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Past issues of the *Journal of International Law and International Relations* can be found online at Westlaw, Hein Online, Proquest and EBSCOhost.

The citation for this issue is (2012) 8 J Int'l L & Int'l Rel

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EDITORS' ACKNOWLEDGEMENT
LOUIS CENTURY & TIM HUGHES

Volume 8 is the culmination of another year of growth and progress for our young journal. Over 100 students of law and global affairs, and dozens of faculty advisors and peer reviewers, were involved in bringing this issue to print.

We are in a period of change for academic journals, and JILIR is no exception. Cycle times for the publication of information, even academic information, are increasingly condensed. Pressure to expedite processes and render quick decisions is intense, and maintaining this pace is difficult for a student-run process wed to the ebbs and flows of the academic calendar. These challenges are amplified for JILIR, a multi-disciplinary journal edited collaboratively by students in different faculties and fields of research. This collaboration, however, remains JILIR's greatest strength, and we are proud that the quality of our publication remains our central focus. The works contained in this issue are demonstrative of the forward-looking and multi-disciplinary scholarship that journals like ours are uniquely positioned to provide.

Over the past year, we have taken steps internally to remain competitive in a changing landscape. We have also taken steps externally, the most visible of which is the reintroduction of book reviews, which last appeared in Volume 3. We hope that book reviews will offer readers another level of engagement with rapidly evolving scholarship in international law and international relations. In particular, reintroducing book reviews has given us new opportunities to engage with promising scholars. The reviews in this volume were all written by invited authors, and we are very pleased with their contributions.

We would like to thank our Associate Editors, primarily first-year students at the University of Toronto Faculty of Law and the Munk School of Global Affairs, without whom we simply would not be able to operate. Our faculty advisors Steven Bernstein and Audrey Macklin contributed their wisdom and support as JILIR continued to evolve. Volume 7 Editors-in-Chief Megan Dersnah, Ryan Liss, and Brendan Morrison left us a journal with very strong foundations. Likewise, we have enormous faith that the incoming Editors-in-Chief – Jonathan Bright and Kate Robertson of the Faculty of Law,

and Graham Smith of the Munk School – will continue to build upon JILIR's successes. They along with our other Senior Editors were responsible for the debate and dialogue that helped us choose among an exceptional pool of submissions for Volume 8. Andrew Max was instrumental in stewarding articles through peer review, and Jonah Kanter ably managed our submissions. Todd Brayer and Vanessa Zhang were dedicated and diligent in putting the physical volume together, and Jennifer Wong kept our business and financial house in order.

We would also like to thank Advisory Board member Jose Alvarez of Columbia University for his helpful advice, and Kenneth Abbott of Arizona State University for his contributions as both author and advisor in this volume.

A special thank you goes to Sarah Pais and Jessica Roher for their support (and patience) over the past year.

Most importantly, we would like to thank the contributors, whose work is contained in the pages which follow. The following papers are the result of months of editorial feedback, peer review, revision, and continued dialogue with our very patient authors. We are excited to be publishing their work. Their dedication, patience, and exceptional scholarship are commendable.

Louis Century and Tim Hughes
Editors-in-Chief

Reimagining Participation in International Institutions

KENNETH W ABBOTT AND DAVID GARTNER[*]

I.   Introduction

It is by now well recognized that civil society organizations (CSOs) have become important global actors over the past four decades, shaping international law and politics and substantially restructuring traditional relationships among states, non-state actors, and international institutions.[1] It is uncertain, however, whether twenty-first-century international institutions will maintain the predominantly state-centric models of governance they have inherited or whether they will further transform civil society participation.

