ‘can only be realised if Member States accord higher national priority to ASEAN within their domestic contexts and cooperate more effectively at the regional level.’<sup>7</sup> Following the Report a High Level Task Force was appointed to draft a Charter document that was discussed and adopted at the November 2007 Summit of ASEAN.

#### *The Adopted ASEAN Charter*

The adopted ASEAN Charter consists of thirteen chapters and fifty five articles and differs substantially from the draft Charter produced by the Eminent Persons Group. In the adopted Charter, the preamble recognises the need for further regional cooperation and a collective desire among the Member States to live peacefully, to promote their interests and security, and to ensure sustainable development while enhancing the well-being, development, and welfare of the societies in the region. Article 1 lists the purposes of ASEAN with fifteen different points set out ranging from the maintenance of peace and security to the creation of a drug-free environment for the region. The purposes also set out an agenda for economic integration through the creation of a single market.<sup>8</sup> The purposes include a political agenda calling for the strengthening of democracy, good governance and the rule of law along with the promotion and protection of human rights. Article 2 sets out the guiding principles for the future of ASEAN and is a combination of established ASEAN principles such as the respect for national sovereignty and non-interference in domestic affairs alongside a number of ‘new’ principles such as adherence to the rule of law, good governance, democracy and respect for human rights. The Charter further creates a number of new organs and institutions of ASEAN which will be charged with tasks of future integration along the lines of the purposes

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<sup>5</sup> These documents were the outcomes of ASEAN Summits and may be found at <<http://www.aseansec.org/4933.htm>> (last visited 9 December 2008).

<sup>6</sup> Report of the Eminent Persons Group on the ASEAN Charter, December 2006, available at <<http://www.aseansec.org/19247.pdf>> (last visited 9 December 2008) [EPG Charter Report]. The Report includes a draft Charter, explanatory notes and commentary.

<sup>7</sup> EPG Charter Report, para. 19.

<sup>8</sup> ASEAN Charter, Article 1 (5).

and principles set out in Articles 1 and 2.<sup>9</sup> The Charter does not contain any specific legal obligations upon the member states other than the broad aspirations set out in the purposes and principles. Article 5 provides that member states ‘shall take all necessary measures’ to implement the provisions of the Charter and comply with membership obligations.

### *Move to Legalisation*

ASEAN’s approach to regional cooperation prior to the Charter shunned legally based institutions, procedures, or membership obligations. The 1976 Treaty of Amity and Cooperation, which created the organisation, set out a number of principles to guide the relations of the member states but omitted any explicit legal obligations or commitments; a pattern that has continued throughout ASEAN’s development. In one sense the aversion to legalisation has been seen as a significant strength in the viability of ASEAN as a regional organisation which has been able to ensure peaceful relations among its members. The aversion to legal mechanisms and institutions has been explained as a critical component of ‘ASEAN Way’ which is understood as socio-cultural belief in informal mechanisms based on consultation and consensus, with a tendency not to impede upon sensitive domestic issues.<sup>10</sup> The EPG Report makes clear that a new approach to the ASEAN Way is needed and that a developed legal framework for the regional organisation is ‘long overdue’.<sup>11</sup> In the Charter there is an expressed commitment to adhere to ASEAN’s new ‘rule-based regimes for effective implementation of economic commitments.’<sup>12</sup>

The EPG Report identified the issue of effective implementation and monitoring as a significant problem for the organisation.<sup>13</sup> It called for a more rigorous approach to dealing with membership obligations through the creation of a dispute settlement mechanism covering all fields of ASEAN activity and responsible for ‘compliance monitoring, advisory, consultation as well as enforcement mechanisms.’<sup>14</sup> The EPG Report also dealt with the

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<sup>9</sup> These include - the ASEAN Summit as the supreme policy making body (Article 7); an ASEAN Coordinating Council consisting of Foreign Ministers (Article 8); ASEAN Community Councils in the areas of politico-security, economic and social cultural affairs (Article 9); ASEAN Sectoral Ministerial Bodies (Article 10); an enhanced office of Secretary-General and Secretariat (Article 11); a Committee of Permanent Representatives to ASEAN consisting of ambassadors based in Jakarta (Article 12); ASEAN National Secretariats (Article 13); an ASEAN Foundation to support the Secretary General in creating greater awareness of ASEAN (Article 15); and the post of Chairman of ASEAN (Article 31).

<sup>10</sup> See Paul J. Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SYBIL 165 (2004). It is important to note that the member states of ASEAN have not been reluctant to make use of other international legal mechanisms such as the International Court of Justice or the dispute mechanisms of the World Trade Organization, See Miles Kahler, *Legalization as Strategy: the Asia-Pacific Case*, 54 Int’l Org. 551 (2000) at pp. 563-565.

<sup>11</sup> EPG Report, paras. 2, 18-19.

<sup>12</sup> ASEAN Charter, Article 2 (n).

<sup>13</sup> EPG Report, para. 44.

<sup>14</sup> EPG Report para. 45.

sensitive issue of what to do in situations of non-compliance, suggesting that measures such as the suspension of rights and privileges be included in the Charter.<sup>15</sup> The adopted Charter takes a much less rigorous approach and does not attempt to address this issue at any length. In Article 5, “Rights and Obligations”, it is stated that in cases of serious violations of the Charter, or of non-compliance, the matter will be dealt with under Article 20. Article 20 provides that the ASEAN Summit will deal with any serious breaches of the Charter or other, undefined, aspects of non-compliance, but there is no further detail beyond this. The issue of compliance is undoubtedly one of the most sensitive issues for ASEAN’s move towards legalisation as the organisation has a long history of non-intervention.

The adopted Charter remains short on specific legal obligations of membership but it does put into place a formal institutional structure for the future development of a legal framework. The ASEAN Summit has been designated as the supreme policy making body and will be responsible for the overall direction of the organisation. The Summit will be taking all major decisions on the direction of the organisation, as all of the provisions dealing with other ASEAN institutions refer to a responsibility for implementing decisions of the ASEAN Summit. The Secretary General is given the power to monitor the implementation of agreements and report on it annually to the Summit.<sup>16</sup> This is a major development as now the regional body will have the powers of oversight and monitoring in relation to the member states.<sup>17</sup> At the same time, the Charter remains committed to ensuring that issues are dealt with through consensus which potentially will prevent any outspoken criticisms of particular members.<sup>18</sup>

### *Impact on Governance in the Region*

A major feature in the various declarations and documents leading up to the ASEAN Charter is the attention given to issues of governance, both at the domestic and regional

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<sup>15</sup> EPG Report, para. 31.

<sup>16</sup> ASEAN Charter, Article 11 (2)(b).

<sup>17</sup> It appears that the responsibilities of the Secretary General are being taken seriously as there are explicit provisions for guaranteeing the neutrality of the office through an undertaking by the member states not to influence the SG in anyway. At the same time, the SG serves at the pleasure of the heads of state and governments, which leaves open the potential of political considerations determining the functioning of the role and the extent to which the activities of the members states are brought into question, see ASEAN Charter, Article 11 (9-10).

<sup>18</sup> Article 20 (1) provided that decision making in ASEAN will be based on consultation and consensus. However the same article also includes, in paragraph 2, that if consensus cannot be achieved the ASEAN Summit make take a decision on the matter in question. This is unlikely to have any impact as the consensus principle will equally apply to the Summit and it is unlikely the body will attempt any sort of majority voting procedures. The impact of consensus will also be felt in the development of economic integration where there are provisions for flexible participation in economic commitments, see Article 21. However, the terms of the provision provide that flexible participation is only possible through consensus on the formula of ‘ASEAN minus X’, which will allow any one member state to hinder attempts towards flexible participation. This can be compared with the European Union’s approach to ‘enhanced cooperation’ whereby a minimum of eight member states can choose to engage in further integration efforts so long as the existing treaties are respected, see Article 43 Treaty of European Union.

level. The Vision 2020 Report and the EPG Charter Report set out a number of principles regarding governance and emphasise the need for the regional body to be more directly involved in the governance of the region. The pattern of regional cooperation prior to these reports, with its emphasis on respect for national sovereignty and non-intervention in domestic affairs, meant that issues of governance were not discussed and the regional organisation had no input in this area.

The process leading up to the adopted Charter continually spoke of the need to ensure ASEAN's future would be as a 'people-centred organisation'. The Vision 2020 document set out the idea of a "Community of Caring Societies" where 'all people enjoy equitable access to opportunities for total human development.' In this context ASEAN leaders stated a desire for their nations to be 'governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community.' The EPG Report also suggested that in addition to the traditional ASEAN principles, further principles should be articulated such as 'the active strengthening' of democracy, good governance, the rule of law and respect for human rights.<sup>19</sup> The adopted Charter does include a combination of traditional ASEAN principles of non-intervention in domestic affairs as well as 'adherence to the rule of law, good governance, the principles of democracy and constitutional government' and 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.'<sup>20</sup> Even though the Charter has a number of potentially competing principles, the declarations in support of democracy and human rights are significant for the region which has primarily had authoritarian forms of governance and a regional organisation that has been silent on this issue.<sup>21</sup> As discussed above, the legal obligations and the monitoring and enforcement mechanisms under the Charter remain vague and underdeveloped, but there is now a publicly declared commitment to the promotion and protection of democracy and human rights that is part of the membership commitments to ASEAN. The full extent of this commitment may be questioned given the lack of agreement for the creation of a human rights monitoring body<sup>22</sup> and the maintenance of provisions on non-interference in domestic affairs<sup>23</sup> but it has also set out substantial rhetoric in support of new approaches to governance in the region.

