International Law and the Mediation of Culture

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When international relations scholars think about international law they either ignore culture or offer highly deterministic accounts of its role. For the majority of scholars, international law is a rational construction, an institutional solution to the problem of order in an anarchical system, a body of rules and practices that reflect the contending interests and capabilities of major states. Issues of culture barely rate a mention. For others, culture is the deep foundation of international law, the structuring "mentality" that gives law its form and content. International law, from this perspective, is a Western cultural artifact, globalized through centuries of imperialism and hegemony. These contrasting views lead to different expectations about the future of international law in today's culturally diverse international order. For rationalists, law's fate will be determined by the shifting configuration of interests that accompany new functional challenges and great power transitions. For the more culturally attuned, there are two possibilities. One is that functional utility will replace culture as law's foundation. International law may well be a Western cultural artifact, but "rational buy-in" will sustain it in a multicultural world. The other, more pessimistic, expectation is that the rule of international law will be fundamentally undermined by cultural diversity, particularly as rising non-Western powers articulate and promote markedly different cultural norms and values.

Like all polar opposites, neither of these positions is especially satisfying. States do use international law to solve functional challenges under anarchy, and the resulting rules, norms, and principles do reflect underlying patterns of power and interest. Yet to a significant degree modern international law evolved out of a distinctive cultural context: that of nineteenth-century Europe. This profoundly affected its normative foundations, institutional form, and substantive content,

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giving "the West" a distinctive kind of structural power (as critics repeatedly remind us). But if culture and international law are related, deterministic accounts of this relationship rest on questionable assumptions about the nature and dynamics of both law and culture. Where anthropologists now recognize that cultures are often marked by contradiction, subject to ongoing contestation, loosely integrated, and mutually interpenetrated, international relations scholars persist in seeing them as coherent, homogenous, and bounded. More than this, they discount the agency of a culture's members, assuming that they all experience a culture's systems of meanings in the same way, and that their behavior is the simple enactment of cultural scripts. Similarly, while theorists of international law now emphasize its constitutive dynamics—the way in which its norms, principles, and practices generate forms of legal and political agency and license certain configurations of power—cultural determinists in international relations treat it as a static regime of regulatory rules, one in which compliance depends in significant part on a degree of cultural cognition and competence.

This essay advances an alternative perspective on culture and international law. After exploring in greater detail determinist accounts of this relationship, I reverse the typically assumed causal pathway between culture and law, presenting international law as a mediating social institution, one that structures global cultural interaction and negotiation. In developing this position I draw on two strands of contemporary anthropological and legal thinking. From anthropology I take the idea that cultural meanings and practices, in all their contested and contradictory complexity, are structured and conditioned by prevailing social institutions. From international legal theory I take the proposition that international law is constitutive: its norms and practices are more than regulatory; they produce agents, structure shared meanings and understandings, and license forms of social action. When these insights are placed within a broader understanding of international society, in which international law is a core fundamental institution, international law can be seen as a key social institution mediating global cultural negotiation. To illustrate the value of this perspective, I consider, however briefly, the way in which the institution of international law conditioned the cultural negotiations that produced the international human rights regime, particularly the two legally binding International Covenants adopted by the UN General Assembly in 1966. For cultural determinists, human rights is the canary in the coal mine, the issue that more than any other brings to the fore the fragility and vulnerability of law in a culturally diverse international order. The issue of

human rights has indeed provided a focal point for cultural contestation and negotiation, but much of this has played out within the institutional framework of international law. This framework has defined the terms of cultural engagement (establishing states as the principal negotiating agents, structuring their interaction on the basis of sovereign equality, and licensing certain negotiating forums), ordained the resulting rules and principle as "legal," and established these norms as social facts around which subsequent cultural engagement on human rights has revolved.

Culture Determines Law

Deterministic accounts of the links between culture and international law rest on prior assumptions about the broader relationship between cultural unity and the development of international orders. Perhaps the clearest articulation of these assumptions is provided by key scholars of the English School.[1] Martin Wight famously defined a "states-system" as a group of sovereign states that interact with one another regularly and share institutions that facilitate their "communication and intercourse" (a definition that informed Hedley Bull's later conception of an "international society").[2] Wight could find only three historical examples of such systems: the ancient Greek system of city-states, China during the Warring States period, and the modern international system that originated in Europe. Each of these, he argued, developed in a distinctive cultural context. Indeed, he asserts as a general principle that "a states-system will not come into being without a degree of cultural unity among its members."[3] Precisely what constitutes "a degree of cultural unity" is decidedly unclear, however. Wight himself asked whether it entails "a common morality and a common code, leading to agreed rules about warfare, hostages, diplomatic immunity, the right of asylum, and so on," or requires, more expansively, "common assumptions of a deeper kind, religious or ideological."[4]