International environmental institutions have been among the most celebrated leaders of what has been called a "participatory revolution."[2] Both

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[1] See Kenneth W Abbott and Duncan Snidal, "Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) 42 Vand J Transnat'l L 501 at 577–78; José E Alvarez, *International Organizations as Law-Makers* (New York: Oxford University Press, 2005); MM Betsill and E Correll, eds, *International NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations,* (Cambridge: MIT Press, 2008); PG Cerny, *Rethinking World Politics: A Theory of Transnational Pluralism* (New York: Oxford University Press, 2010); Rodney Bruce Hall and Thomas Biersteker, eds, *The Emergence of Private Authority in Global Governance* (New York: Cambridge University Press, 2002); A Claire Cutler, Virginia Haufler, and Tony Porter, eds, *Private Authority and International Affairs* (Albany: SUNY Press, 1999); Terry Macdonald, *Global Stakeholder Democracy: Power and Representation beyond Liberal States* (Albany: SUNY Press, 2008); Phillip Pattberg, *Private Authority and Global Governance: The New Politics of Environmental Sustainability* (Cheltenham, UK and Northampton, USA: Edward Elgar, 2007); James N Rosenau and E-O Czempiel, eds, *Governance without Government: Order and Change in World Politics* (Cambridge, UK: Cambridge University Press, 1992); Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Sidney Tarrow, *The New Transnational Activism* (Cambridge: Cambridge University Press, 2005); Kenneth Anderson, "Book Review: Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks" (2005) 118 Harv L Rev 1255 at 1311; Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 Am J Int'l L 596; Steve Charnovitz, "Nongovernmental Organizations and International Law" (2006) 100 Am J Int'l L 348 at 372; Daniel C Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 Yale LJ 1490; David Gartner, "Beyond the Monopoly of States" (2010) 32 U Penn J Int'l 595; Benedict Kingsbury et al, "The Emergence of Global Administrative Law" (2005) 68 Law & Contemp Probs 15. For a review of changes in these relationships within the UN system, see *UN System and Civil Society: An Inventory and Analysis of Practices,* Background Paper for the Secretary-General's Panel of Eminent Persons on United Nations Relations with Civil Society, May 2003, online: http://www.ngocongo.org/congo/files/un-civil_society-background_paper1.doc [*Inventory*]. A recent policy-oriented review is Robert Falkner, *Global Governance — The Rise of Non-State Actors: A Background Report for the SOER 2010 Assessment of Global Megatrends*, European Environment Agency Technical Report no 4 (Luxembourg: Publications Office of the European Union, 2011).

[2] Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law" (1997) 21

the 1972 Stockholm Conference on the Human Environment and the 1992 Rio Conference on the Environment and Development (UNCED) saw unprecedented civil society involvement—organizations such as the Commission on Sustainable Development (CSD) and the Global Environment Facility (GEF) pioneered arrangements for civil society input into international decision-making. Yet civil society input remains merely consultative, and some more recent environmental organizations have abandoned expanded participation, challenging the leading accounts of civil society's role.[3]

At the same time, a new generation of global health institutions is transforming the landscape of participation, incorporating civil society representatives and other non-state actors directly into formal decision-making bodies.[4] As a result, the nature of participation in these two fields has sharply diverged—global health is now the innovator, while the environment has become a relative laggard. Explaining this divergence and exploring its normative implications are essential not only for these two important fields but also for the design of institutions capable of responding effectively to other pressing global challenges.

To be sure, CSOs play important roles in international regimes without directly participating in decision-making. CSOs frequently act as advocates, seeking to influence the agendas, positions, and decisions of states and international organizations.[5] CSOs also play significant operational roles. For example, under the current International Health Regulations (IHR), the World Health Organization need no longer rely only on state reporting of infectious disease outbreaks.[6] It can now utilize information provided by CSOs and other non-state actors as well.[7] CSOs also co-operate with international officials in numerous informal ways.[8] We focus in this article, however, on CSO participation in international decision-making—an issue of substantial importance and one in which dramatic differences have emerged.

Harv Envtl L Rev 537. See also Steven Bernstein, "Legitimacy in Global Environmental Governance" (2004) 1 J Int'l L & Int'l Rel 139 at 148-51.

[3] See Raustiala, *ibid*; Bernstein, *ibid*; Peter Spiro, "NGOs in International Environmental Lawmaking: Theoretical Models," in Daniel Brodansky, Jutta Brunnée & Ellen Hey, eds, *Oxford Handbook of International Law* (New York: Oxford University Press, 2007); Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18 Michigan J of Int'l L 183.

[4] See, for example, Kenneth Anderson, *Global Governance: The Problematic Legitimacy Relationship between Global Civil Society and the United Nations,* (2008) American University, Washington College of Law Research Paper Series no 2008-71; Martin Shapiro, "Administrative Law Unbounded: Reflections on Government and Governance" (2001) 8 Ind J Global Legal Stud 369.

