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### The Internet is Changing International Law

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# THE INTERNET IS CHANGING INTERNATIONAL LAW

HENRY H. PERRITT, JR.\*

## INTRODUCTION

The Internet is changing international law because it is eroding the dominance of traditional sovereign states at the same time that it facilitates new institutional mechanisms for making, applying, and enforcing law. I have explained elsewhere how the Internet threatens traditional sovereignty<sup>1</sup> and how the Internet itself can be a new kind of sovereign.<sup>2</sup> This article explains how the Internet influences the operation of other international institutions for making, applying, and enforcing law, thus changing the forms and content of international law.

The article begins by explaining the traditional distinctions among different types of international law and arguing that those distinctions are becoming less meaningful. Part II describes some of the major international institutions, to illustrate the rich set of law-making and law-applying institutions that guide the evolution of international law. Sometimes, scholars of international law talk as though public international law were the only “real” category of international law, thus marginalizing law related primarily to international institutions or to private international law. Part I of this article, explaining the erosion of the distinctions among international law categories and describing the international institutions, should make clear that this temptation is one to be resisted. Indeed, sovereignty itself is becoming a diffuse concept, and understanding international

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1. See generally Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT’L LEG. STUD. 155, 156-71 (1997).

2. See generally Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L. J. 413, 437-63 (1997).

law as the body of norms and institutions guiding states must necessarily be enlarged to accommodate new kinds of nongovernmental organizations ("NGOs") performing traditional sovereign functions. Part III of the article explains the NGO phenomenon.

Within Part III, the article draws theoretical direction from "regime theory." Regime theory offers a synthesis that explains some of the major trends in international law. That synthesis suggests that democratization increases the potency of international law and that cultural diffusion and interpenetration of formal legal decisions and norms erode geographically based boundaries.

Part III of the article focuses mainly on the effect of the Internet. It argues that the Internet accelerates all the phenomena shaping international law by making it easier to access norms, that it facilitates legal harmonization by improving access to models, that it improves the operation of norm forming institutions, that it improves the operation of enforcement institutions, and that it strengthens NGOs.

The result will be a rich body of international law that comes into play in almost every public or private dispute, made more accessible by the Internet. The international political arena now is more varied and open because of the strengthening of international law making and law applying institutions. The strengthening of NGOs adds new actors to political and legal processes at the international level, and these new actors carry international norms to domestic political and legal institutions. The Internet represents a new tool for these new actors to use in the new arena. Because of low barriers to entry, the new tools are less subject to monopoly control by states.

The final Part of the article summarizes necessary conditions for the Internet to have this effect, emphasizing freedom of access to public information and a competitive structure at every level of the "stack" of communications and content elements of the world's telecommunications and information infrastructure.

In a comment published in this volume, Professor Jack Goldsmith challenges these propositions.<sup>3</sup> I was quoted in the New York Times in early 1998, referring to Professor Goldsmith: "Jack's skepticism is useful because it forces some intellectual discipline on the rest

3. See Jack H. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1127-31 (1998) ("Fallacy III: Optimism About Cheap, Plentiful Information").

of us.”<sup>4</sup> I said that and still believe it. Professor Goldsmith is constructive in his skepticism that the Internet will change the direction of international law development. His skepticism forces greater discipline on my argument. But he gets the point of my article wrong. The article does not argue that the Internet will change the direction in which international law is evolving; it argues that the Internet will accelerate evolution already underway because of other forces. Harmonization, greater transparency, more democracy, and greater influence by entities and groups of both supranational and subnational scope already are quite evident. The Internet simply reinforces them.

### I. WHAT IS INTERNATIONAL LAW?

Three sources of international law exist: treaty law, customary international law (“CIL”), and universal law or *Jus Cogens*. The first two sources are consensual. A sovereign state can opt out by refusing to sign a treaty or by manifesting its lack of consent for a norm of customary international law. *Jus Cogens* is binding on all states regardless of their consent. Because of the unresolved controversies over the source and legitimacy of international law—positivist in the sense of based only on the legislative acts of sovereign states, or somehow more generally based on the consent of the world community or some body of natural law—many scholars dispute the existence of *Jus Cogens*.

A treaty is a contract among sovereign states. Like contracts, many treaties not only establish norms, but also provide mechanisms for delegated rule-making, adjudication, and enforcement. The United Nations Charter is an example of a fairly complete treaty. Treaties also can be irrevocable, as many view the constitutional documents of the European Union, beginning with the Treaty of Rome. In certain respects, treaty law is like contractual or statutory law expressed through documents. Customary international law is like the common law in some important respects. It is not expressed in a document such as a treaty, but develops through the conduct of states accompanied by *Opinio Juris*—a desire that the conduct give rise to a binding norm. Unlike the common law, however, it is not a product of judicial interpretation in the first instance, but rather the

4. Carl S. Kaplan, *How to Govern Cyberspace: Frontier Justice or Legal Precedent?*, N.Y. TIMES CYBER L.J., (Mar. 27, 1998) <<http://search.nytimes.com>>.

actual practice of those who eventually become obligated to continue their practice. It is thus equivalent to the doctrine in American labor law that a sustained practice by labor and management supports an inference that they intend their contractual relationship to include an obligation to continue the practice,<sup>5</sup> and the concept in contract law that a course of dealing between contracting parties supports an inference of the interpretation they give their contract.<sup>6</sup>

Because customary international law is consensual, states can exempt themselves from a norm of customary international law by manifesting an intent not to be bound by it. While customary international law ordinarily addresses relations only between states, there are some judicial expressions of the possibility that persons may enjoy rights created by customary international law.<sup>7</sup>

The growing importance of customary international law, along with treaty based law, has spawned a lively debate in American legal literature as to whether federal courts should incorporate customary international law into federal common law. Professor Goldsmith, who writes elsewhere in this volume, has challenged the appropriateness of such incorporation, arguing that it upsets the constitutional balance by thrusting federal courts into a law-making role that should be reserved to the political institutions of American government.<sup>8</sup> Regardless of which side of the argument one finds most persuasive, the argument would not be interesting without the emergence of customary international law as a potent political and legal force.

International law conventionally is divided into public international law, which regulates conduct among states (including the law of war), and private international law.

5. [I]t is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When long-standing practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective-bargaining agreement itself.

Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R., 802 F.2d 1016, 1022 (8th Cir. 1986).

6. See RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

7. See *The Paquette Habana*, 175 U.S. 677, 708-09 (1900).

8. See Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (arguing that customary international law should not be treated as federal law without authorization from the political branches).

## A. Public International Law

### 1. State-Centric Tradition

Traditional international law regulated relations among states, while domestic ("municipal") law regulated relations between persons and between persons and states.<sup>9</sup> The UN Charter reinforces this dualist notion by expressly preserving domestic jurisdiction.<sup>10</sup> The limited nature of public international law is expressed more precisely in the ideas (1) that only states and not persons enjoy rights under international law and have standing to enforce them and (2) that only states and not persons have obligations under international law. Increasingly, treaties to which states are parties obligate the states to enact laws imposing obligations on private citizens. The new Organization for Economic Co-operation and Development ("OECD") treaty on international bribery is a good example: "Each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person . . . to offer . . . any undue pecuniary or other advantage . . . to a foreign public official . . . in order to obtain . . . improper advantage in the conduct of international business."<sup>11</sup>

### 2. Law of War

The Law of War traditionally governed the conduct of military forces in armed conflict.<sup>12</sup> Human rights law gradually is being integrated into the body of law applied by military authority, to protect civilians against conduct by military personnel and to protect civilians against other civilians in peace keeping and peace enforcement operations (known in military circles as "Military Operations Other

9. The antecedents of this dualist theory of international law can be understood better by recalling that international law arose in an era in which state sovereignty was vested in individual sovereigns who negotiated arrangements with other individual sovereigns, making up a web of contracts among kings. Legal relations among kings could be distinguished from legal relationships among their subjects.

10. See U.N. CHARTER art. 2, para. 7 (renouncing authority to intervene in domestic jurisdiction of states).

11. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1, para. 1; *OECD Convention on Combating Bribery of Foreign Public Officials* (visited Jan. 20, 1999) <<http://www.oecd.org/daf/cmib/bribery/20nov1e.htm>>.

12. See Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3 (Department of the Army Pamphlet 27-50-288) (explaining history of law of war). See generally RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45-71 (1995) (reprinting "General Order 100" published during the U.S. Civil War as a restriction on military conduct toward civilians).

than War ("MOOTW")).<sup>13</sup> The law of war is becoming a bridge between its state-centric origins and newer notions of human rights law. While the source of the law of war is customary international law and treaty law in the Geneva Conventions, it is usually expressed in Rules of Engagement, promulgated and enforced by military authority in the field.<sup>14</sup>

### 3. Human Rights

For centuries human rights were protected by public international law in the sense that certain conduct by State A against citizens of State B violated State A's obligations to State B under international law. In the twentieth century, however, human rights law extended to protect citizens from their own governments, thus significantly increasing permeability of the boundary between international and domestic law. Such human rights concepts had their roots in the Law of War, discussed *supra*, and flourished after the post-World War II Nuremberg and Japanese War Crimes Tribunals applied human rights norms against individual German and Japanese officials, after adoption of the UN Charter and the Universal Declaration of Human Rights. Human rights concepts reached a new plateau with the 1975 Helsinki Accords and the 1994 establishment of the Yugoslav War Crimes Tribunal by the UN Security Council.

One of the unsuccessful arguments made by Nazi war criminals before the Nuremberg Tribunal was that they could not be found guilty of violating norms against genocide and mistreatment of non-combatants in war time because those obligations only bound states. The Nuremberg Tribunal held that the norms also bind individuals. In the *Kadic* case, the Second Circuit held that international human rights norms also create rights that can be asserted by individuals at least when national law so provides,<sup>15</sup> and that international law imposes obligations on individuals as well as states.<sup>16</sup> In addition to

13. Contrast Whitaker, *supra* note 12, at 17 n.112, with *id.* at 18 n.123 (noting that international law does not obligate peace keeping forces to take on all the responsibilities of a host government).

14. See Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 52 & n.83 (1996). Colonel Warren describes concepts and procedures for formulation of rules of engagement in MOOTW. See *id.* at 51-52.

15. See *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1996), *rev'g*, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

16. See *id.* at 239. See generally Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) (arguing for individual rights approach modeled on standing analysis under Administrative Procedure Act).

these common law and customary law developments, the International Covenant on Civil and Political Rights clearly creates rights owned by individuals and enforceable against individuals.<sup>17</sup>

### *B. Private International Law*

Private international law encompasses the subject usually known to American lawyers as “conflict of laws.”<sup>18</sup> Somewhat whimsically criticized by John Austin as not really being “international” even though it admittedly constitutes “law,” this body of principles concerns the relationship among multiple sources of law originating in different sovereign states.<sup>19</sup> The principles typically affect the outcome of private lawsuits. For example: A, a citizen of Bosnia, may sue B, a citizen of Alabama, over a contract to perform computer services in Bosnia. Regardless of whether the suit is filed in Alabama Circuit Court, the U.S. District Court for the Northern District of Alabama, or a cantonal court in Bosnia, the court presented with the lawsuit must decide whether to apply Bosnian, Alabaman, or federal contract law. This is a “choice of law” problem.

Or, in the same contract dispute, a decision already may have been rendered by a Bosnian cantonal court in a suit brought by A. When B sues in Alabama Circuit Court, the Alabama court must decide whether to recognize the Bosnian judgment and if so, whether to give it preclusive affect or some lesser status. This is a judgment recognition and preclusion problem. Finally, in the foregoing example, B, seeking to avoid recognition, may claim that the Bosnian court did not have personal jurisdiction over him. In order to decide the recognition question, the Alabama court must determine limitations on the jurisdiction that may be asserted by the Bosnian court.

To a considerable extent, resolution of the choice of law and the personal jurisdiction questions implicate principles of state jurisdiction founded in public international law. The substantive law of state X cannot be applied to the controversy consistent with international law unless state X has prescriptive jurisdiction over the controversy. The personal jurisdiction issue cannot be resolved in favor of a de-

17. The Covenant obligates state parties to provide an “effective remedy” for violation of rights recognized by the Covenant. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(3)(a), 999 U.N.T.S. 171, 174.

18. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 21 (1991).

19. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2608-09 (1997) (review essay).



termination that the Bosnian court had personal jurisdiction unless Bosnia enjoys adjudicatory jurisdiction over the controversy, including the parties. Determination of these matters is greatly simplified by international arbitration when the parties exercise their power to select both the substantive law and the forum. There is a trend in the United States to respect party autonomy in choosing both substantive law and forum.<sup>20</sup>

### C. Unification of International Law

The boundary between public and private international law, though often treated as distinct, in fact, always has been indistinct.<sup>21</sup> At the time of Jeremy Bentham, international law involved the personal relations of sovereigns, while the subject matter of today's private international law was covered by municipal law.<sup>22</sup> Erosion of natural law theories in preference for positivism widened the gap, reflected in the tension between monism and dualism in international law theory.<sup>23</sup> Monists sought unification.<sup>24</sup> Dualists distinguished sharply between public international law as the law of relations between states—mocked by John Austin, as not really “law,” although it was international—and private international law as the law governing persons—mocked by Austin as not really “international” although it was “law.”<sup>25</sup> Whether international law is part of domestic

20. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991).

21. See Hongju Koh, *supra* note 19, at 2609 (strong blending of public and private remained key features of legal system even after Bentham and Austin began to lay the intellectual foundations of dualism); Paul, *supra* note 18, at 25-26 (explaining how European scholars sought to unify public and private international law even as Americans were separating them; conflicts can be understood as species of public international law by treating them as a limitation on state sovereignty).

22. See Mark W. Janis, *Academic Workshop: Should We Continue to Distinguish Between Public and Private International Law?*, 79 AM. SOC'Y INT'L L. PROC. 352 (1985) (moderated by Michael Cardozo).

23. See Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556, 561-62 (1996-97) (explaining monism and dualism).

24. See generally Bin Cheng, *Introduction to Subjects of International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 23, 25 (Mohammed Bedjaoui ed., 1991) (monists, “led by Hans Kelsen, believe that international and municipal law . . . [form] . . . a single normative system” because the ultimate subject of all law is the individual; dualists, led by H. Triepel and D. Anzilotti, believe they are distinct legal systems). Monism correlates with a natural law view. Dualism correlates with positivism. Monists believe national courts are obligated to apply international law; dualists believe they apply international law only when the national legislature has so provided. Thus there is a correlation between direct effect and monism.

25. See Janis, *supra* note 22, at 352.

law of a state is itself a question of domestic law.

Always, however, international commercial law straddled any gap between the two types of international law, because it regulates the activities of both individuals and states.<sup>26</sup> Admiralty was a strong example. Admiralty restricted the power of states against vessels belonging to nationals of other states. It also was a source of individual right against vessels belonging to other individuals. The growing importance of transnational business in the late decades of the twentieth century and the increasing emphasis on international human rights law in the same time period have stimulated a return to a more unified view.<sup>27</sup>

Now any principled distinction between public and private international law is even more difficult to draw. As Part III explains, customary international law, drawing not only from the practice of states, but also from trade practice, is giving rise to a body of transnational commercial law. Treaty based law is eclipsing customary international law as the most important source of law in the global context. Treaty based organizations such as the World Trade Organization ("WTO") and the International Telecommunication Union ("ITU") adjust rights and relationships among private actors and states and among private actors as much as they provide mechanisms that adjust disputes among states. In the trade arena, nonstate actors interact across national boundaries through international institutions such as the WTO and the World Bank, intensifying interpenetration of domestic and international legal systems.<sup>28</sup> It is less clear than it was fifteen years ago that compartmentalization of public international law and private international law is helpful.