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<sup>19</sup> EPG Report, para. 3.

<sup>20</sup> ASEAN Charter, Article 2.

<sup>21</sup> It has been claimed that the influence of democracy and the move to legalization in the region are interconnected, Amitav Acharya, *Democratization and the prospects for participatory regionalism in Southeast Asia*, 24 *Third World Q.* 375 (2003) at pp. 381-382.

<sup>22</sup> Article 14 of the Charter calls for the establishment of an ASEAN human rights body which is seen as being in 'conformity with the purposes and principles of the ASEAN Charter'. Article 14 (1). The Article then explains that a human rights body will be created by the ASEAN Foreign Ministers at some, undetermined, future date, article 14 (2). There has not yet been any definite agreement on this body, for further information see the website of the Working Group for an ASEAN Human Rights Mechanism, <<http://www.aseanhrmech.org/>> (last visited 9 December 2008).

<sup>23</sup> It is worth noting however, that in other international organisations there has been a move to reinterpreting the practical impact of the principles of sovereign equality of states and non-intervention in



The other major shift in how governance in the region is viewed is the emphasis on an increased role of the regional organisation. The Vision 2020 statement set out the resolve of the member states ‘to develop and strengthen ASEAN’s institutions and mechanisms to enable ASEAN to realize the vision and respond to the challenges of the coming century.’ The EPG Report went even further to say that the goals and objectives of the Charter process will ‘only be realised if Member States accord higher national priority to ASEAN within their domestic contexts and cooperate more effectively at the regional level.’<sup>24</sup> The ASEAN Charter speaks of a commitment to ‘intensifying community building through enhanced regional cooperation and integration’.<sup>25</sup> In the Purposes, the member states pledge ‘to maintain the centrality and proactive role of ASEAN as the primary driving force in its relations’.<sup>26</sup> The emphasis on the role of the regional organisation has also been tied to ensuring increased participation for civil society in the processes of governance and for making the regional integration project relevant to individuals.<sup>27</sup>

### *Conclusion*

The ASEAN Charter undoubtedly marks a significant stage of ASEAN’s development as there is now a clear plan for structures, processes, purposes and principles for future regional integration. The Charter is limited in its impact due to the adherence of ASEAN’s traditional emphasis on sovereignty and non-intervention in domestic affairs but, significantly, there is now, at the very least, rhetorical support for the importance of democracy and human rights, along with a commitment to a more active role for the regional body.<sup>28</sup> Now that the Charter

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domestic affairs due to moves towards the promotion and protection of democracy. In the Charter of the Organisation of American States, Article 19 established the principle of non-intervention in domestic affairs as a foundation of the organisation. At the same time Article 23 states the principle of non-intervention in domestic affairs will not apply in circumstances where the organisation is acting to ensure peace and security and Articles 2 and 3 make a number of direct links between the promotion and protection of democracy and the maintenance of peace and security. The UN General Assembly has passed a number of resolutions for the promotion and protection of democracy where respect for state sovereignty is recognised but only to a limited extent in that it is recognised there is no one democratic system and states may choose a range of possible democratic alternatives and the GA’s support for democracy is not an interference in domestic affairs, Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy, GA Res. 59/201, preamble (23 March 2005).

<sup>24</sup> EPG Charter Report, para. 19.

<sup>25</sup> ASEAN Charter, preamble, indent 10.

<sup>26</sup> ASEAN Charter, Article 1 (15). The Charter further provides that the Office of the ASEAN Chairman will be responsible for ensuring the centrality of ASEAN in regional affairs, Article 32 (b).

<sup>27</sup> ASEAN Charter Article 1 (13) expresses the desire ‘To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building.’ The EPG Report spoke of the need to create a ‘people-orientated ASEAN’, paras. 9-10.

<sup>28</sup> The commitment of the member states to the Charter principles are already in question as there was little public involvement in drafting the final version of the Charter; the current situation of the present government of Myanmar (Burma) has raised questions regarding ASEAN’s commitment to the stated purposes and principles in Articles 1 and 2; (*Historic ASEAN Charter Reveals Divisions*, International Herald Tribune, 20 November 2007, available at <<http://www.iht.com/articles/2007/11/20/asia/asean.php>>

has been ratified it is up to the member states to act in pursuit of the stated objectives. A failure to act, or action that fails to respect the full range of stated purposes and principles, will be damaging to the future development of ASEAN as an effective regional organisation.

## **ADVOCATING FOR ISRAEL IN THE ERA OF THE HUMAN RIGHTS COUNCIL**

**Hilary Stauffer**

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When U.S. President Barack Obama awarded the Presidential Medal of Freedom to 16 honorees in August 2009, one recipient in particular caused quite a stir in certain circles. The presentation of a Medal to Mary Robinson—the former President of Ireland, former United Nations High Commissioner for Human Rights, and much-admired humanitarian—had many conservative commentators up in arms. This is due partially to the prickly relationship Mrs. Robinson had with Israel during her term as High Commissioner. However, it can also be attributed to the fact that Mrs. Robinson’s tenure at the UN coincided with the demise of the discredited Commission on Human Rights, and the beginning of the “reform process” that created the UN’s Human Rights Council. As the Council gets ready to begin its 12<sup>th</sup> session in September 2009, it is an apt time to review its progress to date. I can do so from an insider’s perspective.

From September 2006 until December 2008, I worked as a legal adviser, specializing in human rights and humanitarian affairs, at the Permanent Mission of Israel to the United Nations in Geneva, Switzerland. This career choice came with saddled with numerous misconceptions, most of which are not applicable to me. To wit: I am not Israeli, Jewish, or neo-conservative in my ideology. I am not inherently suspicious of the United Nations, and I do not harbor any ill-will towards the Palestinians, nor seek to undercut their efforts at realizing self-determination (whatever that ill-defined term may be taken to mean.)

Rather: I am American, was raised Catholic, liberal in my politics, and pacifist in nature. I fervently believe in the necessity—and potential—of U.N. human rights mechanisms. I believe that one can be an effective advocate for Israel and simultaneously recognize that the vast majority of Palestinian civilians lead difficult lives, adversely affected by any number of factors, including their own leaders’ corrupt practices and, yes, certain Israeli policies.

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(last visited 9 December 2008) ) and there is a reluctance to act on the establishment of a human rights mechanism (*New ASEAN Rights Body Should Not Be Too Ambitious: Singapore Official*, Jurist Report, 12 June 2008, available at <<http://jurist.law.pitt.edu/paperchase/2008/06/new-asean-rights-body-should-not-be-too.php>> and *Myanmar Objects to Monitoring Powers of New ASEAN Human Rights Body*, Jurist Report, 22 July 2008, <<http://jurist.law.pitt.edu/paperchase/2008/07/myanmar-objects-to-monitoring-powers-of.php>> (last visited 9 December 2008)).

During my time at the Mission, the question I was asked most often by other diplomats was: “so, how did you get your job?” But the “how” is straightforward—the Mission had an opening for an English-speaking lawyer with a specialty in human rights, and I applied. And besides, the unspoken query that people were *really* posing was not “how,” but “why”—as in “*why* would you *choose* to work for Israel, given all the attendant controversy?” In my mind, the answer to this question is just as straightforward: Israel needs an advocate. One needs look no further than the Human Rights Council for evidence of this fact.

In June 2006, the United Nations General Assembly voted to establish the Human Rights Council (HRC) to replace the Commission on Human Rights, which, over several decades, had strayed from its original lofty purpose and become a tool for serial human rights abusers to block any criticism of their own record. It was also prominent soapbox from which the Arab and Muslim countries could criticize Israel, which the Commission did. Repeatedly.

The HRC was supposed to fix all that. And yet the Council’s record to date has been an unfortunate display of politicization and anti-Israel sentiment, characterized by circular reasoning which would not be out of place in a Monty Python skit. Some good work does get done; for example, several of the Special Rapporteur mandates have been renewed, and these remain a useful investigatory tool for human rights violations. Moreover, the Universal Periodic Review places the human rights record of every member state under the spotlight once every four years. But on the whole, the HRC’s record has been less than satisfactory.

Soon after I began working at the Permanent Mission of Israel in September 2006, my life became consumed by the “institution-building process” of the new Council, during which—among other things—the Agenda for the new Council’s work was determined. Unfortunately, despite assurances that the HRC would be an improvement over the Commission, at best it has maintained the *status quo*. Similar to the Commission, the Council’s Agenda boasts a standing item for consideration of the “human rights situation in ‘Palestine’ and the other occupied Arab territories” (Agenda Item 7). The HRC’s Agenda guides the Council’s action for five years at a time. Implausibly, in June 2007, when the Agenda was finally revealed after a year’s worth of complex, bare-knuckled negotiations, Israel’s extreme disappointment at the inclusion of this item was met with blank stares and apparent incomprehension that it could be anything less than thrilled with this “compromise” text. I remember diplomatic colleagues telling me, in rather patronizing tones, that the language was “fairly mild,” and this was the “best Israel could hope for,” as the “special nature” of the situation in the Middle East meant that this outcome was almost inevitable.