[5] See, for example, Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Law* (New York: Cornell University Press, 1998); Richard Price, "Transnational Civil Society and Advocacy in World Politics" (2003) 55 World Pol 579; Thomas Risse, "Transnational Actors and World Politics," in Walter Carlsnaes, et al, eds, *Handbook of International Relations* (London: Sage Publications, 2002).

[6] World Health Organization, *International Health Regulations*, 2nd edition (2006).

[7] David P Fidler and Lawrence O Gostin, "The New International Health Regulations: An Historic Development for International Law and Public Health" (2006) 34:1 JL Med & Ethics 84 at 90.

[8] *Inventory*, *supra* note 1 at 3.

Building on the Charter of the United Nation's (UN Charter) provision for CSO "consultative status" with the Economic and Social Council (ECOSOC), many international institutions—including those addressing environmental issues—have established procedures for consulting with civil society, including arrangements by which CSOs act as observers.[9] Consultations are often held in connection with governing body meetings, and authorized observers actually attend such meetings. However, none of these procedures provides for membership in governing bodies or for direct participation in decision-making. Environmental organizations including the United Nations Environment Programme (UNEP), the CSD, the GEF, and the Adaptation Fund (AF) remain fundamentally inter-governmental, despite consultative processes that are more (the CSD, the GEF) or less (the AF) extensive.

In contrast, recent global health institutions have embraced a multi-stakeholder model in which non-governmental organizations (NGOs), the private sector, private foundations, and other constituencies within civil society—including populations directly affected by health threats—participate directly in governance structures, deliberation, and decision-making. For example, the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) allots a quarter of its board seats to non-state stakeholders, while the board of the GAVI Alliance (GAVI) includes representatives of CSOs, businesses and foundations, as well as private individuals.

The broad multi-stakeholder character of institutions such as the Global Fund and GAVI demands an equally broad understanding of "CSOs." The term encompasses advocacy, service, and other NGOs as well as NGO coalitions and networks.[10] But it also encompasses other organizations "that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations."[11] We include private foundations, scientific and technical bodies, indigenous peoples associations, and communities suffering the effects of particular international phenomena—all of which participate in the institutions discussed in this article. CSOs may be transnational, national, or local. In practice, transnational groups are more likely to participate in international decision-making, while national or local groups are more likely to participate in local decision-making.

In this article, we document the growing divergence in civil society participation between global health and the environment, suggest explanations for this divergence, and analyze the implications of direct participation for responding to global challenges. The first section briefly

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[9] Charter of the United Nations, (1945) 39 AJIL 190, Article 71 [UN Charter].
[10] John Gerard Ruggie, "Reconstituting the Global Public Domain—Issues, Actors, and Practices" (2004) 10 Eur J Int'l Rel 499 at 522 n 1. Ruggie's definition also includes "transnational social movements … and activist campaigns."
[11] The World Bank has adopted this definition, developed by civil society research centres. See *Defining Civil Society,* online: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/ 0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.ht ml.

compares civil society participation across four pairings of health and environmental institutions. To maximize comparability, we analyze pairings of institutions that have similar missions and that were established at similar points in time. The second section offers an explanation for the divergence in participation. We identify three significant causal factors: civil society demand for participation; the nature of the forum in which an institution is established; and path dependence within an issue area. We also show how these factors have influenced the development of specific institutions. The third section considers the normative implications of civil society participation in international decision-making. We argue that direct participation has important advantages over mere consultative processes. The article concludes by considering the implications of our analysis for the future design of effective international institutions.

II.   The Divergence of Global Health and Environmental Institutions

This section compares four pairings of institutions from the fields of global health and the environment. While complete symmetry is not possible, we pair organizations from the two fields in terms of both their function—for example, policy-making or financing—and the general timing of their establishment. This approach allows us to at least partially control for explanatory factors that are associated with function (for example, that states might maintain particularly tight control over financing bodies) and with the development of norms and practices over time (for example, that a broad norm of civil society participation may have developed in recent decades). Table 1 identifies the four pairings discussed in this section.