The monism/dualism dichotomy is giving way in the international law literature to a more nuanced approach which recognizes both theoretical and practical problems confronting a judge who would directly apply international law.<sup>29</sup> Increasingly, domestic courts in the

26. See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 35 (1996).

27. See Janis, *supra* note 22, at 353.

28. See Hongju Koh, *supra* note 19, at 2624 ("By the 1970s and '80s . . . [t]he growth of international regimes and institutions, the proliferation of nonstate actors, and the increasing interpenetration of domestic and international systems inaugurated the era of 'transnational relations,' defined by one scholar as 'regular interactions across national boundaries arising when at least one actor is a non-state actor or does not operate on behalf of a national government or an intergovernmental organization.'" (quotations omitted)).

29. See Abdelkader Boye, *The Application of the Rules of International Public Law in Municipal Legal Systems*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note

United States are pressed to consider international legal norms along with purely domestic norms in deciding cases.<sup>30</sup> Although some American courts have declared international law to be part of domestic U.S. law,<sup>31</sup> the more usual approach is to presume that Congress intends for U.S. statutory law to be interpreted as consistent with international law.<sup>32</sup> Well recognized principles determine whether treaties to which the United States is a party have "direct effect" (i.e. can be applied directly as sources of law in domestic cases), but otherwise reflect some reticence in wholesale incorporation of international legal norms into the domestic legal order.<sup>33</sup> Some states, however, directly and explicitly incorporate some or all of international law into their domestic legal systems.<sup>34</sup> One barrier to the application of international law in domestic court systems is the difficulty of gaining knowledge of international law.<sup>35</sup>

### Conclusion

Drawing from the use of different sources—treaties, customary international law, and *Jus Cogens*, and synthesizing the previously distinct categories of public international law, human rights law, and private international law, the body of international law now has become a relatively seamless web. Any given dispute may involve norms and institutional mechanisms originally associated with a separate source of law.

24, at 289.

30. See *Breard v. Greene*, 118 S. Ct. 1352, 1355 (1998) (holding that failure to assert Vienna Convention claim in state court waived it); *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (holding that Alien Tort Claims Act incorporates international law violations).

31. See *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 381 (S.D.N.Y. 1961), *rev'd on other grounds*, 376 U.S. 398, 422 (1964) (holding that international law may be part of U.S. law in some circumstances).

32. This follows the so-called "*Charming Besty* canon." See Curtis A. Bradley, *The Charming Besty Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998) (exploring U.S. constitutional implications of doctrine that U.S. statutes should be interpreted so as to be consistent with international law).

33. See *Breard*, 118 S. Ct. at 1355 (rejecting international law claim to prevent execution of prisoner; claim was waived by failure to present in state court); *In the Matter of Surrender of Elizaphan Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997) (denying extradition pursuant to arrest warrant issued by international tribunal).

34. See BULG. CONST. art. 5(4) (adopted 1991) (providing that international treaties ratified by Bulgaria have the force of domestic law and supersede contrary provisions of national law); KONST. RF art. 15 (adopted 1993) ("The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by law, the rules of the international treaty shall apply.")

35. See *Boye*, *supra* note 29, at 291.

## II. NORMS AND INSTITUTIONS

Any legal system comprises norms and institutions. These correlate with the primary and secondary rules of Hart.<sup>36</sup> International law is no exception. Historically, public international law emphasized norms more than institutions, although this had begun to change by the middle of the 19th century. Private international law emphasized institutions more than norms because of its deference to party autonomy. Private parties developed and expressed their own norms which then could be applied within an institutional framework defined by private international law.

Public international law has evolved from a fairly complete set of norms and a thin institutional framework into a much more complete set of norms and institutions to guide state behavior. Public international law institutions have evolved from a framework for political interaction into more complex institutions that apply law. Norms have existed since Grotius or before. Institutional arrangements for applying international law are no older than the turn of the century. While the League of Nations was a relatively complete institutional system, the League of Nations institutional structure was political more than legal. The UN charter takes on a more legal character and, as section B of this Part explains, other institutional arrangements for public international law in the trade area have proliferated in the last few decades. The World Trade Organization is a particularly clear example. Regional trade arrangements such as the North American Free Trade Association ("NAFTA") and the Mercosur are other examples. The European Union involves not only mechanisms for adjudicating disputes between states but also devolution of state sovereignty over disputes and rights of persons.

International arbitration was the first international public law institution. It originated in papal arbitration and grew in prominence in arbitration agreements that solved disputes resulting from the American Revolution and the War of 1812.<sup>37</sup> It reached a high-water mark of support in the post-Civil War Alabama arbitration, when an inter-

36. But see James Paul Maniscalco, Note, *The New Positivism: An Analysis of the Role of Morality in Jurisprudence*, 68 S. CAL. L. REV. 989, 1021 (1995) ("Raz does not fundamentally disagree with Hart's concept of a legal system of primary and secondary rules, but he fills in these relatively abstract terms with concrete definitions. This makes explicit the inherent interrelationships between rules which were not recognized by Hart.").

37. See Henry T. King, Jr. & James D. Graham, *The Origins of Modern International Arbitration*, 51 DISP. RES. J. 42, 42-48 (1996) (describing arbitration under Jay Treaty and Treaty of Ghent).

national panel awarded the United States damages against Great Britain,<sup>38</sup> which resulted in establishment of predecessors of the World Court shortly after the turn of the century.<sup>39</sup>

Private international law, conversely, began with institutional (or at least procedural) arrangements and evolved into concerns with transnational norms. This can be explained by the erosion of support for natural law views, and preference for positivist views of law. Unless sovereign states express their sovereign will in favor of international norms, none can exist. Accordingly, treaty frameworks had to be erected first, through which the sovereign will can be expressed, in order to “legislate” in the private law arena.

Now, harmonization supplements truly international private law norms. Through the process of harmonization, individual states adopt legal norms that are the same as those adopted by other states. The result is as if there were a single body of international private law or norms, but the source of the norms is the sovereign state and is, therefore, legitimate. There is, however, a body of private international law norms not originating in state legislation or common law: the growing body of the international commercial law applied by arbitrators and national courts looking to customary international law<sup>40</sup> and trade practice<sup>41</sup> as the source of norms.

While no comprehensive governmental institutions exist to make or enforce international law, treaty-based “regimes” exist in a number of specialized areas.<sup>42</sup> They exist, among other things, to facilitate the handling of mail from country to country, as in the case of the Universal Postal Union; to channel funds for development, in the case of the World Bank; to provide frameworks for periodic negotiation of new treaty provisions and to maintain a secretariat for existing

38. *See id.* at 48 (describing Alabama Claims Arbitration under Treaty of Washington).

39. *See* Stephen M. Schwebel, *The Performance and Prospects of the World Court*, 6 PACE INT'L L. REV. 253, 253-56 (1994) (providing history of international arbitration as precursor of international court); Heidi K. Hubbard, Note, *Separation Of Powers Within The United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 170 (1985-86) (describing history of international arbitration between states, dating back to Jay Treaty of 1794); *see also* Eric C. Bruggink, *The “Alabama” Claims*, 57 ALA. LAW. 339, 342 (1996) (describing early arbitration treaties).

40. Customary international law is based on the practice of states.

41. Trade practice is based on the practice of private traders.

42. *See Official Web Site Locator for the United Nations System of Organizations* (visited Feb. 11, 1999) <<http://www.unsystem.org/index8.html>> (containing a list of organizations within the United Nations system); *see generally* 2 UNITED NATIONS LEGAL ORDER (Oscar Schachter & Christopher C. Joyner eds., 1995) (providing a careful analysis of many of the organizations listed at <<http://www.unsystem.org/index8.html>>).

treaty provisions, in the case of the World Intellectual Property Organization ("WIPO"); and to administer treaty-based rules and to fill in the interstices, in the case of the International Civil Aviation Organization and the International Telecommunication Union. Other international regimes such as the OECD and the Group of Seven ("G7") simply provide frameworks for high level discussions on issues of mutual interest. These organizations are primarily economic in character. Other regimes focus on security matters, including the Organization for Security and Cooperation in Europe and the North Atlantic Treaty Organization ("NATO").

The UN plays both economic and security functions, with security matters centered in the Security Council, human rights matters delegated to the Commissioner for Human Rights, refugee matters delegated to the High Commissioner for Refugees, and social and economic matters within the province of the Economic and Social Council. The General Assembly plays an overall advisory function, and the Secretary General is the chief administrator.

In evaluating the institutions, it is useful to consider which ones perform which of the three traditional governmental functions: adjudication, rulemaking, and enforcement.<sup>43</sup> International rulemaking is manifested in two ways: treaties that simply express norms, and those that provide ongoing institutional mechanisms for further rule negotiation or delegate the authority to promulgate rules for treaty-authorized bodies.

Today, the web of treaty-based law provides a foundation for new trans-national legal mechanisms.

Anne Marie Slaughter puts it well:

The state is not disappearing, it is desegregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today's international problems—terrorism, organized crime, environmental degradation, money laundering, bank failure, and securities fraud—created and sustain these relations. Government institutions have formed networks of their own, ranging from the Basle Committee of Central Bankers to informal ties between law enforcement agencies to legal networks that make foreign judicial decisions more and more familiar.<sup>44</sup>

43. The adjudication, rulemaking, and enforcement functions correlate with the judicial, legislative, and executive functions of government.

44. Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997).

The institutions described in the following sections reflect and provide the mechanisms for this transgovernmental order.

### *A. Norm Treaties*

This section identifies treaty-based norms and considers more elaborate institutional arrangements to provide for future rulemaking, adjudication, and enforcement.

#### 1. Law of War Conventions

The Hague and Geneva Conventions express norms regarding the commencement of war and protecting noncombatants in war.<sup>45</sup>

#### 2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights obligates its signatories to recognize a number of enumerated human rights, ranging from self-determination, through non-discrimination and free expression to procedural due process.<sup>46</sup>

#### 3. Intellectual Property Agreements—Paris Convention, etc., Predating TRIPS

The Paris Convention harmonized standards for patent protection by signatories, the Rome and Berne Conventions did the same thing for copyright protection, and the Paris and Madrid Conventions cover trademarks.

### *B. Newer Multilateral Treaties Provide Institutional Frameworks: Global or Nearly Global Institutions*

The proliferation and strengthening of international law making and law applying institutions matter because they make international

45. Convention—Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 is the most comprehensive. The first Hague peace conference was held in 1899. The term “Geneva Conventions” refers to the four conventions of 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

46. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

law more sophisticated, translating abstract norms into concretely applicable rules. Anything, including information technology, that improves functioning of these institutions increases the influence and practical significance of international law.

### 1. United Nations

The United Nations ("UN") is the broadest international institution. It expresses important norms and provides global machinery for further rulemaking, adjudication, and enforcement.<sup>47</sup> Its members include some 185 nations, and membership in the UN is widely regarded as an essential attribute of being a sovereign state.<sup>48</sup> The UN's structure and powers are defined by the 1947 Charter, which has not been subject to material change since its original adoption.<sup>49</sup>

With respect to lawmaking, the General Assembly is widely regarded as being capable of articulating principles of customary international law,<sup>50</sup> although it lacks the power to adopt binding rules.<sup>51</sup> The Security Council regularly adopts prospective rules for particular threats to international peace and security.<sup>52</sup> Many subordinate bod-

47. See generally 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 1-32. The phrases "World Government" or "government" set off political alarm bells because they imply a loss of sovereignty. The phrases are used in this article in a purely descriptive sense, signifying performance of mandatory legal functions across sovereign boundaries. See generally Paul Szasz, *General Law Making Processes*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 69-107 (considering rulemaking); see also Carl-August Fleischhauer, *Inducing Compliance*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 231-241 (considers enforcement in the context of Security Council practice); Louis B. Sohn, *The UN System as Authoritative Interpreter of Its Law*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 229 (considers interpretation, the core of adjudication).

48. See Angeline G. Chen, *Taiwan's International Personality: Crossing the River by Feeling The Stones*, 20 LOY. L.A. INT'L & COMP. L.J. 223, 245 (1998) (referring to UN membership as indicator of sovereignty for Taiwan).

49. See U.N. CHARTER.

50. Customary international law is one of three sources of international law. Based on actual practice of states, it is distinguished from treaty law and *Jus Cogens*.

51. See Roger S. Clark, *United Nations Standards and Norms in Crime Prevention and Criminal Justice*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 287, 298 (1995) (implying lack of lawmaking power in General Assembly, by explaining how General Assembly exercises political influence over true lawmaking bodies); John A. Perkins, *The Changing Foundation of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 466 (1997) (arguing that the effect of consent should be understood as an acceptance of the General Assembly resolution).

52. One can argue that these rules are more remedy oriented in particular cases and thus more closely associated with adjudication than rulemaking. See, e.g., S.C. Res. 687, U.N. SCOR 2981st mtg. (1991) (post cease-fire Iraq resolution). UN Security Council Resolution 1244 authorizes an international "civil presence" in Kosovo with extensive powers to establish an interim civil government, necessarily including rulemaking powers. See S.C. Res. 1244, U.N. SCOR 4011st mtg. (1999).



ies of the UN also make rules, including the UN Committee on International Trade and Law ("UNCITRAL"), which has successfully promulgated a variety of model agreements and statutes in the international commercial law arena. (UNCITRAL makes rules only in the sense that UNCITRAL models are likely to be enacted by state legislative bodies.) Lawmaking in these contexts is usually different from lawmaking in legislative assemblies or administrative agencies with rulemaking power. Assemblies and agencies exercise power delegated to them through constitutions or organic statutes. The UN bodies, like most other international lawmaking institutions, constitute a forum in which state representatives can negotiate. Treaty negotiation is a rulemaking or legislative process, in the same sense that negotiation over the terms of a statute<sup>53</sup> or development of an agency rule<sup>54</sup> are legislative processes.<sup>55</sup> While the results of the UN's human rights enforcement activities have been mixed at best, its commitment to the concept, and the availability of the General Assembly as a debating forum, ensures that the UN cannot be ignored in the rule-making context.<sup>56</sup>

In the adjudication context, the International Court of Justice ("ICJ"), defined and established by the UN Charter, is available to adjudicate interstate disputes among nations. Although its use and speed has been widely criticized, the International Court of Justice has decided a number of disputes, compliance with its decisions is high, and there is a trend toward greater use of the ICJ.<sup>57</sup> Serious consideration is also being given to proposals for a permanent international criminal court.<sup>58</sup>

53. See generally Henry H. Perritt, Jr., *And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1049 (1984).

54. See Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L. J. 1625, 1631-32 (1986).

55. See Szasz, *supra* note 47, at 70-80 (enumerating norm setting processes in international arena and explaining that formulation of a treaty text is a negotiation process, resembling negotiation within national legislative processes).

56. See Hurst Hannum, *Human Rights*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 319-325 (arguing that UN has been very successful as a law-making institution in the human rights field).