I was present during all of the bruising “informal working groups” in which language was presented, debated, rejected and then reformulated. I know that political horse-trading occurred on an epic scale. But I can’t agree that sacrificing Israel for the sake of political compromise was a great victory for human rights. A separate agenda item which singles

out one situation for heightened consideration above all others is not a useful compromise. Would it have been considered equally acceptable to have standing agenda item on “the human rights situation in Tibet and other occupied Asian territories?” Or “consideration of the human rights situation of Aboriginal peoples in the Outback?” Or on the “human rights situation of Haitian asylum seekers in the Caribbean, including the Dominican Republic?” I think China, Australia and the Dominican Republic would have strenuously argued that such singling out was unproductive to the greater human rights debate.

After the Agenda was presented, the danger was that the HRC would be discounted before it even began its work in earnest, hampered by its inequitable agenda. Nor did it give Israel very much incentive to engage with this new UN human rights body, given that it already operated at a distinct disadvantage based on the agenda alone.

To clarify, it is not my belief that Israeli-Palestinian conflict is outside of the purview of the U.N. human rights mechanisms. I do think a viable legal argument can be made that as an ongoing armed conflict, the situation is more appropriately considered under the strictures of humanitarian law. However, I certainly understand that due to the atypical interdependence of Israel and the Palestinian Territories, human rights considerations will be raised. I also think it is unfortunate that Israel is held to a higher standard than the Palestinians are, but appreciate the international legal realities of why this is the case. It is merely that because there were already so many *existing* U.N. mechanisms under which to consider the human rights situation in Israel and “Palestine,” incorporating a standing item on the HRC Agenda didn’t do anything except further poison an already highly politicized atmosphere. Moreover, if advocates really had been keen to use the Council as an additional platform to address Israeli-Palestinian issues, they would have had ample opportunity to do so under Agenda Item 4, which is the all-encompassing “Human Rights Situations that Require the Council’s Attention.”

The new HRC could have heralded a clean break with the excesses of the discredited Commission. However, in its present manifestation, it has not contributed usefully to consideration of Israeli issues at the UN. Since 2006, the “human rights situation in ‘Palestine’ and the other occupied Arab territories” had been addressed 11 times during regular Human Rights Council sessions, and five times during special sessions of the HRC. These sessions had resulted in 26 resolutions that were harshly critical of Israel and accused it of numerous violations of international law, while Palestinian breaches were given a passing mention, if at all.

The topic will be addressed yet again at the upcoming Council session in September, when the report of the most recent “Fact-Finding Mission to Gaza” will be presented, after which a condemnatory resolution against Israel is sure to be tabled. Unfortunately, the Council’s preoccupation with Israeli-Palestinian issues leaves little time to focus on other pressing human rights issues, such as China’s crackdown in Tibet before the 2008 Olympics, the brutal Palestinian infighting, South Africa’s violent backlash against Zimbabwean migrants, or Italy’s troubling attitude towards the Roma. This is unfortunate as it undercuts the protections of human rights law: all humans have human

rights by virtue of being human—and violations of these rights need to be cited wherever they are committed. All of these issues, and others, deserve the focus of the Human Rights Council as well.

The tempest surrounding Mrs. Robinson's award and the attention it is temporarily focusing on the Council's activities should be used for useful reflection by HRC advocates. The Council's Agenda is set to be re-evaluated in 2011, at which point it could—and should—be amended and re-drafted to ensure that it is as useful and effective as possible. The Council was created to correct the failings of the Commission; its deficiencies to date could charitably be considered "growing pains." But a continued irrational focus on Israel can't be excused for much longer.

***SI VIS PACEM PARA BELLUM –***  
**IF YOU WISH FOR PEACE PREPARE FOR WAR:**  
**WINNING THE GLOBAL DEVELOPMENT WAR**

**BOOK REVIEW OF**

**John W. Head, “Losing the Global Development War. A Contemporary Critique of the IMF, the World Bank, and the WTO” (Leiden: Martinus Nijhoff, 2008).**

**Valentina Vadi**

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The three major international economic law organizations – i.e. the World Trade Organization (WTO),<sup>1</sup> the International Monetary Fund (IMF)<sup>2</sup> and the International Bank for Reconstruction and Development (IBRD)<sup>3</sup> or World Bank - are the focus of *Losing the Global Development War*.<sup>4</sup> After exploring some institutional aspects, Professor Head scrutinizes the current criticisms of these organizations and makes some proposals to improve the functioning of these institutions. The core thesis of the book is that in order to win the global development challenge, *internal development* within the proposed institutions is needed, in order to cope with the evolving needs of the international community.

The volume is divided into six parts: the first is an introduction to the work and defines its scope of enquiry; the second summarizes the contemporary critiques of the global economic organizations; the third describes the historical origins and the structure of these institutions. Chapters four and five offer the author’s assessment of the criticisms that apply to the policies and operations of the global economic organizations. Interestingly, the author divides these criticisms in two broad categories, looking at how the organizations *in concreto* behave in relation to the populations of their member countries and then at how they *institutionally* behave in relation to their member states. Lastly, chapter six deals with the pivotal question whether the examined organizations should be reformed and if so, what specific types of reforms should be undertaken. Three

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<sup>1</sup> Agreement Establishing the World Trade Organization, 15 April 1994, 33 ILM (1994).

<sup>2</sup> Articles of Agreement of the International Monetary Fund, adopted on July 22, 1944 and entered into force December 27, 1945.

<sup>3</sup> Articles of Agreement of the International Bank for Reconstruction and Development as amended in 1965, 606 UNTS 294.

<sup>4</sup> J.W. Head, *Losing the Global Development War – A Contemporary Critique of the IMF, the World Bank and the WTO* (2008).

Appendixes suggesting bibliography and containing key documents for a better reading of the book respectively follow chapter two, chapter three and chapter six.

At the core of the book lies the linkage between development and peace. The author emphasizes that such a linkage is at the heart of the Bretton Woods system.<sup>5</sup> During the inter war period (from 1920 to 1940) the Great Depression, the harsh reparations policy toward Germany and generalized protectionist policies had led to the myopic economic and political isolationism of states. Thus, after World War II, major international actors reached a consensus on the importance of establishing international economic institutions that would promote peaceful and co-operative relations among nations in economic and political matters.<sup>6</sup> The relative unitary ideology that emerged and grew after World War II is now under attack.<sup>7</sup> According to Head, an *ideological war*<sup>8</sup> is currently taking place vis-à-vis the challenges posed by global development and the ways to achieve it.<sup>9</sup>

The author suggests that the war between the established system and its opponents is currently being lost by the former in three related respects. *First*, the international community is failing to expand and improve on the multilateralism of the past. The recent deadlock of the Doha Round of trade negotiations reflects this lack of co-operation and motivation. *Second*, critics shed doubts on the global economic organizations claiming not only that the ideological foundation on which they rest is misconceived, but also that deep institutional failings require that those global economic organizations be abandoned. *Third*, bilateralism and regionalism ‘gain influence and ... displace the kind of multilateralism that emerged out of World War II’.<sup>10</sup> The rapid growth of regionalism and bilateralism carries worrying implications for the international economic system in terms of stability, fairness and coherence.

As the author believes that the development war is now being lost (this is the reason of the awkward title of the book), his purpose is to offer views and recommendations to reverse this course of action in order to ultimately *win* the global development challenge (this is the reason of the wishful subtitle of this review). After scrutinizing the various

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<sup>5</sup> The Bretton Woods conference was held in 1944 and determined the inception of the charters of the IMF and the IBRD. Although the GATT was not formed at the Bretton Woods Conference, the participants at the conference nevertheless contemplated the necessity of an international trade organization or ITO, and it is generally held that IMF, IBRD and the GATT comprised the Bretton Woods System. As Professor Jackson highlights, “in some ways, the WTO, after many years, has become “the missing leg” of the Bretton Woods “stool”.” See: J. Jackson, *The World Trading System* (2002) at p. 32.

<sup>6</sup> Art. 55 and 56 of the UN Charter.

<sup>7</sup> J.W. Head, *Losing the Global Development War*, p. xv.

<sup>8</sup> *Ibid.*, p. xii.

<sup>9</sup> *Ibid.*, p. xiii.

<sup>10</sup> *Ibid.*, p. 315.

and multi-faceted critiques to the global economic organizations in chapter II, he thus offers a detailed analysis of the structure and functioning of these organizations. In so doing, he clarifies that while some criticisms of the global economic organizations “are simply base off because they rely on outdated information”, others rely on “fundamental misunderstandings of what those organizations are”. In this sense, clarifying the institutional structure and the operation of these organizations is fundamental to ultimately overcome unsubstantiated critiques.<sup>11</sup>

The ultimate purpose of the book is to “contribute firepower –in the form of information and persuasive explanations- to [the ideological] counterattack.” (this is the reason of the Roman motto which constitutes the title of this review).<sup>12</sup> Such ideological counterattack would be based on “the need to forge a new consensus for multilateralism and particularly to encourage the adoption of an ideology of liberal, intelligent, participatory, multilateral and sustainable human development”.<sup>13</sup> In the end, the author admits that this objective may be ultimately regarded as “an appeal to our better selves, our smarter selves to participate in the effort”.<sup>14</sup>

One of the most interesting claims in the book is the comparison of the global development challenge to a *war*. The author clarifies that the term *war* is used in a manner “that [...] falls outside its technical definition for purposes of international law”,<sup>15</sup> and that – in a very broad sense – the development challenge may be seen as a war among different ideologies.<sup>16</sup> There is some value in describing development as an ideological war as this amplifies the concept of challenge inherent in the contemporary development discourse and practice and opens a stimulating debate on the linkage between peace and development.<sup>17</sup> The author affirms that failure to reach development “has military repercussions in the sense that many countries suffering economic distress find themselves drawn to violence, including military violence”.<sup>18</sup>

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<sup>11</sup> *Ibid.*, p. xvii.