TABLE 1: COMPARISONS OF GLOBAL HEALTH AND ENVIRONMENT INSTITUTIONS

Function	Global Health	Environment
Core Institution	WHO (1946)	UNEP (1972)
Policy and Coordination	UNAIDS (1994)	CSD (1993)
Financing	GAVI (1999)	GEF (1991/94)
Financing	Global Fund (2002)	AF (2007) Climate Investment Funds (2008)

1. Core Institutions

The core institutions for health and the environment were created before civil society participation had permeated international governance.[12] Both establish the baseline participation arrangements from which more recent developments have grown. Non-state actors may act as observers, but they have no direct roles in decision-making. Over time, additional consultation mechanisms have been established.

A. 024World Health Organization (WHO)

The WHO, an inter-governmental organization created in 1946, based its relations with civil society on the model of consultative status that was initiated with ECOSOC: "The Organization may … make suitable arrangements for consultation and co-operation with non-governmental international organizations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental."[13] In addition, the World Health Assembly may "invite any organization, international or national, governmental or non-governmental, which has responsibilities related to those of the Organization, to appoint representatives to participate, without right of vote, in its meetings … but in the case of national organizations, invitations shall be issued only with the consent of the Government concerned."[14] Non-state actors have no formal role in decision-making.[15]

B. United Nations Environment Programme (UNEP)

The General Assembly established UNEP in 1972.[16] Its Governing Council includes fifty-eight states elected by the General Assembly.[17] Like the WHO, UNEP adopted the traditional UN model of civil society relations, focused on transnational CSOs: "International non-governmental organizations having an interest in the field of the environment ... may designate representatives to sit as observers at public meetings of the Governing Council ... Upon the invitation of the [chair], and subject to the approval of the Governing Council ... international non-governmental organizations may make oral statements on matters within the scope of their activities."[18]

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[12] *Inventory*, *supra* note 1 at 3-5 (civil society participation did not "explode" until the 1990s).
[13] *Ibid,* Article 71. In addition, the director-general may arrange with member states to have direct communication with national health organizations, non-governmental organizations (NGOs), and governmental organizations. *Ibid,* Article 33.
[14] *Ibid,* Article 18.
[15] As noted earlier, non-state actors also take part in World Health Organization operational activities, for example, as collaborating centres, under the International Health Regulations and as members of the Global Outbreak Alert and Response Network.
[16] *UN Environment Programme (UNEP) Policy on NGOs and Other Major Groups*, online: http://www.unep.ch/natcom/assets/about_natcom/about_ngos.doc.
[17] UN General Assembly (UNGA) Resolution 2997 on Institutional and Financial Arrangements for International Environmental Co-operation (XXVII), 27th Session, UN Doc A/RES/27/2997, 15 December 1972.
[18] *Rules of Procedure for the Governing Council*, Rule 69, online:

Following UNCED in 1992, UNEP substantially expanded its informal consultations with the nine designated "major groups" (MG) of civil society.[19] It initiated an annual Global Civil Society Forum in conjunction with Governing Council meetings. It created a special branch of its Secretariat to promote CSO involvement in UNEP's work. And it organized the Major Groups Facilitating Committee (MGFC), which is made up of constituency representatives. However, the MGFC is explicitly "not a decision-making body" but, rather, a source of expertise and a means to facilitate MG participation in UNEP's meetings and programs.[20] Table 2 summarizes civil society participation in these organizations.

TABLE 2: CORE INSTITUTIONS

	WHO	**UNEP**
Direct Participation	XXX	XXX
Consultation	Observers; Informal Consultation	Observers; Forum; MGFC
Country Level	IHR information; Operations	N/A

2.   Policy and Co-ordination Bodies

UNAIDS and the CSD have broad policy missions, which comprise co-ordinating responses to major issues across the UN system. The CSD has the broader mandate, but UNAIDS pursues a comprehensive response to the AIDS crisis, addressing social, political, economic, and cultural issues as well as medical treatment.[21] UNAIDS broke the taboo in UN practice against

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http://www.unep.org/Documents.Multilingual/Default.asp?Documentid=77&Articleid=1155&L=En.