57. See James H. Carter, *Perspective: Section Tribute to the United Nations*, 29 INT'L LAW. 295, 295-97 (1995) (Part I of the "Report on Improving the Effectiveness of the United Nations in Advancing the Rule of Law in the World" recommends that United States accede to ICJ jurisdiction.); Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 493-96 (1995).

58. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 416-29 (1998); James H. Carter, *Perspective: Section Tribute to the United Nations*, 29 INT'L LAW. 300, 300-01

Enforcement is intimately related to international security because both address the use of force. The UN Charter provides an overarching treaty law framework for almost any interesting intraregional security arrangement.<sup>59</sup> Moreover, the UN Security Council has strong enforcement powers, which regularly have been used since their establishment. Tens of thousands of peacekeeping troops are in the field at the present time, and UN efforts to pacify the former Yugoslavia have been notable.<sup>60</sup> Although the UN's enforcement record is mixed in Yugoslavia and Somalia, the Security Council's position under the Charter ensures its involvement in significant intraregional security arrangements. The UN's potential as an enforcement institution could be enhanced by the organization of an Article 43 military force that could be used more effectively by the Security Council or implementation of proposals for international police forces.<sup>61</sup>

## 2. World Trade Organization

The WTO<sup>62</sup> was established by the Uruguay Round of Negotiations under the General Agreement on Tariffs and Trade ("GATT"). It is aimed at strengthening the rulemaking and adjudicatory func-

(1995) (Part II addresses the International Criminal Court); Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27 (1996) (suggesting that longstanding U.S. objections to court can be overcome); Michael P. Scharf, Comment, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 167-70 (1995) (noting the majority of UN member nations support a permanent international criminal court as opposed to ad hoc international tribunals).

59. Chapter 8 of the Charter recognizes regional security arrangements, and contemplates their integration with Security Council activities. See U.N. CHARTER arts. 52-54. Article 23 of the UN Charter imposes an obligation to settle disputes by peaceful means, and article 52 obligates UN members "to make every effort to achieve specific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council." *Id.* art. 52, para. 2. Also, article 52 obligates the Security Council to encourage the development of dispute settlement through regional arrangements. See *id.* art. 52, para. 3. But Article 53 prohibits enforcement action by regional arrangements "without the authorization of the Security Council." *Id.* art. 53, para. 1.

60. Peacekeeping missions differ from pacification missions such as Yugoslavia. See Olara A. Otunnu, *The Peace and Security Agenda of the United Nations: From Crossroads into the Next Century* (visited July 14, 1998) <<http://www.cgg.ch/olara.htm>> (paper published by Commission on Global Governance).

61. See ROBERT B. OAKLEY ET AL., *POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY* (1998); John F. Murphy, *What Ever Happened to the New World Order*, 19 S. ILL. U. L.J. 561, 564-65 (1995) (discussing and explaining advantages of permanent UN force under article 43 of the UN Charter); Henry H. Perritt, Jr., *Policing International Peace and Security: International Police Forces*, WIS. INT'L L.J. (forthcoming 1999).

62. See *WTO Website* (last modified July 10, 1998) <<http://www.wto.org>>.

tions of the international trade regime.<sup>63</sup> There are 134 signatories to the agreement that created the WTO, all of whom have agreed to the WTO's jurisdiction as defined in the Uruguay Round.<sup>64</sup>

The WTO's rulemaking functions derive from its responsibility for organizing multilateral trade negotiations, which specifically include recently completed negotiations over trade in computer software and chips, telecommunications, and financial services. Not only tariffs are impacted by these rules. The Agreement on Trade-Related Aspects of Intellectual Property annex to the Uruguay Round significantly harmonized copyright, patent, and trademark law on an international basis, and significantly changed American law in all three areas.<sup>65</sup> Obligations to give most favored nation and national treatment with respect to non-tariff as well as tariff impediments to foreign competitors represent a powerful lever to change national legislation and regulations.<sup>66</sup>

One of the major incentives to create the WTO was the need for stronger dispute settlement machinery. The WTO superintends a multi-level dispute settlement quasi-arbitration process that applies WTO rules, while leaving it to the national policy of member states to enforce decisions by imposing trade sanctions or stripping WTO membership.<sup>67</sup>

### 3. G7/P8

G7 was originally an informal collection of heads of state of the United States, Japan, Germany, Great Britain, France, Italy, the European Union, and Canada.<sup>68</sup> However, G7's activities are often

63. The World Trade Organization, established by the Agreement Establishing the World Trade Organization (part of the Uruguay Round), also has the power to interpret the WTO agreement by 3/4 vote of its members. See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125 (1994).

64. See *Organization Members* (last modified Dec. 21, 1998) <<http://www.wto.org/wto/about/organsn6.html>> (listing 133 members, 35 observers, and 7 observers to the General Council).

65. See *Final Act* (visited Jan. 13, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (providing link to Annex 1C to WTO agreement).

66. See *WTO Appellate Body Report on United States—Standard for Reformulated and Conventional Gasoline*, WT/DSD/9 (May 20, 1996), available in 1996 WL 908728.

67. See generally *Final Act* (visited Jan. 13, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (providing link to *Understanding on Rules and Procedures Governing the Settlement of Disputes*, annex 2 to WTO agreement).

68. The name G7 was first used after the London Summit of 1977. See *From G7 to G8* (last modified July 20, 1998) <[http://www.library.utoronto.ca/www.g7.what\\_is\\_g7.htm](http://www.library.utoronto.ca/www.g7.what_is_g7.htm)>.

extended to include Russia.<sup>69</sup> Lacking a formal organic statute or constitution, G7/P8 also lacks formal rulemaking, adjudicatory, or enforcement powers. Nevertheless, the high level at which it functions has positioned it well to articulate principles and norms in certain areas on an *ad hoc* basis, which other institutions then often translate into more detailed operational documents. Presently, focal points of G7/P8 members are to work out rules on terrorism and drug control, and to figure out how to regulate the Internet.<sup>70</sup>

#### 4. Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development ("OECD")<sup>71</sup> originally was organized to administer the Marshall Plan,<sup>72</sup> and comprises most of the developed countries.<sup>73</sup> Originally a consultative and advisory body only,<sup>74</sup> the OECD performed no formal treaty-making, adjudicatory, or enforcement functions; in the last decade, however, the OECD has emerged as a significant rulemaking forum.<sup>75</sup> For instance, the United States has relied on the OECD to begin working out a multinational policy on software encryption.<sup>76</sup>

69. Increasingly, the summit including Russia is simply referred to as "G8." See *id.* (explaining that G7 was called P8 when Russia joined discussions in 1994).

70. See generally *G7 Pilot Projects* (visited Jan. 13, 1999) <<http://www.ispo.cec.be/g7/projidx.html>> (describing information society projects arising out of Brussels summit). A committee of experts prepared material for higher level G7 consideration pertaining to harmful uses of the Internet. The author was a member of the committee of experts, and the author participated in the discussions referenced in the text.

71. See *OECD Online* (last modified July 14, 1998) <<http://www.oecd.org>>.

72. See generally *Convention on the Organization for Economic Co-operation and Development, PARIS 14th December 1960* (visited July 14, 1998) <<http://www.oecd.org/about/trans-ht/conventn.htm>>.

73. Members as of mid-1997 and their date of membership include: Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), New Zealand (1973), The Netherlands (1961), Norway (1961), Poland (1996), Portugal (1961), Spain (1961), Sweden (1961), Switzerland (1961), Turkey (1961), United Kingdom (1961), and United States (1961). See *OECD Online* (last modified July 14, 1998) <<http://www.oecd.org/about/membercountries.html>>.

74. See *About OECD: The OECD and its Origins* (visited July 14, 1998) <<http://www.oecd.org/about/origins.htm>>.

75. Nevertheless, the OECD is actively involved in working out a treaty on multilateral investment. See *The Multilateral Agreement on Investment* (visited Sept. 21, 1998) <<http://www.oecd.org/daf/cm/mai/mainindex.htm>>.

76. See *OECD, Report on Background and Issues of Cryptography Policy* (last modified Dec. 19, 1997) <<http://www.oecd.org/dsti/sti/it/secur/prod/crypto3.htm>> (discussing divergent national approaches). The author was actively involved in discussing U.S. policy with White House and agency officials during 1995 and 1996 and knows from those conversations that the U.S. government hoped to persuade the OECD to embrace an approach that requires key escrow. Those hopes were not realized.

The OECD also has undertaken the development of multinational rules for other aspects of electronic commerce, including digital signatures and a trusted third party infrastructure.<sup>77</sup>

OECD also has developed a mechanism for resolving disputes over nationalization of private investment.<sup>78</sup> The evolving OECD dispute resolution mechanisms supplement cumbersome machinery for ICJ adjudication over rights of foreign direct investors under Friendship, Commerce, and Navigation ("FCN") treaties.<sup>79</sup> It also simplifies arbitration over investment disputes under an elaborate web of bilateral investment treaties.<sup>80</sup> Commentators propose an OECD dispute resolution approach modeled on NAFTA, allowing investor-state arbitration in addition to state-to-state dispute resolution.<sup>81</sup>

### 5. World Intellectual Property Organization

The World Intellectual Property Organization ("WIPO")<sup>82</sup> ("OMPI" in French and Spanish) "was established by a convention signed at Stockholm on July 14, 1967, entitled 'Convention Establishing the World Intellectual Property Organization . . . ' [which] entered into force in 1970."<sup>83</sup> WIPO succeeded the functions of a variety of organizations originally established in the Paris and Berne conventions of the late nineteenth century.<sup>84</sup> WIPO is an intergov-

77. See *id.* (listing information technology security projects, including encryption).

78. See Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181 (1996).

79. See *id.* at 186-88 (reviewing experience in ICJ litigation over rights based on FCN treaties); see also *Combating Bribery of Foreign Public Officials in International Business Transactions—Text of the Convention* (last modified Dec. 11, 1998) <<http://www.oecd.org/daf/cmisis/bribery/20nov1e.htm>> (OECD Anti-Bribery Guidelines).

80. See Camponovo, *supra* note 78, at 192-93 (reviewing experience under bilateral investment treaty arbitration clauses).

81. See *id.* at 212.

82. See generally *WIPO Home Page* (visited July 14, 1998) <<http://www.wipo.org>>.

83. *WIPO History* (visited July 14, 1998) <<http://www.wipo.org/eng/general/wipo/wipo.htm>>.

84. The origins of WIPO derive from the adoption of the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. "Both Conventions provided for the establishment of an 'International Bureau' or secretariat. The two Bureaus were united in 1893 and functioned under various names until 1970 when they were replaced by the International Bureau of Intellectual Property (commonly designated as 'the International Bureau') by virtue of the WIPO Convention." *Id.* WIPO centralizes the administration of the various intellectual property "unions" in the International Bureau in Geneva—the secretariat of WIPO. Centralization ensures economy for the member states and the private sector concerned with intellectual property. "WIPO became a specialized agency in the United Nations system of organizations in 1974." *Id.*

ernmental organization with headquarters in Geneva, Switzerland; its principal function is rulemaking.<sup>85</sup> It is one of the sixteen specialized agencies of the United Nations' system of organizations.<sup>86</sup> WIPO promotes the protection of intellectual property throughout the world, and administers multilateral treaties dealing with the legal and administrative aspects of intellectual property.<sup>87</sup> The number of States that were members of WIPO was 171 as of September 21, 1998. In addition, six States were parties to treaties administered by WIPO but had not yet become members of WIPO.<sup>88</sup>

WIPO enjoys significant rulemaking responsibility and currently is the focus of US-stimulated efforts to negotiate a new multilateral

85. See Szasz, *supra* note 47, at 69.

86. WIPO has, since January 1, 1996, an agreement with the World Trade Organization (WTO), which is not a member of the United Nations system of organizations. The agreement provides for cooperation between the International Bureau of WIPO and the Secretariat of WTO in respect of assistance to developing countries and in respect of the notification and collection of the intellectual property laws and regulations of WTO members . . . .

WIPO History (visited July 14, 1998) <<http://www.wipo.org/eng/general/wipo/wipo.htm>>.

87. On January 1, 1997, WIPO administered the following Unions or treaties (listed in the chronological order of their creation): in the field of industrial property, the *Paris Union* (for the protection of industrial property), the *Madrid Agreement* (for the repression of false or deceptive indications of source on goods), the *Madrid Union* (for the international registration of marks), the *Hague Union* (for the international deposit of industrial designs), the *Nice Union* (for the international classification of goods and services for the purposes of the registration of marks), the *Lisbon Union* (for the protection of appellations of origin and their international registration), the *Locarno Union* (for the establishment of an international classification for industrial designs), the *PCT (Patent Cooperation Treaty) Union* (for cooperation in the filing, searching and examination of international applications for the protection of inventions where such protection is sought in several countries), the *IPC (International Patent Classification) Union* (for the establishment of worldwide uniformity of patent classification), the *Vienna Union* (for the establishment of an international classification of the figurative elements of marks), the *Budapest Union* (for the international recognition of the deposit of microorganisms for the purposes of patent procedure), the *Nairobi Treaty* (on the protection of the Olympic symbol), the *TLT (Trademark Law Treaty)* (for the simplification of formalities before trademark registries), and, in the field of copyright or neighboring rights, the *Berne Union* (for the protection of literary and artistic works) . . . the *Rome Convention* (for the protection of performers, producers of phonograms and broadcasting organizations; administered in cooperation with Unesco and International Labor Office (ILO)), the *Geneva Convention* (for the protection of producers of phonograms against unauthorized duplication of their phonograms), and the *Brussels Convention* (relating to the distribution of programme-carrying signals transmitted by satellite).

*Id.*

88. See *Cooperation with Developing Countries* (visited July 14, 1998) <<http://www.wipo.org/eng/general/wipo/wipo.htm#history>>; *World Intellectual Property Organization* (visited Jan. 29, 1999) <<http://www.wipo.org/eng/dgtext.htm>>. As of September 21, 1998, there were 171 member states in WIPO. See *WIPO Convention* (visited Jan. 29, 1999) <<http://www.wipo.org/eng/ratific/c-wipo.htm>>.

treaty extending copyright protection in cyberspace.<sup>89</sup> Regardless of the merits of the proposed treaties, WIPO has proven remarkable effectiveness as a forum for working out multilateral treaties in the intellectual property area. However, it lacks adjudicatory or enforcement powers.

## 6. UNCITRAL

The United Nations Commission on International Trade Law<sup>90</sup> was established in 1966 as a mechanism for removing obstacles to international trade arising from differences in commercial law between trading states. It has emerged as a powerful instrument for harmonizing transnational commercial law. Also, it has provided the mechanism for negotiation of model texts on: international commercial arbitration and conciliation, international sale of goods and related transactions, cross-border insolvency, international payments, international transport of goods, electronic commerce, public procurement, and international construction contracts.<sup>91</sup>

## 7. ICAO

The International Civil Aviation Organization<sup>92</sup> has formal legislative authority for governing civil aviation over the high seas and for setting certain airworthiness and logbook standards.<sup>93</sup>

## 8. ITU

The International Telecommunication Union<sup>94</sup> administers treaties relating to telecommunications and provides a framework for negotiating treaty amendments. The ITU's standards are one of the most effective forms of "soft law."<sup>95</sup> The ITU not only allocates radio

89. See *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (visited Oct. 21, 1998) <<http://www.wipo.org/eng/main.html>> (text of two proposed treaties adopted December 20, 1996).