<sup>12</sup> *Ibid.*, p. xv.

<sup>13</sup> *Ibid.*, p. xv.

<sup>14</sup> *Ibid.*, p. xv.

<sup>15</sup> *Ibid.*, p. 42.

<sup>16</sup> “[...] the Global Development War may be seen as a war over the developmental ideology that is to be adopted and followed in the coming years [...]” *Ibid.*, p. 28.

<sup>17</sup> On the linkage between peace and trade, see, for instance, B.H. Malkawi, *The WTO, Security and Peace: Are They Compatible, and if so, What is the Framework?*, Journal of World Investment and Trade, 303 (2007); J.H. Jackson, *Reflections on the Trade & Peace Relationship*, in T. Broude et al., *Trade as Guarantor of Peace, Liberty and Security?* Studies in Transitional Legal Policy, Washington, D.C., The American Society of International Law, 2006, pp 23-32.

<sup>18</sup> Head, *Losing the Global Development War*, p. 1.



A notable lacuna of the book is the failure to dedicate attention to the historical roots of the contemporary development debate.<sup>19</sup> The book dedicates just a few lines to the problems and debates related to the New International Economic Order (NIEO)<sup>20</sup> and the Declaration on the Right to Development.<sup>21</sup> By contrast, an accurate analysis of the historical origins of the development discourse would have been important to properly understand the current debate about development as the contemporary critiques to the international economic organizations echo the above mentioned NIEO demands. Another lacuna concerns the possible linkage between development and human rights. Although the author appropriately defines the different meanings of the term development,<sup>22</sup> he avoids any reference to human rights instruments, which have much elaborated and ‘developed’ the concept.

Instead, the merit of the book lies in the critical assessment of the criticisms of the international economic organizations. With regard to the *laissez-faire* approach, or liberal theory which constitutes the central assumption of the Bretton Woods system, the author firstly addresses this criticism with regard to the WTO. He underlines that a number of studies confirm that increased trade among nations brings economic gain which in turn can bring other benefits, including political benefits, i.e. peace.<sup>23</sup> While he rejects the claim that free trade *per se* is a harmful ideology, he does not reject related claims concerning distributional and social injustice that may accompany free trade.<sup>24</sup> With regard to the IMF and the World Bank, the criticism to their liberal approach concerns their policy prescriptions attached to their infusion of funds. While admitting that in some circumstances, the promoted privatization in unsophisticated economies without an adequate institutional framework has led to negative outcomes, Professor Head highlights that “markets must be regulated, and it is the failure to install adequate regulation (on bank lending, on consumer safety, on corporate governance, etc.) that have created havoc in some countries...”<sup>25</sup> Thus, he underscores the importance of ‘careful project appraisal

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<sup>19</sup> *Ibid.*, p. 219.

<sup>20</sup> The term was derived from a UN General Assembly Declaration and referred to a wide range of trade, financial, commodity, and debt-related issues. UN General Assembly, Resolution S-6/3201, 1 May 1974, Declaration for the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3201. The bibliography is extensive. See, for instance, J. Bhagwati, *The New International Economic Order. The North-South Debate* (1977).

<sup>21</sup> UN General Assembly, Resolution 41/128, 4 December 1986, Declaration on the Right to Development, UN Doc. A/RES/41/128.

<sup>22</sup> Head, *Losing the Global Development War*, p. 14.

<sup>23</sup> *Ibid.*, p. 170.

<sup>24</sup> *Ibid.*, p. 173.

<sup>25</sup> *Ibid.*, p. 185.

and design', with regard to the use of environmental impact assessment and social impact assessment.<sup>26</sup>

The criticism concerning social justice and environmental protection includes two aspects. First, businesses relocate their operations to countries that have lax environmental regulation. Second, governments compete with each other in an effort to attract business within their borders. Professor Head stresses that the response to the *race to the bottom* "should not be to abandon free trade generally, but should instead be to pay more attention to that specific element of the free trade regime...by strengthening the application and enforcement of multilateral environmental regulations, especially those found in key environmental protection treaties."<sup>27</sup> The author further points out that the criticism that the IMF and the World Bank disregard the environmental effect of the projects at both the design and the implementation phase is outdated.<sup>28</sup>

With regard to the criticism that GEOs would undermine national sovereignty, in particular with regard to social and environmental concerns, Professor Head admits that this criticism 'holds water'.<sup>29</sup> He holds that "not only should more lee-way be provided to national governments to implement (without discrimination) environmental protections and human rights protection in a...manner as they see fit; in addition, the relationship between GATT Rules and environmental treaties and human rights treaties should be strengthened".<sup>30</sup> Furthermore, he states that trade rules should not override all other rules but "the substantive protections and the procedural requirements set forth in multilateral environmental and labour treaties (and certain other human rights treaties should...take precedence over GATT substantive provisions and procedural requirements".<sup>31</sup> This is a very advanced and perhaps not immediately realisable position. The author admits that while some countries have not ratified several environmental and human rights treaties,<sup>32</sup> others do not seem to support further advances either in human rights or in environmental protection.<sup>33</sup> However, he also stresses that, *de lege lata*, the WTO Charter itself mentions the objective of sustainable development and the Ministerial Decision on Trade

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<sup>26</sup> *Ibid.*, p. 187.

<sup>27</sup> *Ibid.*, p. 212.

<sup>28</sup> *Ibid.*, p. 206.

<sup>29</sup> *Ibid.*, p. 214.

<sup>30</sup> *Ibid.*, p. 216.

<sup>31</sup> *Ibid.*, p. 216.

<sup>32</sup> Head holds that "the USA should embark...on a new era of multilateralism that would bear fruit not only in the area of international economic affairs but also in many other areas, including human rights and environmental protection." *Ibid.*, p. 321.

<sup>33</sup> *Ibid.*, p. 217.

and Environment issued at the conclusion of the Uruguay Round noted that “there should not be any contradiction between upholding and safeguarding an open non-discriminatory and equitable multilateral trading system on the one hand and acting for the protection of the environment, and the promotion of sustainable development on the other”.<sup>34</sup>

By contrast, Head dismisses the claim that the conditionality practices of the IMF and the multilateral development banks encroach on the sovereignty of their member countries. He does so on the basis of two related arguments: first, “as a practical matter, a country objecting to the content of such conditionality can avoid it by declining a loan, or even, in an extreme case, by dropping its membership in the IMF or the multilateral development bank at issue”; second, “international law contains no generally accepted ‘right to development assistance’ under which a country is legally entitled to receive financial assistance from an international financial institutions”.<sup>35</sup> However, it is worth highlighting that in international relations self-isolation might not be a real option. As the role of the IMF and multilateral development banks on social justice is crucial, this linkage surely deserves further enquiry.

Chapter five evaluates the last four of the eight clusters of criticisms directed at the GEOs, concerning institutional and governance issues. With regard to the secrecy and opaqueness complaint, the author notes that “there is momentum towards transparency”,<sup>36</sup> and that the WTO has taken some of the steps that the other GEOs have taken in the past few years – adopting a transparency or disclosure policy. With regard to the democracy deficit complaint, the author endorses many aspects of the criticism, admitting that too little has been done to address forms of unaccountability that arise from weighted voting system in the IMF,<sup>37</sup> but rejects the same complaint as levelled at the WTO, because of its one-state-one-vote structure. With regard to the mission creep complaint, according to which the international economic organizations would have overstepped their authority and their competence, this claim is entirely rejected: the broad provisions of their charters allow these organizations to increasingly focus on environmental protection and social justice.<sup>38</sup>

Chapter five proposes some reforms that would help respond to and overcome the well-founded criticisms enucleated in the previous chapters. While the author holds that “the GEOs have, in general, struck the balance well between 1) charter fidelity and 2) pressure to progress”, he also reckons that GEOs need to be modified to reflect the dramatically

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<sup>34</sup> *Ibid.*, pp. 217-218.

<sup>35</sup> *Ibid.*, p. 225.

<sup>36</sup> *Ibid.*, p. 232.

<sup>37</sup> *Ibid.*, p. 270.

<sup>38</sup> *Ibid.*, p. 270.

new era of international economic relations.<sup>39</sup> In a preliminary way, the author focuses on structural and institutional matters. In particular, he proposes that five institutional principles be formally adopted by GEOs: 1) transparency, 2) participation, 3) legality, 4) competence, and 5) accountability.<sup>40</sup>

At the substantive level, the author stresses the need to strengthen the linkage between international economic law and environmental and human rights protection, in order to ensure that international economic governance does not sabotage environmental and human rights protection. In particular, he focuses on the substantive norms and standards that member countries to the GEOs should undertake.<sup>41</sup> According to Head's proposal, a new type of membership requirement for countries to participate in the WTO or the IBRD should be added, namely a requirement that member countries accept certain key provisions of fundamental treaties.<sup>42</sup> To this end, these institutions' charters should be amended to incorporate by reference those treaty provisions.<sup>43</sup> The author adds that "Incorporating by reference ... certain other treaty provisions would not only bear on the eligibility of a country to become a member, it would also impose a continuing requirement on each member to adhere to those treaties in order to remain a member".<sup>44</sup> A similar recommendation is done with regard to the WTO that should be changed to "eliminate the trade bias,"<sup>45</sup> and incorporate certain trade-related issues into its culture.<sup>46</sup>

The book under review dissects the current criticisms against the global economic institutions and critically assesses the same institutions through the lens of sustainable

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<sup>39</sup> *Ibid.*, p. 314.