[19] See UNEP, *Natural Allies: Engaging Civil Society in UNEP's Work*, 2nd edition (Nairobi: United Nations Environment Programme, 2009), online:
http://www.unep.org/civil_society/PDF_docs/UNEP-NaturalAllies-June2009.pdf. The Major Groups (MGs) are farmers, women, the scientific and technical community, children and youth, indigenous people, workers, business, NGOs, and local authorities.

[20] UNEP, Global Major Groups Stakeholder's Forum, online: http://www.unep.org/civilsociety/GlobalMajorGroupsStakeholdersForum/MajorGroupsFacilitationCommitteeMGF/tabid/2773/Default.aspx.

[21] For example, UNAIDS addresses HIV transmission through sexual relations and drug injections, gender inequalities, discrimination against persons living with HIV, HIV-related travel restrictions and resource mobilization, as well as medical issues. UNAIDS, *Ten Targets: 2011 United Nations General Assembly Political Declaration on HIV/AIDS: Targets and Elimination Commitments*, online: http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2262_UNAIDS-ten-targets_en.pdf. This comprehensive

direct civil society participation. The CSD has expanded on the traditional model, granting MG representatives access to informal interactions with the commission as well as observer status.

A. UNAIDS

In 1994, ECOSOC established UNAIDS as a joint institution co-sponsored by six UN agencies with major AIDS programs. It replaced the WHO's co-ordination of the UN's response to AIDS.[22] The UNAIDS Program Coordinating Board includes six agencies (UN Development Programme (UNDP), the UN Children's Fund (UNICEF), the UN Population Fund, the WHO, the UN Educational, Social, and Cultural Organization, and the World Bank) as well as donor and recipient governments.[23] Ultimately, ECOSOC also provided for five CSOs to sit on the Board, with three from developing countries.[24] UNAIDS thus became the first UN program with civil society representatives on its governing body.[25] The CSOs themselves were authorized to decide which organizations would participate, subject to periodic review by the board.[26] The CSOs also determined that at least three of their delegates must be people living with HIV-AIDS.

Yet CSOs are still granted a limited role: they may speak, but they "have no negotiating role" and cannot "participate in any part of the formal decision-making process, including the right to vote which is reserved for representatives of Governments."[27] UNAIDS subsequently adopted measures to "support and resource the NGO Delegation and wider civil society to systematize and improve the selection, capacity, and working

response required strong coordination among international agencies. Christer Jönsson, "From 'Lead Agency' to 'Integrated Programming': The Global Response to AIDS in the Third World" (1996) Green Global Yearbook 65, online: http://www.fni.no/ybiced/96_06_jonsson.pdf.

[22] The United Nation's response included the UN Development Programme (UNDP), the UN Children's Fund (UNICEF), the UN Population Fund (UNFPA), the WHO, the UN Educational, Social, and Cultural Organization (UNESCO), and the World Bank. United Nations Economic and Social Council, Resolution 1994/24, "Joint and co-sponsored United Nations programme on human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS)," 26 July 1994.

[23] Lindsay Knight, *UNAIDS: The First Ten Years 1996-2006* (Geneva: UNAIDS, 2008) at 22. Some CSOs criticized the association with ECOSOC because the latter's state-centric structure might constrain robust collaboration with CSOs. See Christer Jönsson & Peter Soderholm, "IGO-NGO Relations and HIV/AIDS: Innovation or Stalemate?" (1995) 16:3 Third World Quarterly 459 at 470.

[24] Civil society's role was initially unclear. ECOSOC Resolution 24, 44th Meeting, S/RES/24 (26 July 1994).

[25] Governance and Civil Society Involvement in the UN General Assembly, online: http://www.unaids.org/en/media/unaids/contentassets/documents/programmes/janbeag le/civilsociety/cs_B1L2_gov.pdf.

[26] ECOSOC Resolution 1995/24, Joint and Co-sponsored United Nations Programme on Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (9 June 1995).