While he provided no definitive answer, his subsequent discussions point to the former proposition: a common morality. His account of international law suggests that institutional practices do not arise simply from the rational calculations of states; their form, as well as the degree of commitment they attract, is culturally determined. The ancient Greeks never developed the institution of international law, he argued, because "they did not have the enormous inheritance of legal codes, legal thinking and legal practice which modern Europe derived from the

Civilians and the Canonists, out of which the rules of nascent international society were educed."[5] But while he believed that these common modes of thought and practice were required for a system of states to develop, Wight was agnostic about whether the underlying culture had to exhibit religious, ideological, or even linguistic unity. Western Christendom provided the cultural foundations of the European system of states, but Christendom encompassed diverse linguistic groups, and the system's history was punctuated by intra-Christian religious schisms and distinctly modern ideological contests. Neither the Chinese nor ancient Greek systems displayed any strong sense of religious or ideological unity, but both had a linguistic unity absent in the European case.

When Wight argues that a "states-system presupposes a common culture,"[6] he appears to mean that, therefore, it has to be built upon a common morality, and that this consists of a set of shared meanings and practices. He implies that this culture has to be sufficiently "thick" to do at least three things. First, it has to engender a strong sense of shared identification: a feeling of "we-ness." Indeed, he argues that all historical systems of states have evinced insider/outsider mentalities: "hence the designation of those outside the states-system as 'barbarians.'"[7] Second, the culture underlying an international system has to comprise shared understandings of political legitimacy, of the terms of rightful rule. In the European case, for example, dynastic rule was once the norm, later replaced by the concept of popular sovereignty. For Wight, such understandings "mark the region of approximation between international and domestic politics. They are principles that prevail (or are at the least proclaimed) *within* the majority of states that form international society, as well as in the relations between them."[8] Finally, and perhaps most importantly for our purposes, the culture undergirding a system of states has to express a distinctive kind of institutional rationality: a set of intersubjective understandings about appropriate institutional forms, processes, and practices. It is these understandings, Wight contends, that inform the development of interstate institutions, hence his aforementioned claim that international law never emerged between the Greek city-states because the ancient Greeks lacked the requisite legal sensibilities and practical dispositions. Ancient Greek culture, by contrast, informed the development of a markedly different set of institutions, the most notable being the widespread practice of interstate arbitration.[9]

For Wight, the present global system of states lacks an underlying culture with these requisite characteristics. Writing at the high point of European decolonization, he worried that "diplomatic and technical interdependence" had "outrun

cultural and moral community."[10] Bull was famously concerned that if basic issues of global justice were not addressed, non-Western states would have no commitment to the institutional practices that sustained international order.[11] For Wight, by contrast, the problem was one of cultural dissonance. The institutional architecture of the modern system of states had evolved under conditions of Western cultural hegemony. But as the system globalized with post-1945 decolonization, this hegemony was replaced by greater cultural diversity, undermining the cultural foundations of the institutions that held the system together.

It was Adda Bozeman, however, who pursued this theme most vigorously and hammered home its implications for international law. Bozeman begins with a set of propositions about cultures as coherent, homogeneous entities, characterized by distinctive modes of thought. "Cultures are different," she writes, "because they are associated with different modes of thought. . . . The successive generations of any given society will be inclined to think in traditionally preferred grooves, to congregate around certain constant, change-resistant themes, and to rebut, whether intentionally or unconsciously, contrary ideas intruding from without."[12] It is these different ways of thinking, she contends, that shape a culture's institutional practices. "Just as one has to know that dharma is the basic theme in traditional Indian life and thought before one can appreciate the fact that the Indian Kingdom, being the patrimony of the warrior caste, is rightly associated with the commitment to wage war, so must one know that the typically European idea of a 'law of nature' could not have evolved before 'law' as such had been carefully set apart from 'nature.'"[13] Because of this connection between cultural modes of thought and institutional practices (including in the form of entire political systems), Bozeman was deeply skeptical about the viability of a global international order, especially one that unreflectively sought to universalize Western ideas and practices. In her words:

> An international system is as solid as the concepts that combine to compose it. Such concepts are solid if they are meaningful in different local orders that are encompassed by the international system. We do not have such a globally meaningful system because world society consists today as it did before the nineteenth century of a plurality of diverse political systems, each an outgrowth of culture specific concepts.[14]

The biggest casualty in all of this is international law. For Bozeman, the very idea of the rule of law is a Western cultural artifact. It "would be difficult not to conclude," she writes, "that law has been consistently trusted in the West as the main

carrier of shared values, the most effective agent of social control, and the only reliable principle capable of moderating and reducing the reign of passion, arbitrariness, and caprice in human life."[15] European powers, in their long age of political ascendance, transplanted this faith in the rule of law into the international arena, shaping in profound ways the modern institution of international law. Bozeman describes international law as "the leading European reference for the conduct of relations between states without which 'international order' could not even have been imagined in the West."[16] Yet the globalization of the system of sovereign states has robbed international law of its original cultural foundations, and Bozeman portrays the global cultural condition as one of fragmentation and incommensurability. There is a profound gap, she writes, "between the inner normative orders of the vast majority of states on the one hand, and the substantive concepts of established international law and organization on the other."[17] The net effect, she concludes, has been intensified power politics beneath the thin veneer of an increasingly ineffectual legalistic order.[18]

Lest one think these views on culture and international law are peculiar to now-dead members of the English School, it should be noted that they have been echoed by a wide variety of scholars and commentators. The proposition that international law is a Western cultural artifact is commonplace. Not surprisingly, Samuel Huntington noted that at the dawn of the twentieth century "international law was Western international law coming out of the traditional of Grotius."[19] At the other end of the political spectrum, the Western roots of modern international law are also emphasized by critical legal theorists and scholars of the "Third World Approaches to International Law" network.[20] What do these origins and cultural legacies mean, though, for the future of international law in a global, inherently multicultural order? While some hold that despite its cultural roots international law provides a rational institutional framework in which states of diverse cultural backgrounds can coexist and collaborate, others share Bozeman's pessimism. This is especially evident in concerns about the rise of non-Western great powers, particularly China. The debate, for example, over whether China is a status-quo or revisionist power has strong cultural undertones, even when couched in the seemingly neutral language of power transition and contending interests. Much of the worry that China might be a revisionist power rests on the belief that it is uncomfortable with key norms of the liberal international order, especially the more cosmopolitan ones, and that it will use

its power to promote an entirely different set of international norms grounded in its strong self-identity as a "civilizational state."[21]

Law Mediates Culture

While the cultural roots of the modern institution of international law are diverse and complex, European ideas and practices have been particularly influential. As I have argued elsewhere, during the nineteenth century, in the context of revolutionary political transformations in Europe, old ideas of law as the command of a superior authority were displaced by the ideal of law as a reciprocal accord, a set of rules authored by those subject to them (or their representatives)—obligating because of consent, not command. As these ideals took root domestically, they were also transplanted into the international arena, generating new conceptions of positive international law. States were imagined as individuals writ large, international law was seen as the product of state consent, and the rule of international law was expected to facilitate coexistence and collaboration among states, constraining the play of arbitrary power much as it did within the emergent liberal state.[22] At that time, however, the international system was formally hierarchical: sovereignty in the core was conjoined to empire abroad. International law was deeply implicated in this hierarchy, codifying the notorious "standard of civilization" that licensed the exclusion of non-Western peoples from the club of states as well as their subjection to European tutelage and rule.[23]

But while this part of the determinists' argument is largely correct, their prognosis for the future of international law in a global system of states is less compelling. Empirically, their pessimism sits uncomfortably with international law's growing depth and complexity under conditions of global multiculturalism. The problem stems, however, from the limits of their conceptual understandings. As noted above, the determinist thesis rests on peculiar, and largely outdated, conceptions of both culture and international law. A "Benedictine" conception of culture is assumed, in which cultures are treated as coherent, homogenous, and bounded entities, characterized by singular systems of belief and practice that individuals engage and experience in common ways.[24] International law is also understood in a distinctive way: it is treated as a system of regulatory rules that states encounter as external social facts, and to which they respond through compliance or noncompliance. Importantly, the degree to which states comply is not merely determined by the incentives and constraints of the international legal system.