<sup>40</sup> *Ibid.*, pp. 276-285.

<sup>41</sup> *Ibid.*, pp. 285-288; pp. 307-309.

<sup>42</sup> The listed treaties that, according to Head, should be incorporated in the GEOs charters, are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Vienna Convention for the Protection of the Ozone Layer; the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the Convention on Biological Diversity; the Climate Change Convention and its Kyoto Protocol; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the OECD Convention against bribery. P. 287. The OECD Guidelines for Multinational Enterprises are also mentioned. A notable lacuna is the lack of any reference to the International Covenant on Economic, Social and Cultural Rights.

<sup>43</sup> Head, *Losing the Global Development War*, p. 285.

<sup>44</sup> *Ibid.*, p. 286.

<sup>45</sup> *Ibid.*, p. 307, citing A. Guzman, *Global Governance and the WTO*, 45(2) *Harvard Int'l L.J.* 303 (2004) at p. 337-338

<sup>46</sup> *Ibid.*, p. 308, citing C. Thomas, *Trade Related Labour and Environment Agreement?* 5(4) *J Int Economic Law* 791 (2002).

development. If one accepts the instrumentalist perspective, which deems the point of legal institutions to use the law to achieve given goals, development may be considered the goal of international economic law. In this context, analyzing the structure and the functioning of the IMF, the WTO and the IBRD organizations under the lens of sustainable development is not only appropriate but timely as ever.

The entire subject is presented in a consistently thought-provoking way. The clear and concise method of exposition makes the book a suitable resource for students and curious readers wishing to get a cursory but smart insight on some crucial issues of contemporary international economic law. An interesting feature of the book is its lively language. While the author ultimately offers a legal perspective, he does so trying to adopt a plain English style, making the text fluid and enjoyable.

More substantially, the major merit of the book lies in its equilibrate approach to the study of the international economic organizations and of their critiques. Although these organizations represent “the institutional means for achieving some of the great and essential aims of our age”,<sup>47</sup> the global development challenge can be won, the author asserts, only by adopting an ideology of liberal, intelligent, participatory, multilateral, and sustainable development. One cannot but agree on such a balanced understanding: it has to be seen whether and how the global economic institutions will evolve and respond to the current challenge.

#### **BOOK REVIEW OF**

**Marise Cremona and Bruno De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart, Oxford and Portland, 2008)**

**Rafael Leal-Arcas**

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This book, co-edited by Marise Cremona and Bruno De Witte, examines ‘the basic principles of EU foreign relations law that have emerged over the last 50 years of incremental Treaty-based and judicial development’ in the European Union (EU). The background and context of the book focus primarily on the deliberations over the constitutional framework of the Constitutional and Lisbon Treaties, the increasingly cross-pillar nature of much of the EU foreign relations, and the accountability of external relations policy and practice to democratic and judicial review within and outside the EU. By doing so, the book therefore deals with the constitutional fundamentals of the EU external relations law.

It is argued in the book that legal authors will continue to speak of the EU external constitutional law due to the fact that the EU Treaties ‘occupy a higher rank in the legal

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<sup>47</sup> *Ibid.*, p. 276.

hierarchy than the acts of the EU institutions' (p. xiii) and the fact that the EU Treaties somehow form the EU's constitutional instrument since they provide many of the functions that a constitution provides at the national level. That said, it is argued in the book that 'written norms of the founding Treaties are complemented by another judge-made source of higher law, namely the general principles of Community and Union law' (p. xiii). This is the case of the protection of fundamental rights of the individual against interference by the EU institutions. Furthermore, 'the text of the founding Treaties contains many [...] detailed provisions which one would not normally find in a national constitutional text' (p. xiii).

The book is divided into five parts and has contributions from eleven authors. Thematically, one could divide it into three main categories of chapters: 1) chapters 2, 3, and 4, related to the EU foreign relations law, broadly deal with the dividing line between the EU's first and second pillars in international relations; 2) chapters 5 and 6 analyze the external dimension of the EU constitutional law issues; and 3) chapters 7 to 10 deal with typically constitutional issues.

Many of the book's themes are *déjà vu*. The book examines the legal technicalities of much broader issues of international relations law of the EU. Herrmann provides a legal analysis of recent constitutional case-law on issues such as airport transit visas, criminal sanctions and passenger name records (pp. 27 ff). The delicate issue of EU international agreements and their restraints on EU Member States' external competences, as well as the EU's competence to conclude agreements, are convincingly presented by Hillion and Wessel. Quite refreshing is the section on EU Member States' interactions with the European Community (EC) in areas relating to the Common Foreign and Security Policy (pp. 114 ff.).

The forgotten role of the European Parliament in the EU international relations is a refreshing inclusion in the book (pp. 201 ff) as well as the timely legal analysis of the interrelation between international law and the external dimension of EU law (pp. 233 ff). This issue is currently very topical and will certainly be more so once the Treaty of Lisbon enters into force.

Although the objective of the book is to examine the basic principles of EU foreign relations law that have emerged over the last 50 years of incremental Treaty-based and judicial development, it is rather surprising to see the omission of analysis in the book on how the EU-27 collectively should address timely legal questions of international relations such as the EU's role in the reform of the Bretton Woods institutions (both the World Bank and the International Monetary Fund) or the EU's approach to a new multipolar world. Undoubtedly, multi-polarity will affect the four EU Member States which are current members of the G-7. For example, what can the EU offer the so-called emerging economies to foster trust, a sense of cooperation and respectfulness, as well as a better multi-polar framework of global economic governance? Shouldn't the EU accept the emerging economies as equal players in the current multi-polar framework of global economic governance? Sadly, sepulchral silence remains throughout the book in relation to these crucial legal and policy questions.

Finally, when discussing the external relations law of the EU, the amount of time and energy wasted on the confusing implications of terminological distinctions between the EU and the EC is both ridiculous and surprising. As rightly argued in the book's introduction, the 'absurd situation' that the group of 27 EU Member States has to face every time it deals with the outside world will thankfully terminate with the entry into force of the Treaty of Lisbon. Let us hope that the Treaty of Lisbon will enter into force, if anything, to clarify who does what in the EU external relations law.

**LAW-MAKING THROUGH THE OPERATIONAL  
ACTIVITIES OF INTERNATIONAL ORGANIZATIONS**  
40 *George Washington International Law Review* 87 (2009)

**ABSTRACT**

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SSRN: [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=351568](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=351568)

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The operational activities of international organizations are contributing to the development of international law by causing soft law to harden. To the extent that international organizations act autonomously in engaging in these practices, the process is one-step removed from state consent and as such signifies a new, less state-centric form of law-making. The pattern described in this article proceeds as follows: operational activities occur against the backdrop of widely acknowledged but not well-specified norms; in carrying out those activities, international organizations (IOs) are not seeking to enforce the norms *per se* but typically act in a manner that conforms to them; the reaction of affected governments -- and the discourse that surrounds the action and reaction -- can cause the law to harden. Compliance with the norm is more likely because the more demanding discourse associated with hard law increases the pressure on states to act in accordance with it. This article examines that pattern in four areas: the protection of civilians in peace operations, election-monitoring, ethnic conflict prevention and assistance to internally-displaced persons. It highlights two important theoretical implications: first, that the process indicates a more fluid and pluralistic form of law-making, in which international organizations play an autonomous role; and second that *argumentation* between IO officials, governments and non-state actors is central to that process. It concludes that this is a promising new way to make law in areas where incremental practice driven by international organizations is ahead of broad consensus among states on principle.



**REPRESENTATION AND POWER  
IN INTERNATIONAL ORGANIZATION:  
THE OPERATIONAL CONSTITUTION AND ITS CRITICS**  
(2009) 103 American Journal of International Law 209

**ABSTRACT**

**Jacob Katz Cogan**

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SSRN: [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=448447](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=448447)  
International Law Reporter: <http://ilreports.blogspot.com/>

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There is nothing more fundamental to or characteristic of a constitutional system than the techniques it adopts and employs for the selection of its decision makers, be they executive, legislative, or judicial officials. Such techniques can be based on a variety of principles and can be codified using a number of different forms. In the international system, we have a plethora of possible representative principles – those that treat all States the same, giving them each an equal vote (the sovereign equality principle); those that treat States or groups of States differently and allocate representation on the basis of their relative wealth, military power, amount of exports and imports, or some other distinctive characteristic or interest (the differential responsibilities principle); and those that prioritize region and divvy up positions accordingly (the regionalism principle). We also have a wide array of possible forms for implementing those principles – treaties, resolutions, decisions, and understandings, among many others. In the post-War world, there evolved an operational constitution of representation in which formal and informal arrangements together were employed to reconcile the conflicting principles and interests in play. Though sometimes moderating regional tensions, the operational constitution most often rewarded power – financial, trade, political, military, or otherwise – in order to maintain effective international organization.

This operational regime is currently under stress in two distinct ways. It is being assailed on its own terms as unreflective of contemporary power dynamics. Challenges to the composition of the Security Council and pressure to reallocate voting rights in the International Monetary Fund (IMF) and World Bank are the best examples of this. The operational regime is also being criticized on a more fundamental level by those who would do away with informality and preferences altogether. We see this in the attempt to wrest away the “rights” of the United States and Europe to appoint the heads of the IMF

and World Bank. These two critiques of the operational constitution are moves to create an international system that works on radically different terms from that which has existed for the past sixty years. The Article concludes by considering the future of the operational constitution in light of these challenges.