[27] UNAIDS, "A stronger civil society voice in the UNAIDS work" (11 April 2008), online: http://www.unaids.org/en/resources/presscentre/featurestories/2008/april/20080411astrong ercivilsocietyvoiceunaidswo/. According to the terms of reference for the CSO delegation, however, in practice CSO representatives "fully participate" in deliberations. *Terms of Reference of the UNAIDS PCB NGO Delegation*, online: http://www.unaids.org/en/aboutunaids/unaidsprogrammecoordinatingboard/ngocivilsociet yparticipationinpcb/ [*Terms of Reference*].

practices of the Delegation, and the quality and strategic impact of its interventions."[28] Its Communication and Consultation Facility supports CSO participation and works to "ensure that the voices of the broad and diverse civil society communities are heard and reflected in the development of international policies that will meet their needs."[29]

B.   Commission on Sustainable Development (CSD)

The UN General Assembly (UNGA) established the CSD in 1993.[30] The CSD has an extremely broad mandate: to follow up implementation of Agenda 21, the Rio Declaration on Environment and Development, and the Johannesburg Plan of Implementation and to integrate environment and development throughout the UN system.[31] Yet it has very limited authority. It can only review progress, promote implementation, and make recommendations.

The CSD is an inter-governmental body, with fifty-three state members elected by ECOSOC. Accredited UN observers, including CSOs, may "participate in the Commission in the capacity of observer, in accordance with established practice."[32] In addition, when it established the CSD, the UNGA encouraged informal relationships, specifying that the CSD should "receive and analyse relevant input from competent non-governmental organizations"; "enhance the dialogue … with non-governmental organizations and the independent sector";[33] and arrange for "non-governmental organizations, including those related to major groups as well as to industry and the scientific and business communities, to participate effectively in its work and contribute within their areas of competence to its deliberations."[34] A major goal was to allow CSD member states "to benefit from the expertise and competence of relevant … non-governmental organizations."[35]

Following the sustainable development summits of 1997 and 2002, the CSD enhanced its interactions with civil society.[36] It pioneered "multi-stakeholder dialogues," which were segments of CSD meetings in which the MGs could engage directly with commission members. It also provided additional opportunities for input—for example, the MGs could submit

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[28] *Ibid.*

[29] *Ibid* at para J.

[30] UNGA, *Institutional Arrangements to Follow up the UNCED*, Doc. A/RES/47/191 (29 January 1993), online: http://www.un.org/documents/ga/res/47/ares47-191.htm.

[31] Agenda 21, 13 June 1992, UN Doc A/CONF.151/26 (1992); Rio Declaration on Environment and Development, 13 June 1992, 31 ILM 874 (1992); Johannesburg Plan of Implementation, in *Report of the World Summit on Sustainable Development,* Johannesburg, South Africa, 26 August-4 September 2002, UN Doc A/CONF.199/20 (2002).

[32] UNGA, *Institutional Arrangements, supra* note 30 at para 6.

[33] *Ibid* at para 3.

[34] *Ibid* at para 7.

[35] *Ibid* at para 8.

[36] The UNGA initially called for "focused dialogue sessions." UN Department of Economic and Social Affairs, *Background Information on Major Groups Participation in the CSD,* online: http://www.un.org/esa/dsd/dsd_aofw_mg/mg_csdbackinfo.shtml at para 133.

suggested "priorities for action" and propose content for official reports.[37] The MGs were also able to participate in thematic and regional discussions. The CSD sessions "aim to be as highly interactive as possible. The bureau traditionally includes major groups in every segment of the Organization of Work (except the opening of the High-level Segment and during formal negotiations in the Policy Year)."[38] From this quotation, however, it is clear that the CSD excludes CSOs from participation in the inter-governmental negotiations, which are potentially the most influential part of the CSD process. Table 3 summarizes civil society participation in these two bodies.

TABLE 3: POLICY AND COORDINATION BODIES

	UNAIDS	**CSD**
Direct participation	Board members; No decision role	XXX
Consultation	Observers	Special sessions; Other interactions
Country level	N/A	N/A

3.   1990s Financing Mechanisms

In the 1990s, GAVI extended the legacy of UNAIDS, designating seats on its governing board and allowing non-state actors to fully participate in decision-making. The GEF, which was created a few years earlier, provides no direct governance role for non-state actors, merely consultation arrangements such as those used by the CSD. The GEF also follows the World Bank's approach to stakeholder participation in funded projects.