Because international law is a Western cultural artifact, participation and compliance depend on a particular kind of cultural knowledge and competence. Together, these conceptions preclude any more dynamic, less deterministic, understanding of the relationship between culture and international law. If cultures are bounded, homogeneous entities, and if culture defines the institutional imagination, then contemporary international law lacks solid foundations. And if law is nothing more than a regulatory system of rules, with no acknowledged constitutive power, then it can play no role in the navigation and negotiation of global cultural diversity.

Building an alternative account of culture and international law must begin with a revised understanding of culture itself. Culture remains an "essentially contested concept," and there is little agreement as to its precise definition. Indeed, most anthropological textbooks fall back (rather oddly) on the "omnibus" conception advanced by Edward Tylor in 1871: "Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[25] Using this definition, however, brushes over significant conceptual disagreements among contemporary anthropologists and sociologists. More importantly, cultures are no longer seen as coherent, homogeneous, and neatly bounded entities. In contrast, they are now widely understood to be contradictory, loosely integrated, contested, in perpetual change, and only weakly bounded.[26] In Ann Swidler's words, "all real cultures contain diverse, often conflicting symbols, rituals, stories, and guides to action. . . . A culture is not a unified system that pushes action in a consistent direction."[27]

With this insight, anthropologists and sociologists have turned their attention to cultural diversity—in particular, to the form that the diversity of meanings and practices takes in specific cultural contexts, and to the ways individuals navigate their variegated cultural environments. As noted earlier in this essay, I am particularly interested here in one strand of this literature—in the idea that cultural diversity is structured by social institutions. Ulf Hannerz identifies three dimensions of culture: ideas and modes of thought, forms of externalization (how individuals express meanings in social contexts), and social distribution. Where anthropologists have traditionally seen the first as primary, Hannerz argues that how cultural meanings are distributed in a society—how differently located individuals encounter diverse meanings, and how the distribution of meaning and experience is patterned—affects the content and externalization of ideas

and ways of thinking.[28] Culture, from this standpoint, should be understood as "organized diversity," he contends.[29] This "organization" of diversity is the product of the prevailing social system, which is based on four "organizational frameworks": the prevailing "form of life," which involves "everyday practicalities of production and reproduction"; the "market," where "meanings and meaningful forms are produced and disseminated by specialists in exchange for material compensation"; the "state," which seeks legitimation through various forms of cultural engineering and construction; and social movements that mobilize and transform meanings.[30] While these organizational frameworks are themselves cultural products, they nonetheless structure the "flow" of culture. "In the continuous interdependence of 'the social' and 'the cultural,' it would seem," Hannerz writes, "the social structure of persons and relationships channels the cultural flow at the same time as it is being, in part, culturally produced."[31]

What does this mean for rethinking the relationship between culture and international law? Two characteristics of the present global order bear recalling here. First, the global cultural condition is that of diversity writ large. Even if we recognize that cultures are always contradictory, contested, and interpenetrated, the world clearly comprises multiple cultural formations. Furthermore, even if the amorphous "culture of modernity" now has global reach, it has been indigenized in local cultural settings, producing what Shmuel Eisenstadt terms "multiple modernities."[32] Second, this global cultural condition exists within a distinctive framework of international social institutions. These institutions include many of those emphasized by Hannerz: practices of production and reproduction, the market, social movements, and so on. What interests me, though, is the more formal, overtly political institutions of the global society of sovereign states. As scholars of the English School have long emphasized, to facilitate coexistence and collaboration, states have developed a repertoire of basic institutional practices, such as diplomacy and international law, that when enacted in a growing range of issue areas, to confront a multitude of functional challenges, have produced a dense network of international rules and practices.[33] While these institutions are not equivalent to "the state" emphasized by Hannerz, to the extent that the global order has political institutions that play a role in "organizing" cultural diversity, it is these institutions that underpin the global society of states.

Prominent among them is the modern institution of international law. As many have observed, international law evolved, in part, as an institutional mechanism for structuring and legitimating Europe's subjugation of the non-European

world. In significant measure, this was about the organization of cultural diversity—the reinscription of cultural difference into a legally codified civilizational hierarchy. Yet even with the end of empire, and with the demise of the formal "standard of civilization," international law has remained deeply implicated in the organization of global cultural diversity. There are two ways one could look at this. One could focus on the development of substantive legal norms, examining how specific legal regimes license understandings of culture, legitimate cultural formations and expressions, and structure forms of cultural interaction, exchange, and dialogue. As an interesting counterpoint to the imperial "standard of civilization," one could study, for example, the recent use of international law to frame and secure cultural diversity itself, evident in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (ratified at the time of writing by 132 states). I am interested here, however, in international law's deeper workings: in the way in which the institution of international law—its deep constitutive norms and reproductive practices—mediates cultural engagement and negotiation. I am concerned, therefore, with how international law, as an international institutional practice, structures the global cultural "flow," producing, in the end, substantive normative outcomes.