**DOES ASEAN EXIST? THE ASSOCIATION OF SOUTHEAST  
ASIAN NATIONS AS AN INTERNATIONAL LEGAL PERSON**  
**Singapore Year Book of International Law, Forthcoming**

**ABSTRACT**

**Simon Chesterman**

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The ASEAN Charter, which entered into force on 15 December 2008, asserts in Article 3 that ASEAN "as an inter-governmental organisation, is hereby conferred legal personality". This essay examines the legal status of the Association, as well as the political question of whether the whole is greater than (or perhaps less than) the sum of its parts. The argument presented is that legal personality at the international level is less a status than it is a capacity: the fact that ASEAN now claims international legal personality in the Charter does not mean it lacked it previously, nor that it now possesses it in any meaningful way. Rather, the key question is what specific powers have been granted to ASEAN and how those powers are used. On these questions, the Charter is largely silent.

**THE UN'S CONSTITUTIONAL ASSISTANCE: NEW ADDITIONS  
TO THE "STANDARD OF CIVILIZATION"?**

**ABSTRACT**

**Vijayashri Sripati**

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This essay is drawn from my doctoral dissertation on the evolution of the United Nations' [UN] constitutional assistance from a post-colonial and "Third World Approaches to International Law" perspective. Its (essay's) central thesis is that the UN's push to standardize how a constitution is made, and what it should broadly contain, proposes to set a new international "standard of civilization," defined as "an expression of

assumptions, tacit and explicit to distinguish those that belong to a particular society from those that do not” (Gong, 1984). Further, such imposition of standards is legitimized as a means of implementing public international law. Indeed, history is replete with examples of how the standard of civilization was imposed, meekly consented to, and eagerly embraced. It argues that we must approach the UN’s constitutional assistance from this angle, recognizing its broader historical and ideological aspects and the underlying structural strengths and weaknesses of today’s international society.

The UN’s constitutional assistance is today offered to “post-conflict” countries and others as a component of its development assistance under the broader “democratic governance” framework. In fact, the UN has declared constitutional assistance as an integral part of its “work” and released a policy note in this regard. Since constitution making is quintessentially a *domestic political* process and involves a profound reshaping of a state’s politico-economic order, this essay maintains that the legitimization of the UN’s constitutional assistance as a *practice*, and the consequent *internationalization* of constitution making, must be critically examined. It examines the impact of standards of civilization on the right to self-determination, beginning with the way such standards, in the nineteenth century, justified the creation of mandates to govern peoples in African and Asian territories. Although today’s international standards of civilization incorporate many standards—pertaining to human rights, financial administration, rules of war, and sustainable development (Gong, 2002) - this essay focuses only on the first two on this list. It argues that the UN’s “transparent, inclusive and participatory” constitution-making standard is a new and explicit addition (of a procedural nature) to today’s standards of civilizations, whereas its standards for constitutional content are not wholly new but include some existing standards relative to human rights (explicit) and financial matters (implicit). It concludes by considering how the use of the UN’s constitutional assistance and, by extension, the imposition of standards, is rationalized as a mechanism for implementing international law and policy in the following areas: (1) prevention and resolution of conflicts; (2) international peace and security; (3) democracy and rule of law; (4) women’s right to political participation; and (5) international right to political participation. Thus, by examining its operation, this essay hopes to identify some colonial strands in the UN’s constitutional assistance project.

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# A PROPOSAL FOR NEW ROLES FOR INTERPOL AND THE WORLD CUSTOMS ORGANIZATION IN COMBATING WILDLIFE POACHING AND TRAFFICKING

## ABSTRACT

**Anastasia Telesetsky**

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Over the course of an average week in July 2009, the news of the spoilage of wildlife crimes was grim. A newspaper in Karnataka, India reported that at least a hundred endangered tigers have vanished from the region while law enforcement officials expect to seize a record number of tiger pelts.<sup>1</sup> Earlier in the week 200 kilograms of elephant ivory was seized in Vietnam.<sup>2</sup> Meanwhile in Tanzania, the court arraigned six smugglers for transporting poached elephant ivory out of Africa and into the Philippines and Vietnam.<sup>3</sup>

Wildlife crime is rampant and placing unprecedented pressures on certain species such as African elephants and black rhinoceroses. This short article examines the cooperative role of two low profile international organizations in combating wildlife crime. From the perspective of the public, UNEP, the Secretariat of the Convention on Biological Diversity, the Secretariat of the Convention in the Trade of Endangered Species, and the World Heritage Committee are the four primary international bodies designated to protect internationally vulnerable wild plant and animal species. While these entities are actively involved in the long-term conservation strategies to protect of wildlife and natural heritage, the reality is that the International Criminal Police Organization (Interpol) and the World Customs Organization (WCO) are the two international organizations that are best positioned to demand daily justice against poachers and wildlife traffickers.

### *Interpol and WCO efforts to combat wildlife crimes*

While, Interpol originated as a project of Prince Albert I of Monaco to track individual international fugitives, the organization has evolved over time to combat complex transnational phenomena such as drug smuggling, human trafficking, and terrorism. In 1976, Interpol adopted a resolution asking its member countries to cooperate on wildlife crime recognizing that the black market business in animal trafficking shared common criminal roots with drug trafficking. Since the passage of that resolution, Interpol has

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<sup>1</sup> Pelt Seizures Surge as 100 Tigers Vanish, Imran Khan, July 30, 2009, New Indian Express, available at <http://www.expressbuzz.com>

<sup>2</sup> Vietnam Finds 200 kg of tusks, July 29, 2009, The Strait Times, [http://www.straitstimes.com/Breaking+News/SE+Asia/Story/STIStory\\_409631.html](http://www.straitstimes.com/Breaking+News/SE+Asia/Story/STIStory_409631.html)

<sup>3</sup> Seven Dar residents arraigned over export of illegal ivory export, Rosina John, July 22, 2009, The Citizen, <http://thecitizen.co.tz/newe.php?id=13877>

been petitioned multiple times by member states to help in identifying suspects involved in the poaching and trafficking of threatened species. In 1994, Interpol formed a working group on wildlife crime; in 2006, Interpol posted a permanent staff member to coordinate efforts policing activities associated with wildlife crime. In 2008, Interpol coordinated Operation Baba, a law enforcement operation involving police, customs, national wildlife, and national intelligence agencies from Kenya, Uganda, Zambia, Congo-Brazzaville, and Ghana to arrest poachers and traffickers in ivory.

The World Customs Organization has only recently become active in identifying wildlife crimes. In 2008, the WCO formulated an Action Plan with UNEP to prioritize the detection of wildlife crime as one of the priorities for national customs agencies.<sup>4</sup> In 2009, the WCO helped to organize a one-day Convention on International Trade in Endangered Species search at 90 customs administrations. 4,630 endangered live species and products made from endangered species were seized from ports and at boundary crossings without documentation.<sup>5</sup>

Most recently the WCO has launched a communications tool designed to help real-time coordination with Interpol and other international environmental enforcement organizations. ENVIRONET permits customs officials to exchange real-time information about both suspicious goods that may provide evidence of international environmental crimes and possible wildlife traffickers.<sup>6</sup> Notably, this type of cross-agency cooperation prioritizes problem solving over preservation of institutional boundaries.

*Proposed new roles for Interpol and WCO in combating transnational wildlife crimes*

While the cooperative work of Interpol and the WCO is laudable to identify environmental crimes is laudable, the current state of affairs in wildlife protection demands an even greater role for these low profile organizations. In the context of the rampant poaching of ivory that is raising serious issues of sustainability, Interpol and WCO need to demand more of its fellow institutions. In particular, the governing bodies of these organizations should pass resolutions directed at the CITES Secretariat<sup>7</sup> requesting that it ask its membership to reinstitute the African elephants as an Appendix I species in all countries in order to help Interpol and the WCO combat the recent spikes in illegal ivory trade that is overshadowing the legal trades in ivory between certain African

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<sup>4</sup> WCO Press Release, March 27, 2008, Environmental Crimes Now High on the World Agenda, <http://www.wcoomd.org/press/default.aspx?lid=1&id=152>

<sup>5</sup> WCO Press Release, February 2, 2009, Global CITES Operation Nets over 4500 Species in One Day <http://www.wcoomd.org/press/default.aspx?lid=1&id=174>

<sup>6</sup> WCO Press Release, June 5, 2009, ENVIRONET will connect Customs and its enforcement partners worldwide in the fight against environmental crime, <http://www.wcoomd.org/press/?v=1&lid=1&cid=6&id=183>

<sup>7</sup> A Memorandum of Understanding between the General Secretariat of Interpol and the Secretariat of CITES was signed in 1998 but the real authority behind the agencies is in its state members. <http://www.interpol.int/public/ICPO/LegalMaterials/cooperation/agreements/Cites.asp>

and Asian countries.<sup>8</sup> Similar proposals could be made by Interpol and WCO to ensure that international policies can be effectively enforced.

In addition, Interpol needs to be empowered by its member nations to be capable of taking an even more active role in enforcement against wildlife traffickers and poachers. In particular, member nations of Interpol where trafficking or poaching is rampant should 1) prioritize seeking arrest warrants for known but unprosecuted wildlife traffickers (throughout the supply chain), poachers and recipients of trafficked animals or plants 2) ensure that their extradition treaties allow extradition for wildlife crimes. Presently, most wildlife trafficking and poaching crimes remain unprosecuted and some local legal systems regard trafficking and poaching as more akin to nuisance problems than environmental crimes. For example, many poachers are poor individuals such as subsistence farmers who believe their livelihoods are threatened by big game.