90. See generally *UNCITRAL* (visited July 14, 1998) <<http://www.un.or.at/uncitral/index.html>>.

91. See *UNCITRAL—General Information* (visited July 14, 1998) <<http://www.un.or.at/uncitral/english/commiss/geninfo.htm>>.

92. See generally *International Civil Aviation Organization* (visited July 14, 1998) <<http://www.icao.int>>.

93. See Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 136.

94. See generally *International Telecommunication Union (ITU) Home Page* (visited July 27, 1998) <<http://www.itu.ch>>.

95. See Kirgis, *supra* note 93, at 152 (explaining that most states follow International Con-

frequencies and sets technical standards; it also resolves questions about allocating scarce geostationary orbit slots.<sup>96</sup>

## 9. DOALOS

The Law of the Sea Convention established the seabed tribunal, the United Nations Division for Ocean Affairs and the Law of the Sea.<sup>97</sup> “One of the most extraordinary features of the Convention is the decision . . . to provide for compulsory arbitration or adjudication of disputes.”<sup>98</sup>

## 10. Bretton Woods Institutions

The Bretton Woods conference at the end of World War II reorganized international machinery for financial cooperation, currency exchange, and capital markets. The two central institutions developed out of the Bretton Woods system are the World Bank and the International Monetary Fund.

### *a. World Bank*

The World Bank<sup>99</sup> exercises strong enforcement powers through its lending decisions. It has established an international center for settling international investment disputes through arbitration.<sup>100</sup> It exercises strong enforcement powers through its lending decisions.

### *b. IMF*

The International Monetary Fund<sup>101</sup> was created on December 27, 1945. Its purpose was:

sultative Committee on Telephone and Telegraph recommendations even though they are not binding in a formal sense).

96. See Francis Lyall, *Posts and Telecommunications*, in 2 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 789, 815-16.

97. See generally *Oceans and Law of the Sea Home Page* (visited June 27, 1998) <<http://www.un.org/Depts/los>>.

98. Bernard H. Oxman, *The Law of the Sea*, in 2 UNITED NATIONS LEGAL ORDER, *supra* note 42, at 671, 693.

99. See generally *The World Bank Group* (visited June 27, 1998) <<http://www.worldbank.org>>.

100. See *The International Center for Settlement of Investment Disputes* (visited July 30, 1998) <<http://www.worldbank.org/html/extdr/icsid.html>> (explaining Internal Center for Settlement of Investment Disputes, under 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

101. See generally *IMF, International Monetary Fund, IMF Home Page* (visited July 30, 1998) <<http://www.imf.org>>.



to promote international monetary cooperation; to facilitate the expansion and balanced growth of international trade; to promote exchange stability; to assist in the establishment of a multilateral system of payments; to make its general resources temporarily available to its members experiencing balance of payments difficulties under adequate safeguards; and to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.<sup>102</sup>

It has adopted a choice of law rules, which are widely applied by national courts.<sup>103</sup> The fund also exercises strong enforcement powers by its lending decisions,<sup>104</sup> as demonstrated in the recent Asian financial crisis.<sup>105</sup>

### 11. Basle Committee on Banking Supervision

The Basle Committee was established by the central bank governors in 1974 to address bank capital requirements.<sup>106</sup> It is a mechanism for cooperation, without possessing any formal supranational powers.<sup>107</sup>

### 12. Universal Postal Union

The Universal Postal Union early established a norm that mail not be inspected outside the country of origin which, while nonbinding as a formal matter, has become a customary rule honored almost everywhere.<sup>108</sup> The Berne Treaty Concerning the Formation of a General Postal Union, enacted on October 9, 1874, guaranteed a right of transit, and obligated signatories to forward closed mail by the

102. *Factsheet—International Monetary Fund (IMF) at a Glance* (visited June 27, 1998) <<http://www.imf.org/external/np/exr/facts/glance.htm>>.

103. See Kirgis, *supra* note 93, at 155-56 (explaining that the IMF interpretation of the Fund Agreement would have the effect of superceding inconsistent domestic choice-of-law rules if domestic courts of the member states adhere to the IMF interpretation).

104. See generally *Articles of Agreement—Article 18* (visited July 1, 1998) <<http://www.imf.org/external/pubs/ft/aa/aa18.htm>> (provides text of Articles of Agreement of the International Monetary Fund, Article XVIII: Allocation and Cancellation of Special Drawing Rights).

105. See Stanley Fischer, *In Defense of the IMF: Specialized Tools for a Specialized Task*, 77 FOREIGN AFF. 103 (1998) (probing role of IMF in Asian financial crisis).

106. See generally *BCBS Compendium, Volume 1: Basic Supervisory Methods* (visited July 30, 1998) <<http://www.bis.org/publ/bcbasc002.htm>>.

107. See *History of the Basle Committee and its Membership* (visited Feb. 11, 1999) <<http://www.bis.org/publ/bcbasc101.pdf>>.

108. See Kirgis, *supra* note 93, at 155.

most rapid routes within their command.<sup>109</sup>

### C. Regional Institutions

In some substantive areas, agreement may not be possible on a global basis; rather, it is achievable on a regional basis. Some problems exist regionally and not globally. A number of international treaties provide frameworks for further negotiation, for direct rule-making, and for adjudication at the regional level.

#### 1. European Union

The European Union<sup>110</sup> is nearly a federal government for Europe although the word “federal” engenders much controversy,<sup>111</sup> especially by the British who oppose strengthening community institutions at the expense of sovereign powers of member states. Defined originally by the Treaty of Rome, it included three separate communities: the European Economic Community, the European Iron and Steel Community, and the European Atomic Energy Community. The European Union was consolidated and strengthened by the Single European Act in 1986, and the Maastricht Treaty in 1992.<sup>112</sup> It is composed of a commission, exercising executive power; the European Parliament and the Council of Ministers, exercising legislative power; and the European Court of Justice,<sup>113</sup> exercising adjudicatory power. The Union’s rulemaking powers are extensive and profound. They have been used to revolutionize competition law

109. See Treaty Relative to the Formation of a General Postal Union, Oct. 9, 1874, art. X, 147 CTS 136 (printed in French). See generally Lyall, *supra* note 96, at 790 (noting that ITU and UPU are the oldest international organizations still operating).

110. See generally *Welcome to Europa* (visited July 30, 1998) <<http://europa.eu.int/index-en.htm>>; DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE* (1998) (explaining evolution of competition law as the motivating force for the development of the European Union).

111. See generally J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT’L L. & BUS. 354, 354-60 (1996-97) (referring to perception of constitutionalism); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466-83 (1991).

112. See *Consolidated Version of the Treaty Establishing the European Community* (visited Oct. 14, 1998) <<http://ue.eu.int/Amsterdam/en/traiteco/en/conso2/conso2.htm>> (link to Part Five—Institutions of the Community); *Consolidated Versions of the Treaties* (visited Jan. 13, 1999) <<http://ue.eu.int/Amsterdam/en/traiteco/en1.htm>> (major constitutional documents of European Union, defining powers and authorities of major institutions); *Institutions of the European Union* (visited Jan. 13, 1999) <<http://europa.eu.int/inst-en.htm>> (describing major institutions of European Union).

113. Trial level adjudication is the responsibility of the European Court of First Instance. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 28, 1986, art. 168a, *reprinted at* E.C. Bull. Supp. No.2 [hereinafter EC TREATY].

throughout western Europe, liberalize telecommunications, transform national into continent-wide labor markets, establish a monetary union, and begin the process of harmonizing private and criminal law throughout western Europe.<sup>114</sup> The adjudicatory powers of the European Court of Justice are complete. Its decisions are supreme over those of national courts on matters of European law, and its preliminary ruling jurisdiction regularly puts it in the position of deciding European law components of cases pending before national courts, thus determining the decisions of national courts.<sup>115</sup>

The Union's enforcement powers are limited, although theoretically they exist. There is no European police force, and the emerging aspiration to develop EU-based military capability within the Western European Union ("WEU") was dashed on the rocks of the break up of Yugoslavia. Nevertheless, national enforcement mechanisms are regularly and dependably used to effectuate decisions of EU institutions, and threats not to comply with European Union decisions are the exception rather than the rule.<sup>116</sup>

## 2. Council of Europe

Now forty members strong, the Council of Europe<sup>117</sup> established the European Convention on Human Rights<sup>118</sup> in the wake of World War II. It is independent of the European Union, although its membership overlaps substantially, and its founders essentially were the

114. Compare *The Amsterdam Treaty: A Comprehensive Guide* (visited Sept. 8, 1998) <<http://www.europa.eu.int/comm/sg/scadplus/leg/en/lvb/a09000.htm>> (explaining plans for evolution of European Union, adopted at 1997 Amsterdam intergovernmental conference), with P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 1-65, 73 (Laurence W. Gormley ed., 2d ed. 1990) (genesis and general aspects of European communities).

115. See EC TREATY, *supra* note 113, art. 169 (jurisdiction over state compliance with European law); *id.* art. 177 (jurisdiction over questions of European law referred by national courts); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-17 (1991) (explaining importance of doctrines of direct effect, supremacy, implied powers, and human rights, adopted by European Court of Justice). But see J.H.H. Weiler, *Bread And Circus: The State Of European Union*, 4 COLUM. J. EUR. L. 223, 227 (1998) (noting tendency of national courts to defy European Court of Justice); Weiler & Trachtman, *supra* note 111, at 354, 367 (discussing supremacy of European Court of Justice and growing resistance by national courts).

116. But see Alexander MacLeod, *British Battle Cry: Workaholics Unite!*, CHRISTIAN SCI. MONITOR, Nov. 13, 1996, at 6 (reporting British refusal to accede to European Commission directive to shorten work week).

117. See generally *Welcome to the Council of Europe* (visited June 27, 1998) <<http://www.coe.fr/index.esp>>.

118. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter Protection of Human Rights].

same as the founders of the three communities that have converged into the European Union. Its principal institutions are the European Court of Human Rights<sup>119</sup> ("ECHR"); the European Commission of Human Rights,<sup>120</sup> soon to be merged into a redefined court; and a Committee of Ministers.<sup>121</sup> Current members include most of the former communist countries in central and eastern Europe.<sup>122</sup>

The Council institutions<sup>123</sup> exercise significant lawmaking and adjudicatory—but not enforcement—powers. The convention itself defines basic norms of human rights,<sup>124</sup> and thus represents the exercise of significant rulemaking power by its signatories.<sup>125</sup> The Committee of Ministers has subordinate power to adopt declarations that represent new rules, which are advisory in nature.<sup>126</sup>

The Council of Europe acquired an increased role in European affairs after the Vienna summit in October 1993,

where the member states recognized how important it was for security and stability in Europe that all its countries should accept the principles of democracy, human rights and the rule of law. Under that general concern for democratic security, the Council of Europe has laid down a series of common principles governing the protection of national minorities, actively supported the democratic transition process and strengthened its machinery for monitoring its members' respect for their undertakings.<sup>127</sup>

119. *See id.* art. 19, para. 2.

120. *See id.* art. 19, para. 1.

121. Protocol 11 merges the two institutions.

122. In early 1997, there were forty members of the Council of Europe: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former "Yugoslav Republic of Macedonia," Turkey, Ukraine, and United Kingdom.

123. Council institutions include the Council of Ministers, a decision-making body; the Parliamentary Assembly, a deliberative body; and the Committee of the Regions, Congress of Local and Regional Authorities of Europe, a voice for local democracy. *See Welcome to Europa* (visited Sept. 22, 1998) <<http://europa.eu.int/index-en.htm>>.

124. *See* Protection of Human Rights, *supra* note 118, arts. 1-18.

125. The Council of Europe, its Secretary General, and its Committee of Ministers exist independently of the European Convention. The Convention was adopted by the Council and is integrated with it.

126. Under Article 15b of the Statute of the Council of Europe, the Council of Ministers adopts non-binding recommendations for member governments. The Committee of Ministers also "decides what follow-up should be given to proposals of the Parliamentary Assembly, the Congress of Local and Regional Authorities and the specialist ministerial conferences that the Council of Europe regularly organizes." *About the Council of Europe* (visited June 27, 1998) <<http://www.coe.fr/eng/present/about.htm>>.

127. *Id.*

The Council's Venice Commission<sup>128</sup> specifically focuses on enhancing the functioning of new constitutional courts, through publishing their opinions and otherwise.<sup>129</sup> Already, the Venice Commission has collected and published the full text of significant constitutional court opinions in paper formats and implemented a plan to move these opinions to CD-ROM and Web media in 1997. The Council has developed a conceptual topology or thesaurus to index opinions according to their subject matter. Implementation of that system presently requires significant human editorial effort. The author of this article has worked with the Commission and with member constitutional courts to use the Internet to improve the efficiency of its decision publishing operation.<sup>130</sup>

### 3. Organization for Security and Cooperation in Europe

The Organization for Security and Cooperation in Europe ("OSCE")<sup>131</sup> was established by the Helsinki agreement of 1975, as amended by the Charter of Paris of 1990. Its members include all the Council of Europe's member states, the United States, Canada, and the Asian republics which were formerly part of the old Soviet Union. Originally intended to be an advisory and conciliation organization with respect to disputes among states,<sup>132</sup> the OSCE increasingly has been drawn into operational intrastate roles, making rules for the Bosnian elections, assisting in the establishment and early functioning of the Bosnian ombudsman, and developing recommendations on the Serbian municipal elections.<sup>133</sup>

Its effectiveness has been high, and its potential is strong in the rulemaking and soft adjudication (mediation and conciliation) areas for both Rule of Law and interstate dispute resolution. There is no reason, however, to suppose that it will acquire its own enforcement

128. The European Commission for Democracy Through Law (the Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. See *The Work of the European Commission for Democracy Through Law* (visited Oct. 13, 1998) <<http://www.coe.fr/venice/venice.htm>>.

129. The Venice Commission is the popular name of the European Commission for Democracy Through Law, an activity of the Council of Europe. See Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT'L LEGAL STUD. 155, 184 (1997) (discussing Venice Commission and Web-based activities).

130. See, e.g., (visited Sept. 8, 1998) <<http://www.eceul.net>>.

131. See generally *OSCE Homepage* (visited Sept. 8, 1998) <<http://www.osce.org>>.

132. For background and description, see generally *OSCE—Vade Mecum 5/96* (visited June 27, 1998) <[http://www.fsk.ethz.ch/osce/osce\\_vae.htm](http://www.fsk.ethz.ch/osce/osce_vae.htm)>.

133. See *Serbia: Opposition Continues Protest* (visited Feb. 11, 1999) <<http://www.rferl.org/nca/news/1996/12/N.RU.961218174455.html>>.

resources. Still, one of the usual proposals for reform of the OSCE is to give it a larger staff of its own rather than obligating it to rely on volunteers from its members.<sup>134</sup> The OSCE did supervise the Bosnian elections, and this arguably is an example of the enforcement function, inasmuch as several hundred election observers were deployed to individual polling places in Bosnia. Even though their powers were limited to oversight and reporting, their presence no doubt enhanced compliance with the election rules. In charting its evolution, the OSCE has noted the desirability of close cooperation with NATO and the WEU.<sup>135</sup>

#### 4. North Atlantic Treaty Organization

The North Atlantic Treaty Organization ("NATO") was organized in the earliest days of the Cold War as a military alliance to offset Russian imperial ambitions in western Europe.<sup>136</sup> Governed by the North Atlantic Council, it has become a kind of enforcement arm for the United Nations Security Council in Bosnia, succeeding through the Implementation Force for Bosnia and the Stabilization Force in enforcing the Dayton Accords,<sup>137</sup> while the UN had failed through the UN Protection Force ("UNPROFOR") to enforce earlier cease-fires. In Bosnia, its role is purely one of enforcement, which complements all of the other international institutions that are marked by their lack of enforcement capacity. NATO has obvious capacity to become a regular enforcement tool for the UN and other international institutions, although such a change necessitates shifting its mission from predominantly a collective defense body into a collective security body,<sup>138</sup> and it would be awkward to project its force outside the European continent.<sup>139</sup> Basic alternatives for NATO's fu-

134. See *Chairman's Summary* (visited Sept. 8, 1998) <<http://www.osce.org/news/mc06ej02.htm>> (discussing proposals for improving OSCE effectiveness).