Four features of the modern institution of international law are particularly noteworthy. The first is its statism: its ordination of sovereign states as the principal agents and subjects of international law. When it comes to the global negotiation of cultural values, this formal legal status establishes states as the principal political conduits of cultural knowledge, representatives of cultural priorities, and negotiators of global cultural rules, norms, and principles. Second, these states are recognized as sovereign equals. They vary in their material capabilities, and peaks of more or less formal hierarchy punctuate the international horizon, but the legal baseline is that of formal equity. When the negotiation of cultural issues enters the international legal domain, therefore, processes and outcomes are conditioned by this formal equality, greatly complicating projects of cultural imposition. This is reinforced by a third aspect of modern international law: its relation to the practice of multilateralism. Binding rules of international law are frequently negotiated bilaterally, or even "minilaterally," but rules of greater ambit, whose proposed reach is regional or universal, are almost invariably the product of multilateral negotiation. Superficially, this means that they are negotiated by multiple states. More significantly, it means that the rules themselves are, in large measure, reciprocally binding: they apply equally to all parties.[34] This creates a distinctive

incentive structure for those engaged in the legal negotiation of culturally laden and consequential norms. The game is not simply that of imposing one's view on others, or of resisting the same in return; it is about the prospect of assuming the same obligations as others to observe the resulting rules, whatever their complexion. Finally, modern international law has a distinctive structure of obligation.[35] When states "legislate" new rules and principles of international law, they are obliged to observe them because they have consented. States thus negotiate international law under a distinctive "shadow of the future," in which consenting to new rules exposes them to being hoisted on their own petards.

When international law is understood in this way, its constitutive power comes to the fore. A prominent strand of thought in international relations and international law understands international law as a system of rules, regulatory in their effects. This is the perspective advanced in the oft-cited volume, *Legalization in World Politics*.[36] Not only is the "law" understood as a system of rules but for these rules to count as law they must be obligatory, precise, and, in circumstances often missing in international relations, justiciable (amendable to third party interpretation and implementation).[37] As many scholars have observed, however, international law is more than a system of rules. For some it is a more encompassing normative system,[38] for others a language of justification and a form of reasoning.[39] What matters here is that international law's power is more than regulatory: it is strongly constitutive, it creates legal agents and subjects, defines actions as legal or illegal (legitimate or illegitimate), lends authority to certain values, and, as an important body of recent scholarship demonstrates, generates feelings of legal obligation.[40] The four features of international law identified above are all implicated in this constitutive dynamic. International law produces states as *the* legal agents and subjects, places them in legal relations of equality, channels norm development through multilateral processes, and defines the terms of obligation. In this way, international law conditions the flow of global cultural interaction, constituting states as cultural conduits, representatives, and negotiators; structuring intercultural negotiation; and legally congealing the resulting social norms.

International Human Rights Law[41]

The issue of human rights is a key site of cultural engagement in contemporary world politics; indeed, some would argue that it is the critical site of such

engagement. It confronts directly the nature and integrity of the individual, the individual's relationship to society, the status of established cultural practices, the normative foundations of state authority, and the moral obligations individuals of different cultural backgrounds, in different political units, owe one another. For cultural determinists, this is the issue that exposes most starkly the fragility of international law in a multicultural world. The international human rights regime was constructed by Western states, and the end result is a regime of international legal norms to which many of the world's states pay little more than lip service. Furthermore, overzealous efforts to promote these norms, and to compel compliance across the globe, risks undermining norms more essential to the preservation of international order: sovereignty, nonintervention, self-determination, and so on.

Nothing I say here questions the European origins of the idea of human rights, or the important, though not exclusive, role that Western states played in putting them on the United Nations' agenda after 1945. Nor do I deny that the issue of human rights is subject to ongoing cultural contestation. That said, the construction of the international human rights regime is not a simple story of Western cultural imposition, or of Western culture determining international law. Indeed, the story of the negotiation of the key instruments of international human rights law—the two legally binding Covenants—is one of the institutions of international law structuring intercultural negotiations, and producing surprising legal outcomes. These outcomes, in the form of codified and widely ratified international human rights norms, have in turn served to "organize" ongoing global cultural debates, lending them a fundamentally different form than would have been the case in the absence of international human rights law. Cultural controversy there certainly is, but it is a *legally framed and channeled* controversy.