Given the gravity of the survival situation for certain animal populations, the Interpol General Secretariat should be given the authority by Interpol member states to provide direct investigative field assistance to National Central Bureaus in regions identified as high wildlife trafficking and poaching jurisdictions. The investigative field teams should cooperate and coordinate with both national law enforcement and wildlife conservation departments to compile lists of wildlife criminals and to rank the criminals based on whether their poaching or trafficking is sporadic or systematic. Where a list of wildlife criminals has been compiled, a member state should request its national judiciary to issue arrest warrants for crimes of systematic poaching and trafficking. Once a national warrant has been issued and the individual is not apprehended in the member state issuing the warrant, Interpol has the capacity to post a Red Notice to inform all member states of the existence of an arrest warrant and the request to extradite the subject of the warrant notice. Presently, Interpol's website posts only nineteen Red Notices for individuals accused of "environmental crimes."<sup>9</sup> Since these individuals represent a sliver of the population involved in the poaching and trafficking business, there is an urgent need to increase investigations into criminal perpetrators and to issue additional Red Notices to facilitate the arrest and prosecution of known traffickers and poachers.

Given the transnational nature of wildlife crime, Interpol and WCO are essential international organizations for reversing the current wildlife crisis. But to be effective, these organizations need to be empowered to do more than simply channel information about criminal activities. Successful and speedy prosecutions of transnational environmental criminal perpetrators may be our only viable hope for securing a future with some remaining ecological balance.

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<sup>8</sup> In Zimbabwe, Botswana and Namibia, the African elephant is listed as an Appendix II species which can be traded commercially as long as the trade does not harm the survival of the species.

<sup>9</sup> <http://www.interpol.int/Public/Wanted/Search/Form.asp> (Checked on August 6, 2009)

## **A WORLD ASSEMBLY. TOWARDS A GLOBAL GOVERNANCE DEMOCRATIZATION**

### **ABSTRACT**

**Mateus Kowalski**

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While recognizing the trend to globalize reality, its governance is not at the hand of the individualized State power. The United Nations has a wide scope of attributions and a reasonably developed system of power. However, to perform its natural competences within the global governance process it is necessary that its structure be informed by effective authority, that is to say by comprehensive powers and by legitimacy.

In this context, the article addresses one of the aspects that should be considered in the debate of the United Nations reform: the establishment of a World Assembly and the enhancement of the global governance democratization.

On one hand, the World Assembly should have the power to make binding decisions on international matters of global relevance. On the other hand, it should be able to truly represent the international society both at the governmental and citizen level. In this regard, one should recognize that the rule of "one state, one vote" does not reflect the structure of the international society that supersedes the classic notion of sovereign state. Individuals are not represented at all at the General Assembly either directly or indirectly. In fact, while the eleven Member States with more than 100 million inhabitants congregate 69.1% of the world population, they only have a total of eleven votes.

Therefore the article advocates the establishment within the United Nations of a World Assembly composed by two chambers: one representing the citizens of the Member States, whose representatives would be elected by each State in proportion to its population; and an intergovernmental chamber where Member States would be represented.

Any binding decision would have to be approved by both chambers. This system would allow the inclusion of world citizens in the global governance process without forgetting the central role of sovereign States in international relations. Furthermore, in the World Assembly with reinforced powers, the bicameral system would enable the checks and balances that should inform the exercise of that power. The article argues that such a system would contribute to the global governance democratization.

# THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW

## ABSTRACT

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This article explores whether a multilateral investment treaty is necessary and possible in the framework of foreign direct investment (FDI) law or whether the current multifaceted and multilayered system of bilateral and regional investment agreements should be retained. This article aims at studying the existing investment regimes with a view toward creating a multilateral investment framework. This goal, however, does not suggest that current bilateral and regional investment regimes should be replaced or that the existing regimes are inadequate. The article analyzes foreign direct investment from an economic, development, and political perspective. The article then reviews the chronological evolution of FDI regulation, followed by an overview of the current principles and rules of FDI. As a necessary next step, the article examines the support for a multilateral investment framework. The main reasons behind such a framework are twofold: the current fragmented international investment regime may encourage regulatory competition among the various models of international investment agreements; and investor-state arbitration is causing issues of inconsistency of arbitral awards as well as forum shopping in dispute resolution. Finally, the article identifies policy considerations for a future multilateral investment framework. The article concludes that the World Trade Organization (WTO) has the opportunity here to incorporate years of experience of bilateral and regional investment agreements and develop a multilateral agreement for investment. Such an agreement in the WTO context would not replace current investment regulatory regimes, but could clarify the relationship among the General Agreement on Trade in Services, the Agreement on Trade-Related Investment Measures, and bilateral investment treaties.



**LESSONS IN EXTRATERRITORIALITY: BUILDING  
TRANSNATIONAL MODELS OF COMPLIANCE FROM  
AVIATION SAFETY TO AVIATION EMISSIONS**

‘Course Correction: Strategies for Changing Times’, 2009 Annual Meeting and  
Conference of the ABA Forum on Air & Space Law, Chicago, IL, Sept. 24-25, 2009  
(forthcoming Sept. 2009)

**ABSTRACT**

**Roncevert D. Almond**

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Roncevert D. Almond is an associate attorney at The Wicks Group, PLLC, a boutique firm in Washington, DC specializing in international aviation law. He received a J.D. (Cum Laude) and M.A. in Political Science from Duke University as well as a B.A. (Cum Laude) in History from the George Washington University. Mr. Almond has held numerous positions in political campaigns including Obama for America, Hillary Clinton for President and John Kerry for President. He has also worked with the U.N. Special Court for Sierra Leone and participated in the Duke-Geneva Institute for Transnational Law and the Oxford-GW Human Rights Law Program. His published work includes articles in journals such as *Hazmat Packager & Shipper*. He can be reached at [almond@wicks-group.com](mailto:almond@wicks-group.com).

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This article outlines lessons from the extraterritorial application of international law in the field of aviation safety in anticipation of increased environmental regulation of international aviation emissions. It does so by employing a horizontal analysis linking the fields of international law and international relations. The objective is to identify an ideal compliance model from which international lawyers can measure their efforts in constructing transnational legal regimes. Borrowing from constructivist and institutional theories, we can identify stages in the transnational legal process and understand the incentive structure underlying institutional cooperation in order to build regimes that facilitate compliance with international law.

This inquiry into the development of compliance models is necessary in light of the legal and political tumult regarding conflicting proposals to regulate international aviation emissions. The international environmental regime advocates a consensus decision-making and defers to the International Civil Aviation Organization (ICAO) in addressing international aviation issues such as emissions. ICAO has further urged members to not apply emissions trading systems on other member’s operators except on the basis of “mutual agreement” between those states. In contrast, the European Union is aggressively challenging the current international order by unilaterally exerting extraterritorial jurisdiction to enforce environmental standards. By 2012, all foreign carriers operating to the EU will be subject to its Emission Trading Scheme (ETS).

The United States has similarly asserted extraterritorial jurisdiction when proposing a new enforcement mechanism regarding international aviation. The U.S. unilaterally instituted an in-country audit program to assess a state’s adherence to safety oversight standards under the Chicago Convention (1944) before allowing its carriers to fly to and from the U.S. territory. While initially controversial, ICAO, contracting states and transnational actors have come to accept, imitate and rely upon the U.S. model of

enforcement. The result has been the construction of a transnational enforcement process to ensure safety compliance. While not ideal, and exposed to potentially damaging inefficiencies, the international aviation safety regime has increased the propensity for compliance with standards under the Chicago Convention.

The international aviation community should work with the existing international environmental regime in developing a transparent and coherent treaty regime for governing international aviation emissions. It may be argued that achieving broad political consensus on environmental matters is more difficult than in an issue area like aviation safety. While the elegance and efficacy of the international aviation safety regime may seem apparent now, the view in 1944 was likely different. What is important is that the Chicago Convention established an elastic treaty regime that offered avenues for state cooperation and interdependence, institutional development, and an authoritative basis for launching a transnational legal process.

**OBLIGATIONS OF THE NEW OCCUPIER:  
THE CONTOURS OF A *JUS POST BELLUM***

Loyola of Los Angeles International and  
Comparative Law Review, Vol. 31, No. 2, 2008

**ABSTRACT**

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*Jus post bellum* derives its name from two existing bodies of law: *jus ad bellum* and *jus in bello*, which are applicable, respectively, to the initiation of war and to conduct in war. In this article I assess whether the law of occupation is a workable point of departure for a *jus post bellum*. I then comment on what theory of peace informs *jus post bellum*, and I conclude with some suggestions on the scope and content of a *jus post bellum*, emphasizing the role of human rights, multilateralism, and economic reconstruction. In particular, I argue that *jus post bellum* should be based on the emerging norms of accountability, stewardship, good economic governance, and proportionality. *Jus post bellum* triggers principles in play in periods after armed conflict, moving away from war (*ab bello*) towards justice (*ad justitiam*) and peace (*ad pacem*). *Jus post bellum* expands the traditional binary rules of international law into a tripartite system, which will bring the law into closer conformity with the challenges presented by the peace-making, peacebuilding, and post-conflict practices of today.