135. See *OSCE—Vade Mecum 5/96*, *supra* note 132.

136. See generally *NATO Official Homepage* (visited June 27, 1998) <<http://www.nato.int>>.

137. See Javier Solana, *NATO's Role in Bosnia: Charting a New Course for the Alliance*, 44 NATO REV. 3 (1996). Web edition available from <<http://www.nato.int/docu/review/>> (explaining how Combined Joint Task Forces initiative provided framework for Bosnia force, and proposing it as a model for future non-Article 5 operations outside the geographic area reserved for Article 5 operations).

138. But see *The Alliance's New Strategic Concept* (visited Sept. 8, 1998) <<http://www.nato.int/docu/comm/c911107a.htm>> at Part III [hereinafter 1991 Strategy Statement] (acknowledging basis under Article 4 for joint military operations outside the limits of Articles 5 and 6).

139. These and other reasons make NATO an unlikely general-purpose enforcement arm

ture were addressed at a meeting of the North Atlantic Council in Madrid, in 1997, resulting in new force structures.<sup>140</sup>

Regardless of limits on a more general enforcement role for NATO, it is becoming clearer that NATO is a crucial part of a new political structure "with muscle" to preserve peace and establish civil societies throughout Europe. NATO already has endorsed and embraced the OSCE as a close partner in a new structure for peace in Europe.<sup>141</sup> NATO's military capacity<sup>142</sup> and the flexibility of its authority under Article 4 to engage in peacekeeping and human rights activities<sup>143</sup> makes it a more interesting possible anchor for an intraregional security framework than other entities that lack coercive capability.

Thus, NATO is emerging as the obvious foundation for an intraregional security framework, but to understand NATO's potential requires clear thinking about the fundamental difference between two possible NATO roles. The first role—collective defense—dominated NATO's Cold War role. This role is expressed in Article 5 of the North Atlantic Charter which states: "The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all . . . ."<sup>144</sup> Everyone understands that Russia and its allies in Eastern Europe served as focal points for this defensive

for the UN. Within Europe, however, there are growing calls for NATO to change its mission from one of defending the West from attack from the East into one of providing a political structure for Europe. See Stanley R. Sloan, *Negotiating a New Transatlantic Bargain*, 44 NATO REV. 19, 21-22 (1996), reprinted in <<http://www.nato.int/docu/review/articles/9602-5.htm>> (urging that future mission and structure of NATO be settled before enlarging it; noting that non-article 5 military missions probably are not limited by the geographic constraints of Article 6); see also Vaclav Havel, *A Call to Sacrifice*, 73 FOREIGN AFF. 6 (Mar-Apr. 1994) (discussing possible expansion of NATO into a "Euro-Asian nuclear power").

140. See Sloan, *supra* note 139, at 20; see also 1991 Strategy Statement, *supra* note 138.

141. Professor Art notes that the evolution of NATO into a post-Cold War entity began with the London summit in July 1990, where one of four initiatives agreed to was the institutionalization of the then Council for Security in Europe ("CSCE") to provide a forum for a wider political dialogue in a more unified Europe "to strengthen the continent's only pan-European forum so that the Soviet Union would not feel excluded from Europe." Robert J. Art, *Why Western Europe Needs the United States and NATO*, 111 POL. SCI. Q. 1, 13 (1996) reprinted in <<http://epn.org/psq/robtart.html>>. Robert J. Art is director of the International Studies Program at Brandeis University.

142. NATO's military value derives from its integrated military planning and command structure rather than from the discretionary assignment of national forces to it. National forces can be assigned anywhere, but they cannot be used effectively absent an organizational infrastructure such as NATO has nurtured for fifty years.

143. The development of Combined Joint Task Forces, see Art, *supra* note 141, at 31, and the rationalization of a Eurocorps command structure which allows European initiatives with limited American involvement, see *id.* at 29, enhance this flexibility.

144. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246, available at <<http://www.nato.int/docu/basic/txt/treaty.htm>>.

alliance. But NATO's second role—collective security—is most important in the post-Cold War world.<sup>145</sup> Articles 1, 2, 3, and 4 of the original NATO treaty provide ample authority for a new NATO built on the collective security model.<sup>146</sup>

## 5. NAFTA

In addition to limiting restrictions on imports and exports, the North American Free Trade Agreement facilitates investment flows by imposing most-favored nation status and national-treatment obligations with respect to investors, restricting expropriation, and providing for arbitration of investment disputes.<sup>147</sup>

## 6. Common Market of the South: Mercosur

Mercado Comun del Sur arose from a treaty signed March 26, 1991, establishing a common market among the signatories as of 1994.<sup>148</sup> Participants currently include Brazil, Argentina, Paraguay, Uruguay, and Chile.<sup>149</sup> Economic integration under the treaty is governed by a council comprising ministers for economic affairs and central bankers of the signatories, and by an administrative arm composed of their representatives.<sup>150</sup>

## 7. APEC

The Asia-Pacific Economic Cooperation forum<sup>151</sup> has eighteen

145. Nearly fifty years ago, another shift occurred from a collective defense orientation to a collective security orientation, when the Western Union Defense Organization ("WUDO"), focused on defending against a German threat that later faded, and became the WEU as Germany was incorporated into NATO in 1954. See Art, *supra* note 141, at 21. In this context, NATO played a collective security role, a role that included Germany, while WUDO had played a collective defense role, a role that excluded Germany.

146. See North Atlantic Treaty, *supra* note 144, arts. 1-4, 34 U.N.T.S. at 244-46. The literature on NATO is consistent with the idea. See John R. Galvin, *From Immediate Defense Towards Long-term Stability* (visited July 3, 1998) <<http://www.nato.int/docu/review/articles/9106-3.htm>> and other articles in the NATO Review.

147. See Camponovo, *supra* note 78, at 195 (reviewing NAFTA's role in protecting foreign direct investment).

148. See Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041.

149. See Sergio Lopez Ayllon, *The Impact of International Trade Agreements in the Legal Systems of the American Continent*, 19 HOUS. J. INT'L L. 761, 765 (1997).

150. See also Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 143 (1995) (claiming Mercosur is one of the most successful subregional arrangements); James Stamps, *Free Trade Area for the Americas*, 5 NO. 10 MEX. TRADE & L. REP. 7, 9 (1995) (discussing the importance of Chile to Mercosur).

151. See generally *APEC Homepage* (visited July 3, 1998) <<http://www.apecsec.org.sg/>>.



members.<sup>152</sup> It was established at the end of the Cold War on the initiative of Australian Prime Minister Robert Hawke and United States President George Bush. Professor Peter Drysdale identified three preconditions for successful Asia-Pacific cooperation:

- (1) a rules-based international economic system;
- (2) continuing reform of the region's economies and politics;
- and
- (3) continued American engagement.<sup>153</sup>

At a conference in Seattle in 1993, heads of government identified the potential for APEC in the 21st century.<sup>154</sup> APEC has the potential to become a forum for considering development priorities in Asia, for working with the Asian Development Bank to assure that all can share in the region's economic growth, and for focusing attention on barriers to trade and growth. It also could evolve into a forum for dispute resolution on economic matters. It could help to set up common telecommunication standards, and help Asia move toward an open skies agreement that could lower fares for airline passengers and cargo and provide greater consumer choices over routes. It could also promote solutions to environmental problems.

The 1995 Osaka meeting was a major step forward, and this progress was reinforced by action plans developed in the 1996 Manila conference.<sup>155</sup> Together, the Osaka and Manila conferences resolved two major issues: (1) the question of comprehensiveness, resolved by an agreement to include all sectors in the goal of liberalization; and (2) the question of non-discrimination, essentially resolved by an aspiration toward equal treatment of China, still being worked out mostly in the context of American policy.<sup>156</sup> The Manila Conference

152. See *APEC—Member Economies* (visited July 12, 1998) <<http://apecsec.org.sg/member/apecmemb.html>> (members include: Australia, Brunei, Canada, Chile, China, Indonesia, Japan, Hong Kong, Malaysia, Mexico, New Zealand, Papua New Guinea, The Philippines, Singapore, South Korea, Chinese Taipei, Thailand, and The United States).

153. See Peter Drysdale, *The APEC Initiative: Maintaining the Momentum in Manila*, 2 ASIA-PACIFIC MAG. 44 (May 1996). Peter Drysdale is Professor in the Economics Division, Research School of Pacific and Asian Studies at the Australian National University and Executive Director of the Australia-Japan Research Centre (AJRC).

154. See *APEC Leaders' Economic Vision Statement* (visited Sept. 8, 1998) <<http://www.apecsec.org.sg/econlead/blake.html>> (1993 statement of APEC leaders).

155. See *APEC Economic Leaders' Declaration: From Vision to Action* (visited Sept. 22, 1998) <<http://www.apecsec.org.sg/econlead/osaka.html>> (1995 statement of APEC leaders); *APEC Economic Leaders' Declaration of Common Resolve* (visited Sept. 8, 1998) <<http://www.apecsec.org.sg/econlead/subic.html>> (1996 statement of APEC leaders).

156. See *APEC Economic Leaders' Declaration of Common Resolve* ¶ 5 (visited Sept. 8, 1998) <<http://www.apecsec.org.sg/econlead/osaka.html>> (commitment to comprehensiveness and non-discrimination).

in 1996<sup>157</sup> developed collective and individual action plans, and the Vancouver Conference in 1997, among other things, expressed a commitment to electronic commerce.<sup>158</sup>

#### *D. Conclusions*

There are many engines of international law. While there is no universally accepted international legislature, there are many international legislatures with overlapping memberships. The list of international organizations just presented is not exhaustive; yet one can hardly review even this partial list without concluding that there is a wide variety of rulemaking, adjudication, and enforcement arenas in the international context. The strengthening of all of these types of international institutions increases the production of international law and its practical applicability, continuing the shift away from a body of international laws comprising abstract norms and aspirations into the same kind of complete legal system that most people expect to exist at the state level. Anything that increases the effective functioning of these institutions increases the influence of international law.

### III. NEW INTERNATIONAL INTEREST GROUPS CALLED NGOS SHAPE NORM DEVELOPMENT AND INSTITUTIONAL OPERATION AND THE INTERNET HELPS

Many private institutions enjoy power in international politics and law that rivals that exerted by traditional states.<sup>159</sup> Mohammed Bedjaoui refers to Francois Rigaux's "Transnational Civil Society" as involving three determining agents: the state acting through its domestic law, the community of states in the international order, and individuals acting through private initiatives including Non-Governmental Organizations ("NGOs").<sup>160</sup> "It is through the non-governmental organizations and, more and more often, through the

157. See generally *Manila Action Plan for APEC* (visited July 3, 1998) <<http://www.apecsec.org.sg/mapa/vol1/volume1.html>>.

158. See *APEC Leaders' Declaration: Connecting the APEC Community* ¶ 15 (visited Sept. 8, 1998) <<http://www.apecsec.org.sg/econlead/vancouver.html>>.

159. See Jessica T. Matthews, *Power Shift*, 76 FOREIGN AFF., 50, 58 (Jan.-Feb. 1997) (controlling international crime, states must compromise cherished sovereign roles, including cooperation with the private sector); *id.* at 59 (NGOs create new constituencies for compliance with international law).

160. See INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 24, at 12.

mass media that world public opinion makes its voice heard on the major problems requiring action at the international level.”<sup>161</sup> Just as domestic interest groups are an essential part of the political dynamics of domestic politics, NGOs are an essential part of international rulemaking and enforcement.<sup>162</sup> Indeed, because the institutional structure for international governmental functions is less complete than that for state governmental functions, NGOs play a proportionately greater role in the international context than in the domestic context.<sup>163</sup>

The NGO phenomenon is at the center of the international institutional shake out. NGOs, organized and expressing themselves through the Internet, already have great influence on the treaty negotiation process.<sup>164</sup> NGOs are not a new phenomenon. They were instrumental in the eighteenth and nineteenth centuries in stopping the slave trade, promoting peace through international arbitration, advocating worker solidarity, encouraging free trade, and harmonizing international law for maritime commerce.<sup>165</sup>

One commentator has suggested that the influence of NGOs varies as a function of political supply and demand.<sup>166</sup> When particular government agencies and officials need NGOs to perform functions they otherwise would perform themselves, NGO influence grows. This is the demand side of the equation. When NGO capability increases, NGO influence also increases. This is the supply side of the equation.<sup>167</sup> Growing NGO influence in human rights and environmental issues has been mainly due to increasing demand, reinforced by some increase in NGO capability. The Internet, as explained in section B of this Part, promises to accelerate NGO influence mainly by significantly increasing NGO capability.

McDougal, Lasswell, and Reisman identified seven functions performed by NGOs: intelligence, promotion, prescription, invocation, application, termination, and appraisal.<sup>168</sup> Intelligence is gath-

161. *Id.*

162. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 185 (1997).

163. See generally *id.* at 189-90.

164. See *id.* at 272 (citing examples of NGO influence in treaty negotiations).

165. See *id.* at 191-95 (citing all examples enumerated in text).

166. See *id.* at 269.

167. See *id.*

168. See *id.* at 271 (referring to Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PRACTICE, 191, 221-22 (Myres S. McDougal & W. Michael Reisman

ering, analyzing, and disseminating information.<sup>169</sup> Promotion is advocacy of particular policy options.<sup>170</sup> Prescription is actual participation in rulemaking.<sup>171</sup> Invocation is an accusatory role when norm violations are detected.<sup>172</sup> Application is actual adjudication.<sup>173</sup> Termination extinguishes norms.<sup>174</sup> Appraisal is the evaluation of the performance of formal international institutions and norms.<sup>175</sup> Amnesty International and the Lawyers' Committee on Civil Rights perform important intelligence and invocation functions. Their role in promotion and prescription functions was enhanced as they developed "sophisticated information networks linking dissidents, sympathetic governments, and the media."<sup>176</sup>

NGO activity has been especially influential in the environmental arena. At the Stockholm Conference in the early 1970s, NGOs outnumbered accredited governmental representatives and by 1987 were allowed to address plenary sessions drafting environmental treaties.<sup>177</sup> Their role thus moved from promotion to prescription. Greenpeace typifies aggressive performance of the invocation function.<sup>178</sup>

### A. A Synthesis from Regime Theory

Regime theory, and the processes of cultural diffusion and interpenetration, provide the intellectual framework to understand the interaction of state actors and NGOs in the institutional framework summarized in Part II. NGOs, of course, influence the evolution of law not only at the international level, acting through the international institutions, but also at the state level by participating in domestic politics and domestic law-forming and law-applying institutions. Anything that strengthens these processes, including information technology, intensifies the influence of these new actors.

eds., 1981)).