It is taken as a given in most of the literature that the international human rights regime was a Western project, negotiated before non-Western states got to the table.[42] Not only does this view misrepresent the negotiations of the Universal Declaration, which, as Mary Ann Glendon demonstrates, were a deliberate, if nonetheless flawed, exercise in intercultural dialogue,[43] it also sits uncomfortably with the diversity of states that negotiated the International Covenants. Indeed, that these negotiations took place within the institutional structures of the United Nations, in which a steady stream of newly independent postcolonial states stood side-by-side with their Western counterparts as legal equals with full rights of participation and decision, had a profound effect on the resulting treaties.

This is clearly apparent in two areas: the universality of the resulting norms, and the issue of implementation.

While the Western powers preached the universality of human rights, in practice they fought throughout the negotiations of the Covenants to limit the reach of international human rights law. They sought, first of all, to insert a "colonial clause" in both Covenants, formally absolving Europe's colonial powers of any obligation to uphold human rights within their dependent territories. Their argument was that many of these territories had reached a significant degree of self-government, and that the metropolitan powers no longer had the authority to uphold human rights norms there.[44] They shared the table, however, with a growing number of non-Western states that refused to accept any such clause. At the Sixth Session of the Commission on Human Rights in 1950, Chile, China, India, Mexico, and Peru complained that it "would allow discrimination, without colonial people having a vote in the matter"[45]; and in the Third Committee of the General Assembly, opponents denied that dependent territories had the claimed level of self-government, and portrayed the position of Western powers as nothing more than an effort to avoid upholding the human rights of their colonial subjects.[46] Even in 1950 the institutional context of the negotiations, which granted non-Western states legal rights of participation and decision, prevented Western powers from achieving their objective. No colonial clause was ever included in the Covenants.

The major Western powers also tried to include a "federal state clause" in the Covenants. Its main proponents were Australia, Canada, and the United States, which argued that many federal states lacked the authority to uphold human rights in their constituent provinces. This meant, they argued, that the Covenants had to include a formal exemption for such states, limiting their legal obligations to uphold human rights across their territories. Not surprisingly, this met with intense opposition from non-Western states. In 1950, India told the Third Committee that "the United States should take responsibility for its importance in international affairs and consider amending its Constitution to enable it to meet the growing demands of international participation."[47] Pakistan claimed that "it would be unjust for some powerful States to hide behind the federal clause, thus depriving their signatures and even the covenant of any meaning."[48] Debate on the issue dragged on, but the opposition persisted. In 1953 the Dominican Republic, Egypt, Iraq, and Mexico argued that "such a clause was out of place in covenants on human rights, the universality of which should be assured."[49] As with the

colonial clause, the Western powers lacked the formal institutional capacity to impose their will. Indeed, the final texts of both Covenants explicitly deny any special rights to federal states: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."[50]

In successfully opposing these Western initiatives, newly independent postcolonial states ensured the universality of emergent international human rights norms: their applicability to all humans, and the equal obligation of all states to ensure their promotion and protection within their jurisdictions. In addition, they also played a pivotal role in developing the Covenants' enforcement mechanisms, rudimentary and inadequate as these might be. Much of the debate in this area revolved around whether or not individuals and nongovernmental organizations should have the right to petition the United Nations directly about alleged human rights violations committed by states. The Soviet bloc opposed all enforcement measures on the grounds that they violated state sovereignty, and the United States and Britain insisted that the right of petition be restricted to states. In response, key postcolonial states, in association with a number of small Western states, tried to have the individual's right of petition enshrined in the Covenants. Denmark, India, Iraq, Israel, Mexico, and Syria told the Third Committee that "without the inclusion of provisions extending the right of petition to individuals, groups and non-governmental organizations, the whole value of the Covenants would be in question."[51] For years no agreement could be reached, and in the final round of debates Nigeria tried to include an optional article that would grant individuals that right. This was defeated in favor of Lebanon's proposal for the Optional Protocol to the International Covenant on Civil and Political Rights (the text of which was drafted by Nigeria).[52]