# **CRIMINAL PROCEDURE REFORM IN BOSNIA AND HERZEGOVINA: BETWEEN ORGANIC MINIMALISM AND EXOGENOUS MAXIMALISM**

## **DRAFT ARTICLE ABSTRACT**

**Christopher P. DeNicola**

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Before the disintegration of the Socialist Federal Republic of Yugoslavia in 1991, Bosnia and Herzegovina ("BiH") employed a coherent, official inquiry approach to criminal justice that was easily classifiable as "civil law." Its criminal courts deployed investigative judges to investigate serious crimes and trial judges, rather than adverse parties, drove criminal trials in an effort to obtain the material truth. After internecine warfare engulfed the country in the 1990s, criminal proceedings in BiH broke down and courts routinely violated individuals' human rights with ethnically biased prosecutions. In an effort to rebuild BiH's battered criminal justice system, in 2002, the Office of the High Representative ("OHR") aggressively promoted a new, more adversarial criminal procedure code heavily influenced by the mixed common and civil law procedures of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"). Ultimately, Paddy Ashdown, the High Representative, used his vast executive powers to impose this new criminal procedure code on BiH in 2003.

OHR's 2003 criminal procedure code upended BiH's civil law tradition and injected a plethora of common law-oriented procedures into the country. It abolished investigative judges, introduced plea bargaining, and reshaped trial procedures to make the parties, rather than judges, the main trial participants. These extensive changes bewildered Bosnian legal professionals, defendants, and victims because they departed dramatically from the country's historic approach to criminal justice.

Within post-war legal reform literature, some scholars advocate for "organic minimalism," an approach to legal reconstruction that requires rigorous study of a system's internal structure before introducing any reforms. Building on this scholarship, this Article argues that policy makers should perceive their options for legal reconstruction as running along a continuum from organic minimalism to what this Article calls "exogenous maximalism." In other words, they should regard their choices for post-war legal reform as existing between two poles—one centered around careful, historically consistent change, and the other embracing revolutionary transformation.

Applying this analytical framework to OHR's restructuring of BiH's criminal procedures, this Article argues that OHR's sweeping reforms were closer to exogenous maximalism

than organic minimalism. Nevertheless, its reforms were not wholly revolutionary because they allowed a few civil law remnants to remain, such as the free evaluation of evidence.

This Article proceeds by reviewing BiH's legal history, which reveals its entrenched civil law legal culture. Next, it provides comparative context by examining the ICTY's own experience with mixed common and civil law procedures and argues that the ICTY's procedures have similarly bewildered legal professionals and others reared in the civil law tradition. It continues by analyzing OHR's drafting process that led to its imposition of BiH's new criminal procedure code in 2003. Ultimately, this Article argues that OHR's approach to criminal procedure reform was inefficient and detrimental to the prosecution of war crimes in BiH. It contends that if OHR had embraced organic minimalism, its code would have been more readily adopted by Bosnians and thus would have been less likely to violate defendants' fair trial rights. Nevertheless, this Article counsels against abandoning the 2003 code in light of the immense time and resources that local and international actors have poured into its implementation over the past six years. Instead, this Article offers several proposed solutions that would enhance the code's reception, such as educational reform, judicial guidelines, amendments to the code, and the creation of a Supreme Court of BiH.

**ADJUDICATION DEFERRED:  
COMMAND RESPONSIBILITY FOR WAR CRIMES AND U.S.  
MILITARY JUSTICE FROM MY LAI TO HADITHA AND BEYOND**  
*Nationalities Papers* Vol. 37 No. 6, (forthcoming, 2009)

**ABSTRACT**

**William C. Peters**

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The international law doctrine of command responsibility is more clearly stated than consistently applied. A development of customary international law that is now codified, it is intended to establish a level of order for the sustained violence endemic to war. Even state militaries of fully mature Western democracies demonstrate difficulty appreciating the importance of command responsibility and applying its law. Courts-martial practice in the United States under the Uniform Code of Military Justice (UCMJ) has proven inadequate to adjudicate allegations of war crimes involving members of the US armed forces. Despite thorough investigations of US involvement in a number of war crimes extending back to My Lai, the military services have systemically avoided taking cases to trial. If the United States joins the International Criminal Court, the rule of complementarity will compel positive change to how the US processes allegations of war crimes under the UCMJ. To address this adjudication deficiency, Congress should create a position of Special Prosecutor for War Crimes, as legal advisor to the military service secretaries. Such a prosecutor, prepared to bring war crimes cases to trial if necessary where the uniformed military does not, would serve as a much needed backstop to the current system of US military justice.

## **THE ARMS TRADE TREATY: ZIMBABWE, THE DEMOCRATIC REPUBLIC OF THE CONGO, AND THE PROSPECTS FOR ARMS EMBARGOES ON HUMAN RIGHTS VIOLATORS**

### **Abstract**

Paper presented at the Annual Meeting of the Research Committee on Sociology of Law, July 8, 2009. Oñati International Institute for the Sociology of Law. Antigua Universidad del Pais Vasco, Oñati, Gipuzkoa, Spain

**David B. Kope, Paul Gallant and Joanne D. Eisen**

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Advocates of the proposed United Nations Arms Trade Treaty (ATT) promise that it will prevent the flow of arms to human rights violators. This paper first examines the ATT, and observes that the ATT, if implemented as promised, would require dozens of additional arms embargoes, including embargoes on much of Africa. The paper then provides case studies of the current supply of arms to the dictatorship in Zimbabwe and to the warlords in the eastern Democratic Republic of the Congo (DRC). The paper argues that the ATT would do nothing to remediate the conditions which have allowed so many arms to be acquired by human rights violators in Zimbabwe and the DRC. The ATT would have no more effective force than the embargoes that are already imposed by the UN Security Council; therefore states, including China, which violate current Security Council embargoes could just as well violate ATT embargoes. Accordingly, the ATT is a distraction, and human rights activists should instead examine alternative methods of addressing the problem of arms in the hands of human rights violators.

**FIGHTING LEGAL WINDMILLS AFTER BLACKWATER  
PRIVATE MILITARY CONTRACTORS, ACCOUNTABILITY,  
AND THE GENEVA CONVENTIONS**

Paper, presented at the 104<sup>th</sup> Annual Meeting of the American Political Science Association, held in Toronto, Canada, on September 3-6, 2009, at a panel on Dilemmas in Private Security, Past and Present.

**ABSTRACT**

**Tom Syring**

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The outsourcing of tasks formerly exclusively executed by the armed forces to so-called private military contractors has increased significantly over the past few years, often without being sufficiently regulated by law.

At the latest since the allegedly unprovoked shooting and killing of numerous civilians at Nisour Square in Baghdad, Blackwater, one of the private security companies providing protection to US diplomats and other top officials throughout Iraq, has become a face of the legal pitfalls and loopholes in regard to immunity issues. While providing services akin to the armed forces, such contractors are often neither subject to their country's national military codes, nor civil penal codes (as the criminal conduct, taking place abroad, often falls outside the reach of domestic criminal law), and yet are sometimes also exempted from prosecution in the country they are deployed to. As for private US contractors in Iraq, an exemption issued by the US authority prior to handing over sovereignty to Iraq granted them immunity from Iraqi laws and even without such exemption, a war-torn country would often not have the resources to actually try (foreign) perpetrators in its courts.

To be sure, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 outlaw certain behavior, whether committed by state or non-state actors. Common Article 3 of the Geneva Conventions e.g. prohibits "violence to life and person, in particular murder of all kinds" and numerous other perpetrations and states that "each party to the conflict" is bound to refrain from such acts. Furthermore, also non-state actors may be internationally prosecuted for war crimes, crimes against humanity, and genocide (cf. e.g. Articles 1-5, ICTY Statute, Articles 1-4, ICTR Statute, and Articles 5-8, Rome Statute of the ICC, respectively). But, owing to certain restrictions in regard to the (*ad hoc*) international criminal tribunals' personal, territorial, and temporal jurisdiction, the (permanent) International Criminal Court's capacity limits (even at full capacity no more than maybe a dozen cases could be handled by that Court), and the international courts' general confinement to punishing only those 'most serious crimes', international prosecution would still be the exception and not available for the majority of offences. For those, national jurisdictions are primarily supposed to enforce

accountability. However, where neither the national criminal or military courts of the employing country, nor an international court institutes proceedings (which, as pointed out, even in the distant future would only in exceptional cases be an option), the result may be that a private military contractor committing a serious offence abroad might evade punishment altogether – as has happened in the past.

Where adequate accountability mechanisms are altogether lacking, or in any case only half-heartedly enforced, the question is why? Does *de facto* immunity in such cases represent a random mistake where one simply failed to see the consequences, or did it form part of a conscious policy or even strategy, maybe even with a view to circumvent the rules governing International Humanitarian Law by outsourcing responsibility for observing those rules, including the Geneva Conventions? Why do we even have private military contractors? What is the justification for employing them in the first place (as opposed to having the regular armed forces execute those military tasks), and even more importantly, what is the justification offered (if any), for exempting such contractors from laws applicable to regular armed forces, or other means of accountability? Has there e.g. been a perceived need to bypass established rules of engagement in the face of a new enemy and changing types of warfare, including suicide bombers, which led to the increase of employing security contractors without obliging them to abide by the same set of rules and holding them accountable to the same standards? These questions are what this paper seeks answers to, thus aiming at eliminating some of the legal windmills and upgrading the juridical lance.