169. See McDougal et al., *supra* note 168, at 221.

170. See Charnovitz, *supra* note 162, at 271 & n.797 (citing McDougal et al., *supra* note 168, at 221-22 (defining private associations as groups not seeking power)).

171. See *id.* at 272.

172. See *id.*

173. See *id.*

174. See *id.* at 273.

175. See *id.*

176. *Id.* at 264.

177. See *id.* at 262-64.

178. See *id.* at 264.

Michael Mandelbaum has observed that the first two great wars of the 20th century (the Cold War was the third) were followed by movements for "Liberal Internationalism" a.k.a. "Wilsonianism," led predominantly by the United States.<sup>179</sup> Although Liberal Internationalism often is attacked as naive by prominent internationalists such as George Kennan and Henry Kissinger, in fact it has prevailed.<sup>180</sup> Its elements of democracy and self determination, free trade, and arms control have become the dominant commitments of the new era after the Cold War.

A fourth element, international organization, also has prevailed (although Mandelbaum says it has not), but in a different way than Wilson envisioned. Rather than being realized through a comprehensive world government concerned mainly with security issues, the fourth element has prevailed in the form of regional organizations like NATO and NAFTA, as well as specialized global intergovernmental organizations such as: the IMF and the WTO, concerned mostly with trade; and global NGOs concerned especially with human rights and environmental protection.<sup>181</sup> The rise and influence of these international organizations is attributable to the movement of the international community toward rule-based behavior through the rule of law strand of democracy, its movement to rationalize free trade, and its movement to give effect to arms control.<sup>182</sup>

To be sure, Wilson was wrong that the establishment of international organizations was a prerequisite to realization of the substantive goals of democracy, free trade, and arms control. Rather, a substantive political commitment to these goals preceded the

179. Professor Mandelbaum's views discussed in the text were expressed in a private discussion sponsored by the Chicago Council on Foreign Relations, in November, 1997, which the author attended.

180. See GEORGE F. KENNAN, *AT A CENTURY'S ENDING: REFLECTIONS* 271 (1996) (sharply criticizing human rights accords and other "moralistic" approaches to international relations); HENRY KISSINGER, *DIPLOMACY* 30 (1994) (Wilsonian approach has prevailed); *id.* at 52-54 (questioning Wilsonian premises); *id.* at 804-11 (stating that Wilsonianism seemed triumphant at the end of the Century, but its core concepts are insufficient for international stability); JOHN G. RUGGIE, *WINNING THE PEACE: AMERICA AND WORLD ORDER IN THE NEW ERA* 2 (1996) (explaining that Bush and Clinton concepts of "new world order" were broadly Wilsonian).

181. See Robert O. Keohane & Stanley Hoffman, *Conclusion: Structure, Strategy and Institutional Roles*, in *AFTER THE COLD WAR* 381-404 (Robert O. Keohane et al. eds., 1993) (reviewing interaction of political and economic forces in emergence and strengthening of international organizations and regimes after World War II).

182. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 135-216 (1984) (exploring interaction of economic and political forces in emergence of U.S. hegemony and more powerful international organizations in post-World War II period).

establishment of international organization.<sup>183</sup> Nevertheless, international organization was essential to achieve the democratic, free trade, and arms control goals. It does not matter that rule-based regimes are in some sense voluntary. All law is voluntary. No legal system has sufficient resources in the long run to coerce compliance with rules and procedural outcomes not supported as legitimate by a significant portion of the governed population, or, at a bare minimum, by the instruments of enforcement—the army and police. So rather than dismissing post-World War II international organizations as voluntary, and therefore illusory, it is more helpful to focus on their utility in reducing transaction costs for rulemaking and rule application and for satisfying more general psychological desires not to be left out, as in the case of the Euro and China's accession to the WTO. In both instances, states are willing to make considerable sacrifices in sovereignty and policy in order to join the club even though the benefits of club membership may be speculative and indistinct.

One of the problems with Realist and Neo-Realist evaluation of international organizations, which international relationship scholars usually call “regimes,”<sup>184</sup> is that they suggest that legal institutions are interesting only when they represent a way of imposing norms against the will of those made subject to the norms. Because this rarely happens in a dramatic way, Realists and Neo-Realists conclude that international regimes are of only peripheral importance in international relations. This is a misperception of the way law works. To be sure, the conventional definition of a legal system emphasizes coercive enforcement as a possibility.<sup>185</sup> But coercion is relatively rarely em-

183. See Harold Hongju Koh, Remark, *A World Transformed*, 20 YALE J. INT'L L. ix, x-xii (1995) (exploring forces that have led to creation of regimes and international organizations); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1037 (1996-97) (providing discourses over free trade and open markets, the rule of law and human rights, biodiversity and the ecosphere led to establishment of international networks); Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 434 (1997) (exploring forces that led to emergence of international organizations).

184. Regimes are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge.” Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES 141 (Stephan D. Krasner ed., 1983). Regime theory can be associated with both the liberal and the realistic schools of thought in international relations. See *id.* at viii (stating that liberals consider regimes to be the natural state of affairs; realists now concede that regimes, once established, can take on “a life of their own”).

185. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 185-86 (2d ed. 1980) (discussing the role of coercion in legal systems and criticizing Kelsen's formulation of coercion's role as over-simple). Hans Kelsen noted: “[T]o give the tribunal any substantial measure of jurisdiction over disputes between individuals and states . . . is the first effective step to the *super-State*.” HANS KELSEN, *THE LEGAL PROCESS AND INTERNATIONAL ORDER* 27 (1935); see also JOSEPH

ployed in healthy legal systems. Some combination of simple acceptance of norms and legal decision making and of a belief that coercion would be used in the face of noncompliance suffices to make compliance more or less voluntary in the vast majority of cases.<sup>186</sup>

The analytical problem, of course, is to separate genuinely voluntary compliance from compliance induced by the ultimate possibility of coercion. One way to cleave the two interrelated modes of compliance is to focus on those instances in which coercion is extremely unlikely or legally impossible. Compliance with technical standards set by computer network administrators or compliance with social norms such as waiting in line are possibilities. Even when one can identify cases in which coercion plays no, or only a very small, role, one still must decide whether the existence of "legal" institutions, wherein bare norms, or a combination of norms and application mechanisms, makes a difference. If compliance is really voluntary, why bother with the institutions? This is the suggestion of the realists with respect to international legal institutions.

Here, the regime theorists have suggested some fruitful answers:<sup>187</sup> institutionalization may crystallize the norms, thus making compliance more likely because it is easier to understand what the norms are. Institutionalization may reduce transaction costs for developing norms.<sup>188</sup> Institutionalization may reduce ambiguity as to what conduct constitutes compliance and what constitutes violation, making voluntarism a clearer path. Institutionalization makes it easier to focus social, but not coercive, disapproval of violators by reducing the transaction cost for rule compliers who wish to express

RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233 (1979); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981).

186. My colleague, Dale Nance, recently distinguished between guidance and enforcement rules. See generally Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 908-18 (1997). His distinction helps illustrate how rules may be effective without necessary resort to coercive power—even though coercion sits in the background for most legal rules.

187. One prominent Realist student of regimes, Robert O. Keohane, has explained that regimes should be understood as analogous to contracts rather than as quasi-governments. See Keohane, *supra* note 184, at 146. He further explains that the demand for regimes can be understood by theories of "market failure" in economics, which emphasize transaction costs and uncertainty. There will be a demand for regimes in international relations because they reduce transaction costs and reduce uncertainty by enhancing the availability of information. See *id.* at 150-51.

188. See *id.* at 155-57 (explaining demand for regimes in terms of Coase Theorem). Keohane suggests that regimes reduce transaction costs when "issue density"—the number and importance of issues in a given policy space—is high. See *id.* at 155. Among other things, high issue density means that linkages and side payments are more numerous, and regimes facilitate both.

their disapproval of rule violations. In other instances, regimes perform an insurance function.<sup>189</sup> In most of these areas, regimes succeed in proportion to their success in “providing high quality information to policy makers.”<sup>190</sup>

These regime functions belie the conventional wisdom that international law is not really law because so many of the traditional attributes of law are missing. In fact, many regimes provide relatively strong rulemaking, adjudication, and enforcement functions. Their responsiveness and adaptability may be subject to criticism, but so also is the responsiveness and the adaptability of administrative agencies within national legal systems.

As section B of this Part explains, the Internet improves the effectiveness of international regimes by making it easier to negotiate treaties and treaty modifications, by increasing the range of procedural options for adjudication, and by improving the flow of enforcement information generated by NGOs and others. Regimes internationalize law because they channel international factors to influence domestic political results, at least in democratic political systems. In other words, regimes cause states to internalize international law. They increase cultural diffusion because they increase the number of channels through which cultural influences from all other cultures can impinge. Generally, they heighten interpenetration of legal norms among legal systems.

### 1. Cultural Diffusion

Both Mandelbaum and MacNeil have observed that “cultural diffusion” was one of the reasons for the end of the Cold War and the victory of the West.<sup>191</sup> The West won the Cold War not by military success but by ideas. The people of Eastern European and Russia changed their minds. They decided they preferred market capitalism over central planning and democracy over the dictatorship of the proletariat. Cultural diffusion induced them to change their minds, not merely by exposing them to ideological arguments, but by exposing them to the results of competing systems. The war was won as much by desire for blue jeans and rock music compact discs as it was by a comparison of Karl Marx and Adam Smith.

189. *See id.* at 167.

190. *Id.* at 165.

191. This analysis of Wilson’s vision was expressed by Michael Mandelbaum at breakfast remarks where the author was present in March, 1998.



Information technology enables cultural diffusion. The rise of the Internet makes it easier for an elite—and, increasingly, the masses—to obtain information on demand about almost anything through mechanisms that are hard for totalitarian governments to detect or to jam. This new means of access broadens the information possibilities far beyond what was available through radio broadcasts by the Voice of America and similar channels—vehicles relatively easily jammed.

## 2. Interpenetration

In a masterful recapitulation of the competing and overlapping strands of international law, Harold Koh argues that recent versions of old theories come close to the key to understanding why nations obey international law: the recent versions illuminate the process of “norm internalization.”<sup>192</sup> Transnational actors such as public officials, “norm entrepreneurs,” and NGOs mobilize domestic elites and popular constituencies and set in motion a domestic political process that internationalizes a norm of international law.<sup>193</sup> The process can be viewed at three overlapping and potentially reinforcing levels: the level of the international system itself; the level of individuals and groups who make up the state; and the processes and institutions of domestic politics.<sup>194</sup>

International institutions make a difference in compliance because they clarify norms, provide a mechanism for detecting noncompliance, and commit the parties to interact repeatedly over a sustained period of time.<sup>195</sup> Gradually the international norms interpenetrate the domestic legal system of the participants, ripening into “symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance with the internalized norms.”<sup>196</sup> Democratization strengthens the effect of international law because international law as rhetoric influences masses more than it influences leadership cadres, who are more likely to set policy based on interests in the realist tradition.

192. See Hongju Koh, *supra* note 19, at 2645.

193. See *id.* at 2648 (analyzing example of ABM Treaty Interpretation debate).

194. See *id.* at 2649-50.

195. See *id.* at 2653 (analyzing example of domestic pressures to comply with Oslo Accords by Netanyahu government).

196. *Id.* at 2654.

*B. How Does the Internet Affect These Phenomena?*

The Internet is not simply a technology that improves the efficiencies of international institutions through automation; it has transformative potential. The Internet's World Wide Web makes it easier to access international norms, thereby promoting compliance. It facilitates harmonization of substantive law among states by improving access to models. It improves the operation of norm-forming institutions. It improves the operations of enforcement and application institutions. It potentially improves the operations and, therefore, the strength of NGOs as a part of the political dynamics of international rule making and enforcement.

Professor Goldsmith's comment that the transformative potential of the Internet is "much more complex than [I] suggest[[]],"<sup>197</sup> is no doubt true, but it is also true that judging is much more complex than the Law and Economics literature, which he cites, suggests. For example, he suggests a model that views judges as leisure seekers. That surely oversimplifies most judicial behavior. He suggests that many judges are immune from political pressure. That may be true in part, but judges are not immune from social and political approval in a general sense. Otherwise, why do life-tenured judges care about their reversal and affirmance rates? Judicial desire for approval of their decisions drives them to link their own decisions with those of others.

It may be pertinent to resurrect Justice Oliver Wendell Holmes' observation that the life of the law has not been logic; it has been experience. We do not have adequate theoretical models to explain in a rigorous way transformations in international law and the behavior of actors in the international arena. The absence of those models should not blind us, however, to phenomena that are reshaping the international stage, reinforced by information technology.

1. The Internet makes it easier to access norms, thereby improving voluntary compliance.

Not only does greater availability and accessibility of international law promote voluntary compliance, it increases interpenetration. While ignorance of the law may be no excuse for violating it, one cannot obey the law unless one knows what it is. By some estimates, there are more than 15,000 treaties and agreements to which

197. Goldsmith, *supra* note 3, at 1128.

the United States is a party.<sup>198</sup> There are surely thousands of scholarly opinions about the content of customary international law. These are scattered all over the world. The comprehensive scope of legal publishers in the United States with respect to domestic U.S. legal materials is not typical of other countries nor of international materials. Even an institution such as The Library of International Relations ("LIR") at Chicago-Kent College of Law whose mission it is to organize international materials must devote considerable efforts to locate them, get copies, and index them for feasible access. The Internet is already beginning to change this process.

The Internet affects all three sources of law by making them more available. The greatest impact is on treaty law. Access to the Internet and the Internet's global popularity have significantly increased general accessibility to treaty law on the World Wide Web. For instance, international human rights treaties are available through the Council of Europe.<sup>199</sup> The United Nations is doing a good job of making scanned images of pages of all treaties in the United Nations series available on the Web.<sup>200</sup>

Now, the United Nations has moved rapidly to place all the treaties for which it is a custodian on the Web, LIR is moving its collection (much of which already has been scanned into image form) on to the Web, and the Venice Commission is moving its collection of constitutional courts decisions to the Web. One can hope that legislative bodies around the world will follow the lead of the U.S. Congress, which established a multiplicity of Web servers that provide not only the text of enacted laws but also proposed legislation and legislative history materials.<sup>201</sup> Hopefully, the U.S. Department of State will undertake to publish on the Web treaties to which the United States is a party. Already, this occurs on a fragmentary basis with trade agreements.<sup>202</sup>

198. By 1979, the United States was estimated to have become party to 8,909 agreements, including 1,281 treaties. Between 1980 and 1992, the United States became party to another 4,728 agreements, including 218 treaties, for a total of 13,637 agreements and 1,499 treaties. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 203-04 (2d ed. 1995).

199. See generally *European Court of Human Rights Home Page* (visited July 3, 1998) <<http://www.dhcour.coe.fr/>>.

200. See generally *Index of Depts/Treaty/Collection/series* (visited July 3, 1998) <<http://www.un.org/Depts/Treaty/collection/series>>.

201. See *Thomas: Legislative Information on the Internet* (visited Sept. 5, 1998) <<http://thomas.loc.gov>>.

202. See *Agreements Negotiated by the United States Trade Representative* (visited Sept. 23, 1998) <<http://www.ustr.gov/agreements/index.html>> (WTO and NAFTA agreements).