What we see in these negotiations is how the institution of international law organized the flow of cultural ideas and debate in the key area of human rights. When ideas that were European in origin entered the formal arena of international legal negotiation, an arena that granted non-European states equal legal standing, leading Western states lost the capacity to dictate their meaning and form of institutionalization. It is often argued that the emphasis given to civil and political rights over economic and social rights was a Western achievement. Yet even this is greatly overstated. In contrast to the Soviet bloc, leading postcolonial states insisted repeatedly that civil and political rights had priority.[53] Moreover, as we have seen above, postcolonial states were instrumental in universalizing international human rights, actively opposing the colonial and federal exceptions

advocated by leading Western states. The legally binding instruments that emerged from this process have in turn become key focal points for global cultural engagement. If international law's deep constitutive principles—statism, sovereign equality, multilateralism, and consent—mediated the flow of a set of culturally specific ideas into international legal principles, these principles have subsequently shaped constructions of cultural difference, modes of cultural argument, and patterns of cultural agreement.

Conclusion

Simon Chesterman argues that the idea of the rule of law is comprised of three key principles: that state power may not be exercised arbitrarily, that the law must apply also to the sovereign and instruments of the state, and that the law must apply to all persons equally.[54] The "international rule of law," he argues, is the idea that these principles should apply to "relations between States and other subjects of international law."[55] In articulating these ideas, he draws a distinction between the rule *of* law and rule *by* law, the former entailing the superiority of the law (its ability to constrain arbitrary power), the latter involving merely the use of the law for instrumental purposes. The international rule of law only exists, Chesterman contends, when we see evidence of the former: when the superiority of international law is recognized, and when it limits, to any meaningful degree, the play of power politics. Such evidence is scarce on the ground, he concludes: "At the international level anything resembling even this limited idea of the rule of law remains an aspiration."[56]

However limited international law may be in constraining arbitrary state power, the preceding discussion points to a richer understanding of the rule *of* law than Chesterman admits. As we have seen, cultural determinists think of the international rule of law in much the same way: as a system of regulatory rules that, in a compatible context in which states share the requisite cultural knowledge and sensibilities, can contribute to the preservation of international order. The principal claim advanced here, however, is that the international rule of law is not merely about the superiority of law but about its constitutive power, that is, the way in which it generates forms of agency, modes of action, strategies of justification and argument, and normative outcomes. This is evident in modern international law's dual relationship with culture, for while it is at once a culturally rooted institution and a product of nineteenth-century liberal ideals, it has also

served to organize global cultural interaction and debate around the issue of human rights.

This has important implications for how we think about the future of international law in a multicultural world. For determinists, international law is vulnerable in a culturally diverse international order; it is a Western cultural artifact that grew out of, and remains dependent upon, a particular kind of cultural homogeneity, at least at the core of the international system. Rationalists reply that whatever international law's cultural origins, its future will depend on the prevailing configuration of state interests, particularly among the great powers. If international law is useful, it is likely to endure, even under conditions of heightened cultural diversity. The argument advanced above suggests a third way of thinking about these issues. International law may well have Western cultural origins, and "rational buy-in" might sustain it into the future. But international law is a mature social institution, one of the basic institutional practices of the modern international order. As such, it is one of the institutional frameworks that structure the global "flow" of culture (as shown in the above discussion of human rights). International law is not a simple product of culture; it helps structure the cultural universe in which it operates and evolves. International law thus has a form of structural power in the face of growing cultural diversity, a diversity it helps constitute and organize. Its sources of durability are twofold, therefore: its functional utility, and its role in structuring the very cultural diversity many see as corrosive.

NOTES

[1] For other discussions of the English School's perspective on these issues, see Barry Buzan, "Culture and International Society," *International Affairs* 86, no. 1 (2010), pp. 1–26; and Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (New York: Oxford University Press, 2007).
[2] Martin Wight, *Systems of States* (Leicester U.K.: Leicester University Press, 1977), p. 22.
[3] Ibid., p. 33.
[4] Ibid., p. 34.
[5] Ibid., pp. 51–52.
[6] Ibid., p. 46.
[7] Ibid., p. 34.
[8] Ibid., p. 153.
[9] See Christian Reus-Smit, *The Moral Purpose of the State* (Princeton, N.J.: Princeton University Press, 1999).
[10] Wight, *Systems of States*, p. 34.
[11] Hedley Bull, *Justice in International Relations: The 1983–84 Hagey Lectures* (Waterloo, Ont.: University of Waterloo, 1984).
[12] Adda Bozeman, *Future of Law in a Multicultural World* (Princeton, N.J.: Princeton University Press, 1971), p. 14.
[13] Adda Bozeman, "The International Order in a Multicultural World," in Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (New York: Oxford University Press, 1984), p. 390.
[14] Ibid., p. 404.
[15] Bozeman, *Future of Law*, p. 38.