A. GAVI

In 1998, the World Bank called for a new approach to childhood vaccinations.[39] The WHO proposed to host a new vaccination partnership. When the WHO terminated its own childhood vaccine initiative, however, the Bill and Melinda Gates Foundation (Gates Foundation) stepped in, offering major funding for a new program.[40] Under the influence of the Gates

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[37] UN Department of Economic and Social Affairs, Major Groups Programme, *CSD-19 Guidelines for Major Groups*, online: http://www.un.org/esa/dsd/csd/csd_pdfs/csd-19/ MG-Guidelines-CSD-19_18-november.pdf.

[38] UN Department of Economic and Social Affairs, *Entry Points for Major Groups*, online: http://www.un.org/esa/dsd/dsd_aofw_mg/mg_csdentrpoin.shtml.

[39] Kristin Ingstad Sandberg et al, *A New Approach to Global Health Institutions? A Case Study of New Vaccine Introduction and the Formation of the GAVI Alliance* (2010) 71 Social Science & Medicine 1349.

[40] *Ibid* at 1353. The Gates Foundation's initial contribution was US $750 million. GAVI Alliance, *Donor Profile for Bill and Melinda Gates Foundation*, online: http://www.gavialliance.org/ funding/donor-profiles/bmgf/.

Foundation, GAVI was established in 1999 as an independent public-private partnership.

GAVI granted non-state actors an unprecedented participatory role.[41] The Gates Foundation holds one of four permanent seats on the GAVI board.[42] In addition, several of the twelve rotating board seats are designated for non-state constituencies, including NGOs, research and technical institutes, and vaccine industries in developing and industrialized countries. In 2005, GAVI added five "unaffiliated" board members—private individuals with relevant expertise, especially on financial issues.[43]

GAVI also engages more broadly with civil society. It holds regular partners' forums. It helped create the Civil Society Constituency, which is a network of supportive CSOs that funnels input into decision-making.[44] GAVI's communications focal point supports participation and improved communication with and among CSOs.[45] Finally, GAVI has tested support for CSO participation in its national vaccination programs.[46]

B.   Global Environment Facility (GEF)

In 1991, catalyzed by pledges from France and other European Union countries, the World Bank, UNEP, and the UNDP created the GEF as a pilot project to finance environmental measures in developing countries.[47] During the pilot phase, the World Bank operated the GEF, and, in 1994, the participating states and agencies restructured it as a largely autonomous institution.[48] The GEF provides grants and concessional funds to developing and transitional economies to finance the "agreed incremental costs" of environmental projects. It is the official financial mechanism for several environmental conventions and "the largest funder of environmental projects."[49]

Only states serve on the GEF Council, with recipient states making up the majority. Since its pilot phase, the GEF has organized CSO consultations prior to its Council meetings. The GEF also initially selected participants from its NGO network of accredited organizations. Since 2005, however, it

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[41] *Ibid* at 1354.

[42] GAVI Alliance, *Board Members*, online: http://www.gavialliance.org/about/governance/boards/members/index.php. The other permanent members are international organizations.

[43] *Ibid*. A separate board oversees GAVI's Innovative Finance Facility for Immunization. *Governance and Legal Structures*, online: http://www.gavialliance.org/about/governance/iffim/index.php.

[44] GAVI Alliance Civil Society Constituency, online: http://www.gavialliance.org/support/what/cso/index.php.

[45] *Ibid.*

[46] *Civil Society Organisation Support,* online: http://www.gavialliance.org/support/what/cso/index.php.

[47] Developed state support was in part a strategic move to establish a single environmental fund, rather than separate funds for each treaty. Laurence Boisson De Chazournes, "The Global Environment Facility (GEF): A Unique and Crucial Institution" (2005) 14 RECIEL 193 at 196; Charlotte Streck, "The Global Environmental Facility—A Role Model for International Governance?" (May 2001) 1:2 Global Environmental Politics 71.

[48] GEF, *Instrument for the Establishment of the Restructured Global Environment Facility,* October 2011, online: http://www.thegef.org/gef/sites/thegef.org/files/publication.GEF_Instrument_Oct2011_final_0.pdf [*Instrument for the Establishment of the Restructured GEF*].