Publishing these materials on a web server—as simple as copying a word processing file to a different directory on a small computer connected to the Internet—makes them instantly available to the entire world. Not only can a business seeking information on establishing an international satellite circuit find out about the regulatory structure and the requirements of Inmarsat,<sup>203</sup> but a lawyer advising a client on immigration possibility or international bills of lading can find relevant legal materials as easily as he can locate a court of appeals case on Westlaw.

While deliberate noncompliance with law is always a possibility, most people conduct their affairs so as to comply with legal norms they know about. Making it easier for them to know the norms either directly or through their counsel increases the likelihood of compliance. The Internet can make international norms more prominent in the rhetoric that underpins any collective security (or economic) initiative.<sup>204</sup> Information technology, especially the Internet, makes it easier to refer to international norms because it makes them more accessible to those wishing to make such reference. It also makes political audiences more receptive because they know about the international norms that are made more accessible. Norm-based rhetoric and information technology supporting the rhetoric is more important in the absence of the bipolar political structures defining the Cold War because the absence of those structures makes norm-based decisionmaking, rather than traditional interest-based patterns of decisionmaking, more likely.<sup>205</sup>

## 2. The Internet facilitates harmonization among state laws by improving access to models.

The kind of large scale Web publishing of international documents described in the preceding paragraphs results in the extension of the virtual law library already present on the Internet Web. Such an expanded library provides a rich source of models for interest groups and parliamentarians writing new law. No longer must the author of a new commercial law for Bosnia-Herzegovina take a stab

203. See *Inmarsat Homepage* (visited Aug. 26 1998) <<http://www.inmarsat.org/index2.html>>.

204. See Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 468-69 (1996) (explaining role of rhetoric linked to norms of international law in shaping responses in security council and in domestic support for those responses).

205. See *id.* at 468 (explaining changes in diplomatic reference to “security” after the Cold War to include non-military threats to states and people).

in the dark; the author can begin with recently enacted commercial laws in Croatia and emerging models from the European Commission, both available on the Internet.<sup>206</sup>

The availability of legislative models increases the likelihood of harmony among legislative enactments in different sovereign states, reinforcing economic pressures for such harmonization in order to reduce trade barriers. But not only does the virtual library make harmonization of positive law more likely—it also makes harmonization of decisional law more likely. The constitutional courts connected through the Venice Commission must decide issues arising under the European Convention on Human Rights—a single source of positive human rights law, incorporated by reference into the constitutions of most of the states of Central and Eastern Europe.<sup>207</sup> Because the constitutional courts in these countries are applying the same document, and because the kinds of conduct likely to give rise to human rights claims do not vary substantially from state to state, it is logical that courts from different states would decide similarly the same issues under the same law. The Venice Commission Project makes it easier for them to do this by giving them easy access to constitutional court decisions of all of the states confronted with the same questions.<sup>208</sup> Even though *stare decisis* does not operate in a strong form in countries without sources of similar law traditions, as a matter of practical politics, a judge will be pressed to explain deviations from precedent established elsewhere.<sup>209</sup>

Professor Goldsmith may doubt the tendency for national and international institutions to harmonize substantive law and for judges dealing with issues already decided by other judges to relate their

206. See, e.g., *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package* (visited Sept. 5, 1998) <<http://www.ispo.cec.be/infosoc/legreg/docs/97236.html>>; *Law on Telecommunications* (visited Sept. 5, 1998) <<http://www.vlada.hr/dokumenti/telecom2.htm>>.

207. See *The Constitutional Court of the Czech Republic* (visited Sept. 23, 1998) <[http://www.concourt.cz/angl\\_ver/decisions/doc/4-276-96.html](http://www.concourt.cz/angl_ver/decisions/doc/4-276-96.html)>; see generally David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects And Risks*, 8 CONN. J. INT'L L. 243, 243-44 (1993) (discussing a common European attitude towards human rights).

208. The author has assisted this phenomenon by helping constitutional courts get connected to the Internet through a project called "ECEULNet." See *The Constitutional Court of the Czech Republic* (visited Sept. 20, 1998) <<http://www.concourt.cz/>> (acknowledging assistance from ECEULNet); *The Constitutional Court of Hungary* (visited Sept. 5, 1998) <<http://www.law.vill.edu/ceecil/hungary/court.html>> (same).

209. See Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997).

own decisions to the ones that have gone before.<sup>210</sup> If he does, his quarrel is with phenomena evident in the real world<sup>211</sup> and not with my arguments. In August 1998, as I was evaluating Goldsmith's critique of a draft of this article, I was agreeing to a request by a state court chief justice to present a program to state supreme court judges in the Midwest to show them how to access European human rights law and tort law from other English speaking jurisdictions so they could have a wider variety of legal models to use in analyzing domestic employment discrimination and torts cases. Whether or not the law and economics literature believes that judges follow precedent and models from other jurisdictions, judges believe that they do.

My point is not that more information about pertinent judicial decisions in other jurisdictions will inexorably lead to agreement across jurisdictional lines, but rather that the easier availability of judicial decisions globally will force judges to articulate the connections between their decisions, even if deviant, and other decisions. The result is more reasoned decisionmaking, and—I postulate, without being able to prove—a tendency for greater harmony at the margins. There surely will be disagreement, but at least it will not be accidental.

Professor Goldsmith cites Cass Sunstein in support of the proposition that decentralized national courts are not likely to interpret standards in a uniform fashion. Professor Sunstein also says,

There is a serious problem from the standpoint of democratic citizenship, since members of the polity, given the right and duty to decide on the content of law, will by hypothesis lack knowledge of what the law really is. This ignorance will compromise the process of democratic assessment of law.<sup>212</sup>

The Internet increases the feasibility of obtaining knowledge of what the law really is, by making it easier to obtain access to decisions. Elsewhere Sunstein observes that rules are less acceptable when information costs are high.<sup>213</sup> Reducing information costs<sup>214</sup> makes rules more acceptable. More reliance on rules results in greater harmoni-

210. See Goldsmith, *supra* note 3, at 1128-30.

211. See, e.g., Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 689-93 (1998) (observing that law has moved from a regime of statutory interpretation to a regime of interpreting and applying international models, conventions, and treaties).

212. Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 1007 (1995).

213. See *id.* at 1015.

214. Professor Sunstein's reference to information pertains to factual information more than information about rules themselves. See *id.* at 973. The Internet increases accessibility of factual, as well as legal, information.

zation, at least compared to ruleless adjudication.

Ethan Katsh's argument that information technology will undermine a system of precedent because it breaks down categorization, is questionable. Just as the Web makes it easier to find more decisions, it also makes it easier to organize them into categories and to publish taxonomies that improve access to categorized cases.<sup>215</sup> Professor Katsh's current views seem closer to my own than to Goldsmith's. Katsh' 1995 book<sup>216</sup> (Goldsmith cited his 1989 book, written before the Internet was a relevant phenomenon)<sup>217</sup> is bolder in exploring information technology's potential to displace existing legal processes and institutions than was his 1989 one.<sup>218</sup>

### 3. The Internet improves the operation of norm-forming institutions.

The utility of the Internet's virtual library, electronic publishing, and case-management functions is not limited to adjudication and fact finding; it easily can be extended to aspects of international rule-making and treaty making. Paul Szasz has dissected the treaty-making process into four major and some twenty subordinate tasks or "stages."<sup>219</sup> Many of these can be sped up and made more effective by use of the Internet. In the initiation stage, assessing the likelihood of success and developing estimates of schedule and costs can be enhanced by virtual libraries and by electronic surveys of member governments. In the second stage, when the text of a multilateral treaty is formulated, preliminary studies of the state of law can be enhanced by virtual library functions, the completed studies and analyses can be distributed through electronic publishing, and group drafting can use the same deliberation tools used by judges of constitutional courts to

215. Cf. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997) (taxonomies must evolve to accommodate globalization of law; information transfer is necessary to enable the evolution).

216. See M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 238-41(1995).

217. See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 267 (1989).

218. Katsh notes that surprises are likely as the law responds to the information technology revolution. See KATSH, *supra* note 216, at 240. Most of the questions, Katsh suggests, will fall into two categories. See *id.* The first involves modifying legal doctrine to relate to new ways of interacting. See *id.* The second involves the possibility that cyberspace is a "quite different culture and one that will bring its values to bear on all of us . . . . A new logic has emerged." *Id.* at 242 (quoting WILLIAM MITCHELL, *CITY OF BITS* (visited Sept. 23, 1998) <[http://mitpress.mit.edu/e-books/City\\_of\\_Bits/Bit\\_Biz/TerritoryTopology.html](http://mitpress.mit.edu/e-books/City_of_Bits/Bit_Biz/TerritoryTopology.html)>).

219. See Szasz, *supra* note 47, at 70-71 (The four stages named by Szasz are (1) the introduction of a bill, (2) its assignment to a committee and the committee's report, (3) adoption by one house of the legislature and then by the other, and finally (4) approval by the executive or return to the legislature.).

draft opinions. When governmental consultations are necessary, drafts can be made available through electronic publishing, and comments can be received through the Web or e-mail, facilitating the consultation process. In the adoption stage, deliberation software can increase the options for consensus formation and voting. During the ratification ("entry into force") stage, virtual library functions can ease the burdens of smaller, less developed countries, and can organize reservations made by individual states. Once the treaty enters into force, placing treaty depositories on the Internet—an electronic publishing function—improves compliance.<sup>220</sup>

All of these possibilities facilitate rule making in international institutions, where distances otherwise would be a barrier. They also increase the role of NGOs because they represent channels for NGO participation in addition to traditional state-controlled channels.

Professor Goldsmith also challenges my assertion that the formation of international law through treaty making and the evolution of customary international law will be improved by the Internet. He has been in the forefront of an attack on the "modern view" of customary international law ("CIL"), which promotes its incorporation into U.S. federal common law.<sup>221</sup> Part of that attack is to point out that the "new" CIL is developed more quickly, depends less on actual state practice, and is fragmented by the increased number of states. The result is growing incoherence in CIL. He says that the Internet makes the problem worse, not better. I disagree. The problem of incoherence is surely worse when many of the relevant developments and rhetoric are invisible. The Internet reduces the transaction costs of law formation, increases visibility of the results, and thus, at least, makes it possible for reason to reduce incoherence.

#### 4. The Internet facilitates the operation of application and enforcement institutions.

The Internet makes it easier to enforce international norms against violators. It does so by enlarging the range of possibilities for adjudication, by enhancing NGOs' enforcement roles, and by creating

220. Szasz observes that the availability of treaties is "woefully fragmented." *Id.* at 107. Dawson observed that legal publishing enhances legitimacy and development of legal norms. Cf. JOHN P. DAWSON, *THE ORACLES OF THE LAW* xi-xii (1968).

221. Compare Bradley & Goldsmith, *supra* note 8, at 2260 (stating that "CIL should not be treated as federal law without authorization from the political branches"), with Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 395-97 (1997) (criticizing Bradley & Goldsmith's view).



new types of sanctions.

The Internet enlarges the possibilities for adjudication involving international norms. In private international law, international arbitration already is commonplace. Parties to transnational commercial agreements often prefer arbitration to litigation and national courts. They have greater control over the procedure and the identity of the decision-maker in arbitration. They can specify within very broad limits the substantive law to be applied by the decision maker. Most important, the international arbitration awards are more likely to be enforceable than national court judgments because the treaty framework for enforcement of international arbitration awards is much more complete than the treaty framework for enforcement of judicial decisions. The Internet facilitates international arbitration by making it cheaper and quicker. The dispute process can be commenced by electronic message. Discovery can take place by e-mail. The docket can be posted on a private web page with links to relevant documents in the case. Similarly, public arbitration awards can be posted and collected on the Web so they can inform other arbitrators and others bound by the same norms involved in the earlier arbitration about an evolving body of decisional law.

As an example of uses of technology for this purpose, the Center for International Law for Information Law and Policy ("CILP"), the American Arbitration Association, the National Center for Automated Information Research ("NCAIR"), and the Cyberspace Law Institute embarked on the Virtual Magistrate Project in October 1995.<sup>222</sup> This project resulted in a complete system for limited-purpose arbitration involving the claims of defamation, customary fraud, or an intellectual property infringement against persons using large Internet service providers. While the Virtual Magistrate system only decided one case, its implementation was complete; indeed, it remains available to receive additional disputes suitable for its particular rules and procedures.<sup>223</sup>

The International Ad Hoc Committee ("IAHC") developed this sort of recommendation in early 1997 for reorganizing the administration of Internet domain names, including preliminary adjudication of disputes between holders of Internet Domain Names and holders of trademarks.<sup>224</sup> The recommended dispute resolution process envi-

222. See *Virtual Magistrate* (visited Sept. 5, 1998) <<http://vmag.cilp.org/>>.

223. See *id.*

224. See *Internet International Ad Hoc Committee* (visited Sept. 5, 1998) <<http://>

sions electronic means for receiving and handling claims, a proposal being worked out in more detail by WIPO.

The same uses of technology described for international adjudication are not limited to the international context but their advantages in that context are greater than in a virtual domestic context. International adjudication involves large distances and therefore potentially greater delay and cost in every step of the adjudicatory process. By substituting electronic communication, storage, and publication for equivalent steps requiring the transportation of persons or physical objects, the speed of adjudication is increased and the cost is reduced.

Other sections of this article explain the growing influence of NGOs in international political dynamics and rule of law.<sup>225</sup> The Internet enhances the enforcement of international norms, but also helps NGOs play an enforcement function. Through Web pages and e-mail, NGOs can pull information and mobilize resources for prosecuting rule violations. An example of this process at work is the Organization of Economic Boycott of Myanmar for Human Rights Violations.<sup>226</sup> The pressure for Pepsico and others to withdraw from Myanmar was organized almost entirely by NGOs and private persons rather than by governments. They used the Internet intensively to organize the boycott.<sup>227</sup> Students at Chicago-Kent College of Law and other parts of the Illinois Institute of Technology have worked with international organizations and NGOs to establish a Web-based database for collecting, maintaining, and disseminating evidence on war crimes and other human rights violations committed in Kosovo, derived from interviews with refugees. This "Operation Kosovo" project began in August of 1998 and continues as of this writing.

NGO rule enforcers can use specialized web pages to post results of their investigations to solicit expressions of support and contribution for formal and informal enforcement actions. They can use the Web and e-mail to organize mass write-in campaigns to prod political actors and to commence formal enforcement proceedings. With or without driving commencement of formal enforcement proceedings,

[www.iahc.org/](http://www.iahc.org/)>.

225. See *supra* notes 159 to 196 and accompanying text.

226. See *Some Example: States Who Are Violate Basic Human Rights, and Firms/Company There Are Dealing with Them*, (visited Sept. 24, 1998) <<http://www.geocities.com/CapitolHill/8929/tekst-gb.htm>>.

227. See *id.*

the Web is an extremely effective way to communicate blacklists of rule violators, thereby facilitating informal enforcement.

Finally, in certain areas, the growing importance of the Internet as a political and legal forum and as a marketplace creates leverage for use against violators of international norms. One reason the debate over reform of Internet domain name administration is so interesting is that it has the seeds of a new private mechanism for enforcing private rules in an international arena. One cannot participate effectively on the Internet unless one has a domain name. The IAHC recommendation envisioned a web of contractual relationships among domain name registrars pursuant to which all registrars will obligate themselves to revoke the domain name of an Internet user violating the rules and decisions of institutions created under the IAHC recommendations.