[16] Bozeman, "The International Order in a Multicultural World," p. 406.
[17] Bozeman, *Future of Law*, p. 181.
[18] Ibid., p. 186.
[19] Samuel P. Huntington, *The Clash of Civilizations* (New York: Touchstone, 1997), p. 53.
[20] See, for example, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).
[21] Martin Jacques, *When China Rules the World* (Harmondsworth, Eng.: Penguin, 2009), p. 228.
[22] Reus-Smit, *The Moral Purpose of the State*, ch. 6.
[23] See Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984); and Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago: University of Chicago Press, 2009).
[24] I term this conception "Benedictine" because the classic statement of this understanding is Ruth Benedict's *Patterns of Culture* (Boston: Houghton Mifflin, 1973), originally published in 1934.
[25] Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art, and Custom, Volume 1* (London: Murray, 1871), p. 1.
[26] See William H. Sewell, "The Concept(s) of Culture," in Gabrielle M. Spiegel, ed., *Practicing History: New Directions in Historical Writing After the Linguistic Turn* (London: Routledge, 2005), pp. 52–55.
[27] Ann Swidler, "Culture in Action: Symbols and Strategies," *American Sociological Review* 51, no. 2 (1986), p. 277.
[28] Ulf Hannerz, *Cultural Complexity: Studies in the Social Organization of Meaning* (New York: Columbia University Press, 1992), pp. 7–9.
[29] Ibid., p. 13.
[30] Ibid., pp. 47–49.
[31] Ibid., p. 14.
[32] Shmuel Eisenstadt, "Multiple Modernities," *Daedalus* 129, no. 1 (2000), pp. 1–29.
[33] Hedley Bull, *The Anarchical Society* (London: Macmillan, 1977).
[34] See John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution," in John Gerard Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993).
[35] Christian Reus-Smit, "The Politics of International Law," in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), pp. 41–43.
[36] Judith Goldstein et al., eds., *Legalization in World Politics, International Organization* special issue (Cambridge, Mass.: MIT Press, 2011).
[37] Kenneth W. Abbott *et al.*, "The Concept of Legalization," *International Organization* 54, no. 3 (2000), p. 404.
[38] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995).
[39] Friedrich Kratochwil, *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press, 1991).
[40] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010).
[41] Space prevents a detailed account of the negotiation of the two International Covenants, and the following discussion draws on the more detailed exposition presented in my recent book, Christian Reus-Smit, *Individual Rights and the Making of the International System* (New York: Cambridge University Press, 2013), ch. 5.
[42] "It should not be forgotten," Adamantia Pollis and Peter Schwab argue, "that the San Francisco Conference which established the United Nations in 1945 was dominated by the West, and that the Universal Declaration of Human Rights was adopted at a time when most Third World countries were still under colonial rule." Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," in Christine M. Koggel, ed., *Moral and Political Theory,* Vol. 1 of *Moral Issues in Global Perspective* (Peterborough, U.K.: Broadview Press, 2006, 2nd ed.), p. 62.
[43] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).
[44] Australia, Belgium, Britain, Canada, France, the United States, and New Zealand, among others, all ran this line. United Nations, *Yearbook of the United Nations 1950* (New York: UN Department of Public Information, 1950), p. 525.
[45] Ibid., p. 522.
[46] United Nations, "General Assembly, Third Committee, summary records," General Assembly Document A/C.3/SR.296, 1950, p. 69.

[47] Quoted in Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington, Ind.: Indiana University Press, 2008), p. 405.
[48] Quoted in ibid., p. 227.
[49] United Nations, *Yearbook of the United Nations 1953* (New York: UN Department of Public Information, 1953), p. 385.
[50] International Covenant on Civil and Political Rights, December 16, 1966, Article 50.
[51] United Nations, *United Nations Yearbook 1953*, p. 187.
[52] Erik Mose and Torkel Opsahl, "The Optional Protocol to the International Covenant on Civil and Political Rights," *Santa Clara Law Review* 21, no. 1 (1981), pp. 275–76.
[53] Reus-Smit, *Individual Rights*, p. 183.
[54] Simon Chesterman, "An International Rule of Law?," *New York University Public Law and Legal Theory Working Papers* (2008), Paper 70, p. 15.
[55] Ibid., p. 32.
[56] Ibid., p. 39.