Revocation of domain names as a sanction against international rule violators can be extended beyond the relatively narrow scope of the IAHC dispute resolution procedure, which was limited to conflicts between domain names and trade marks. While obtaining agreement on the norms to be enforced and maintaining compliance with universal commitment to enforce decisions by revoking domain names may be difficult in practice, conceptually, there is no reason that domain name revocation could not become a standard penalty for those adjudicated to be violators of international norms relating to child pornography, hate speech, consumer fraud, intellectual property infringement, or defamation.

5. The Internet potentially improves the operation and therefore the strength of NGOs.

The Internet improves the operation and therefore the strength of NGOs. As mentioned earlier, McDougal, Lasswell, and Reisman identified seven functions performed by NGOs: intelligence, promotion, prescription, invocation, application, termination, and appraisal.<sup>228</sup> Internet use improves performance of most of these functions by NGOs, thereby facilitating the organization and operation of NGOs, and enhancing their influence under the supply and demand model suggested by Charnovitz.<sup>229</sup>

Use of the Internet reduces the transaction costs for organizing,

228. See Charnovitz, *supra* note 162, at 271 and accompanying text.

229. See *supra* notes 166 to 178 and accompanying text.

maintaining, and carrying out the functions of an NGO. Group organization and maintenance cost advantages from Internet use are greater when group members are more dispersed. Accordingly, when potential NGO constituents are dispersed around the world, the cost of communicating with them and enlisting their support is likely to be greater than the resources available unless information technology reduces the cost.

Those active in NGOs tend to be better educated and have higher incomes than the general population.<sup>230</sup> As a consequence, they are more likely to have access to Internet technology. When that is the case, the cost of communicating with them is no greater than the cost of establishing Web pages and e-mail lists and of posting messages to those types of virtual spaces likely to appeal to them. The Internet infrastructure is already paid for and it covers the costs of reproduction, distribution, sorting, and storage of the materials. This function of the Internet instantly replaces or supplements direct mail campaigns and newsletters. As credit card commerce on the Internet becomes more common, more people will be equipped to contribute to NGOs directly through the Internet, thus expanding fund raising possibilities. Marcia Dam, Vice President of USA for UNHCR, collected substantial amounts of money for Kosovo refugee relief through a Web page organized for that purpose.

More than this kind of membership maintenance is possible. NGO activities can be directed and coordinated through e-mail and the Web. A communication associated with direction and coordination can either be public or private, depending on how e-mail and Web systems are set up. One simple approach is to set up a Web page for each major project and allow project participants to post messages to discussion groups placed within that Web page. As soon as a project participant has something to report or a project leader has a new direction to give, that information instantly is available to other key members simply by copying a file from one directory to another on an Internet-connected computer.

The Internet enhances performance of the promotion function by NGOs. NGOs can use the Web (indeed they already are using the

230. "The majority of participants usually come from public sector backgrounds (for example, service in elective, appointive, or administrative office) and therefore usually give large consideration to the interests of the state." Bruce Russett, *Ten Balances for Weighing UN Reform Proposals*, 111 POL. SCI. Q. 259, 261 (1996). "Even those whose personal backgrounds are predominantly from civil society or NGOs are usually highly privileged members of their societies." *Id.*

Web in the United States for this purpose) to mobilize mass opinion in support of particular positions in rulemaking or enforcement proceedings. They can organize e-mail campaigns to decision-makers, frame petitions and collect signatures, and make drafts available for those seeking treaty language, model statutes, or model contract language. Internet use by NGOs enhances their performance of the invocation function. When violations of international norms are detected by NGOs, they can focus attention on the violators through the techniques used to organize the boycott in Myanmar and to maintain blacklists, as discussed in section III.B.4.

As the Internet further blurs the lines between domestic interest groups and international NGOs, it strengthens the ability of individual and small-group interests to be expressed and given fulfillment through international institutions. Not only that, it makes it easier for NGOs to influence domestic politics. It is no accident that China's growing restrictions on political freedom in Hong Kong have limited the role of international organizations in politics. International organizations, especially in the human rights area, already play an active role in creating embarrassment for existing domestic political institutions.

The Internet and the World Wide Web fundamentally change the possibilities for mobilizing these interest groups and focusing their power on political choices taken by individual states. Erosion of the United States commitment in Vietnam, Lebanon, and Somalia resulted from the impact of messages conveyed by modern information technology to domestic U.S. political audiences.<sup>231</sup> Support in the United States and elsewhere in the West for intervention in Bosnia was driven largely by scenes of ethnic cleansing and civilian targeting in Dubrovnik and Sarajevo.<sup>232</sup> Pressure for intervention in Albania in 1997 and Kosovo in 1998-99 similarly was influenced by information technology's capacity to connect national or local political audiences around the world with events far away. Chicago-Kent's "Operation Kosovo" assisted the Kosovar Albanian diaspora in Germany communicate with Albanian refugees in camps in Albania, through an encrypted e-mail channel. No longer is the choice of intervention solely

231. *But see* David Gompert, *How to Defeat Serbia*, 73 FOREIGN AFF. 30 (1994) (discussing firm U.S. refusal to get involved in Bosnia until television coverage of Sarajevo market massacre).

232. *See* James F. Hoge, Jr., *Media Pervasiveness*, 73 FOREIGN AFF. 136, 138-39 (1994) (discussing impact of CNN coverage of Sarajevo market shelling on U.S. Bosnia policy).

the province of political elites and professionals in diplomacy; now, due to information technology, it is a mass political question. Because the Internet increases access to the channels of communication to these world-wide audiences, it fundamentally alters the balance of power among different political actors.

The Internet makes it easier to organize and maintain interest groups, both within and across state boundaries. This has large implications for collective security because it contemplates more robust interaction between those seeking external intervention and those opposing it. The Armenian diaspora is generally perceived as largely determining U.S. policy toward Armenia, and the Croatian diaspora is credited with shaping German policy toward Slovenia and Croatia after they seceded from Yugoslavia.<sup>233</sup> Information technology makes such phenomena far more likely and thus can reinforce maintenance of and action by collective security institutions. The resources necessary for collective security will be state-based for the foreseeable future.<sup>234</sup> Fulfilling collective security commitments requires political will derived in turn from domestic political support in the states having the resources. Public reaction to the siege of Sarajevo, to ethnic cleansing in Bosnia, to the conflict in Kosovo, and to Serbian suppression of municipal election results are early examples.

### *C. The Net Result*

1. The movement of international law away from its state-centric tradition will be accelerated by the Internet.

The Internet will accelerate the movement of international law away from its state-centric tradition. Professor Koh's "transnationalist" school of international relations theory emphasizes the role of private actors in international law.<sup>235</sup> Professor Anne Marie Slaughter agrees.<sup>236</sup> Private actors create purely private legal relationships by dealing with each other, create mixed relationships by dealing with

233. See SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 184-85* (1995) (German position to recognize Slovenia and Croatia was driven by domestic political pressures, including those of Croat minority in Germany).

234. See generally Anthony DePalma, *Canada Accuses 47 of Misconduct in Bosnia*, N.Y. TIMES, Jan. 18, 1997, at 6 (reporting that the military mission of Canada's "65,000 strong army . . . has shifted from national defense to [international] peacekeeping").

235. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-85 (1996) (explaining role of private actors in transnational legal processes).

236. See *supra* note 44 and accompanying text.

states, and as political actors, they coordinate their private self-interest across national boundaries, exerting pressure vertically through national interest groups, thereby shaping the policy of states. The Internet will strengthen all these phenomena by making the horizontal relationships easier despite distance and regardless of formal national borders.<sup>237</sup>

In other words, Rigaux's "Transnational Civil Society"<sup>238</sup> is strengthened by the Internet. Because of improved accessibility to international norms, domestic judges and legislators are more likely to be influenced by them, thus increasing interpenetration. Improved communication and information exchange through the Internet strengthens the role of NGOs in domestic political processes as well, further increasing interpenetration.

2. International Human Rights Law will become indistinguishable from private international law because the former will have effective institutions, and the latter will have truly international norms; there is much overlap between commercial rule of law and individual human rights.

International human rights law and private international law will become less distinguishable. The institutional mechanisms for enforcing human rights norms will improve, significantly enabled by the Internet making it easier to detect violations, to mobilize pressure against violators, and to adjudicate violations more cheaply. At the same time, the overlap between commercial rule of law and human rights law will begin to supply norms for private international law. Basic due process concepts drawn from human rights law will accelerate harmonization of commercial law. By making models and draft statutory materials more widely available more quickly, the Internet will accelerate this process.

State control over communications and information access will diminish, accelerating the ascendancy of new intermediaries like NGOs at the expense of traditional sovereigns; that will tend to shift political dialogue to the international level and away from the nation state level—much as television and radio tended to shift the political dialogue in the United States from the state and municipal level to the national level.

237. The principal limitation on this influence of the Internet will be language difference.

238. See *supra* note 160 and accompanying text.

3. Subsidiarity will receive increasing attention as a way of balancing global and local concerns.

Much needs to be done intellectually to sort out those matters that cannot be dealt with effectively at a more local level from those that will drift to international, political, and legal institutions. In this regard, careful analysis of the federalism in the United States would be instructive, not so much from the perspective of the commerce clause and preemption as from the perspective of political will to act nationally as opposed to locally. Europeans refer to the preference for local resolution of issues as subsidiarity.<sup>239</sup>

The Internet not only reinforces other phenomena encouraging the development of international law; it facilitates government at the local level. One of the problems with earlier twentieth century information technologies such as television and radio broadcasting is that their economies of scale forced public affairs information to larger political units. The evening news covers Washington more easily than it covers the state representative district. An ordinary citizen is more likely to see the President of the United States on television than the Mayor. The greater visibility of higher levels of government encourages reliance on those higher levels to help solve problems. The Internet changes that. Its lower barriers to entry mean that an alderman can have a home page that looks just as functional and just as accessible as the home page of the President of the United States. As lower levels of government begin to take advantage of the Internet's potential, local officials can become more relevant in the lives of their constituents even as power on certain issues is shifting upward from nation states to international institutions and from national political organizations to international ones.

Subsidiarity relieves political pressure to resist adherence to international norms. Greater possibilities for effective government at the local level means that local concerns can be accommodated more completely, thus reducing alienation from more remote legal and political institutions. In other words, the Internet is likely to strengthen local and international law, probably at the expense of national, state-based law. Some early glimmers of this effect are evident from efforts at the state level in the United States to influence international de-

239. See Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 381 (1998) (explaining significance of subsidiarity in European law).



velopments.<sup>240</sup>

#### 4. Enablers of the Internet

Although the potential for change and progress is evident, technology, on its own, is not enough to implement that change. People have to use the technology for certain activities before international law is altered. Moreover, individual actors must be able to find the law. The Internet is a vast virtual library. In order for this library to have a collection, individuals and institutions possessing relevant information must place it on computers connected to the Internet. Further, other individuals and institutions must provide a value-added layer of bibliographic information pointing to primary documentation. For example, the full text of treaties must be placed on the Internet, and someone also must organize a list of treaties with pointers to the text of the treaties, which may be located on a multiplicity of servers. Many of those providing the bibliographic information may choose to standardize typologies or thesauri for indexing documents, but they need not do so to provide value. One of the Internet's major advantages is the diversity of approaches to information retrieval.

Both the placement of primary information and the publication of bibliographic aids is facilitated by the Internet. An Internet server can be established for as little as \$5,000. All it takes to publish a document on the server is to save it in a particular format—"HTML"—from either of the two most popular word processing programs and then to "publish it" to a particular directory on the server—a single step in either of the two most popular Internet Web browser programs.<sup>241</sup> For an institution such as a court that regularly generates textual judgments or opinions, the process of Web publishing can be automated with a few simple scripts that take word processing files for opinions or judgments as soon as they are released and automatically formats them and publishes them to an appropriate directory on the web server, automatically generating indexes and tables of contents as new opinions or judgments are added.

The preparation of bibliographic aids also is simple. All one needs is a concept for organizing the information. For simple con-

240. See David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands its Foreign Policy Expedition From Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021, 1022 (1997).

241. They are Netscape Navigator and Microsoft Internet Explorer. Microsoft Word 2000 allows Web publishing directly from word processing software.

tent, one simply keys the text for the (usually hierarchical) arrangements for organizing the information resources and links the entries on the word processing documents to the URLs for the full documents. Typically, the linking can be done with one mouse click in popular word processing programs and Internet web browsers. The typology or thesaurus then is published to an Internet web server in the same fashion as is used for primary documents. The web server containing the bibliographic information may be anywhere in the world and need have no pre-established relationship with the web server containing the primary documents.

The actions necessary for conferencing on the Internet are somewhat more sophisticated. Someone needs to set up a e-mail list for a discussion group on a Web page. For an experienced web master or UNIX administrator, this is a five to ten minute task. Once the information is in place, the potential for international law evolution is vast.

#### CONCLUSION: ALLOWING THE INTERNET TO PERFORM

The boundaries between international law and domestic or municipal law are becoming indistinct. No longer can one limit the operation of international law to the relations between states; international law now regulates relations between individuals and states. The universe of international institutions that provides a framework for making new international law and applying it in individual cases is much richer than it was fifty years ago. NGOs are as important in international law-making and law interpretation as nation states and their official delegates. The combination of these phenomenon has increased "interpenetration," the mutual influence of municipal and international law.

The Internet is reinforcing and accelerating these phenomena because it makes information about existing and proposed law more readily accessible to all of the relevant actors. The Internet makes it easier to access norms, thereby improving voluntary compliance. The Internet facilitates harmonization among state laws by improving access to models. It improves the operation of norm-forming institutions and facilitates the operation of application and enforcement institutions. The Internet potentially improves the operation and therefore the strength of NGOs. The net result will be continued movement of international law away from its state-centric tradition, and integration of International Human Rights Law with private in-

ternational law because the former will have effective institutions, and the latter will have truly international norms. The Internet and the underlying phenomena will increase emphasis on subsidiarity in international law as a way of balancing local and global concerns.

Lawyers and law students can do much to promote the evolution of international law by making it possible for the Internet to fulfill its potential. The basic principles already have been laid down. The 1997 telecommunications annex to the WTO agreement obligates most significant trading nations to open up their telecommunications markets.<sup>242</sup> Unbundling of the elements of telecommunications service now is the norm for everyone. This principle should be extended to Internet service.

But competitive access to the conduit is not enough. The Internet will do little if there is no relevant content on it. The same principles of competitive access and opposition to monopoly that are appropriate for the telecommunications infrastructure also are appropriate for the information infrastructure. While copyright and other forms of intellectual property have an important role to play in private creation of information, they are irrelevant for public information, which is created as a public duty imposed on lawmakers and judges. The basic underpinnings of an international freedom of information act are visible in the guarantees of freedom of expression and freedom of access in the International Covenant of Civil and Political Rights.<sup>243</sup> They should be extended by decisional law and by national implementation of the core principles of the American Freedom of Information Act.<sup>244</sup>

Freedom of information and competitive access to the Internet are important new international human rights, and they should be added to the inventory of values promoted by United States foreign policy and by human rights organizations.

242. See *Trade in Services* (visited Feb. 11, 1999) <<http://www.wto.org/wto/services/12-tel.htm>> (Annex on Telecommunications).

243. See generally Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899, 906-11 (1997).

244. See *id.* at 903-06, 911-13.