[49] GEF, *What Is the GEF,* online: http://www.thegef.org/gef/whatisgef.

has allowed the network to select its own delegates. Pre-consultations now include three components. A preparatory meeting allows CSOs to finalize submissions and select delegates for its Council sessions. A jointly sponsored consultation then allows CSOs to interact with Council members, although Council attendance has been spotty.[50] Finally, ten CSO representatives (five at one time) may attend Council sessions as observers, speaking only when invited. The GEF Assembly meetings also provide modest opportunities for CSOs to interact with governments.

At the project level, the GEF's charter calls for "consultation with, and participation as appropriate of, major groups and local communities throughout the project cycle."[51] The GEF's principles for public involvement state that effective public participation can enhance country ownership and accountability; help address the needs of affected people; build partnerships between the GEF's implementing agencies and stakeholders; and contribute experience and knowledge.[52] "Public involvement" is defined as including the dissemination of project information; consultation with stakeholders (without decision-making authority); and stakeholder participation "as appropriate."[53] These principles echo the World Bank's approach to civil society input on funded projects.[54] However, it is difficult to assess their impact. While the principles call for the bank to promote public involvement throughout the project cycle,[55] the GEF's actual project criteria place a relatively low priority on consultation and stakeholder participation.[56] Table 4 summarizes civil society participation in these financing bodies.

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[50] IUCN, *Review of Practices on NGO/CSO Participation and Recommended Measures for NGO Representation at Meetings of the CIF Trust Fund Committees*, January 2009, online: http://siteresources.worldbank.org/INTCC/Resources/Review_of_Practices_NGO-CSO_Particiaption_Final.pdf.

[51] *Instrument for the Establishment of the Restructured GEF*, *supra* note 48 at para 5.

[52] GEF, *Public Involvement in GEF-Financed Projects*, June 1996, online: http://www.thegef.org/gef/gef/node/2024. *Instrument for the Establishment of the Restructured GEF*, *supra* note 48 at para 4.

[53] *Instrument for the Establishment of the Restructured GEF*, *supra* note 48 at 8.

[54] World Bank, *Involving Nongovernmental Organizations in Bank-Supported Activities*, Good Practice no. 14.70, online: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:22511723~pagePK:220503~piPK:220476~theSitePK:228717,00.html.

[55] *Instrument for the Establishment of the Restructured GEF*, *supra* note 48 at 15.

[56] *Criteria for Review of GEF Projects*, online: http://www.thegef.org/gef/sites/thegef.org/files/documents/GEFProjectReviewCriteria2008.pdf at Article 7.6.

TABLE 4: 1990S FINANCING MECHANISMS

	GAVI	GEF
Direct participation	Designated board seats	XXX
Consultation	Constituency; Forum; Focal point	NGO Network; Observers; Consultations
Country level	Pilot CSO funding	Consultation "as appropriate"

4. *Twenty-first-Century Financing Mechanisms*

Recently established financing organizations reflect the most striking divergence in civil society participation. The Global Fund has expanded board participation even further than GAVI. It also requires applicant countries to create multi-stakeholder bodies to oversee applications and funded projects. In sharp contrast, the AF reverts to a state-centric model with accredited observers, and private actors also have limited input in its funded projects. The Climate Investment Funds provide CSOs with no direct role in governance, but it grants them "active observer" status, the ability to operate constituency selection processes, and the opportunity to establish consultation mechanisms such as those of the GEF.

A. Global Fund

The Global Fund, which was created in 2001, broadens CSO participation by designating separate seats on its board for northern and southern NGOs.[57] The board also includes a representative from the affected communities— people living with AIDS, tuberculosis, or malaria.[58] Instead of designating particular organizations for seats (as GAVI does for the Gates Foundation), the Global Fund establishes a full constituency model, reflecting the diversity of its represented sectors. For each civil society constituency, a communications focal point manages an inclusive nomination and selection process to select a board member, an alternate, and a delegation. It also facilitates communication with other delegations and the Secretariat.[59]

Civil society delegates have significant voting power. The board is divided into a donor bloc, including donor countries, foundations, and the private sector, and a recipient bloc, including recipient countries and civil

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[57] Sonja Bartsch, "The Global Fund to Fight AIDS, Tuberculosis and Malaria," in Wolfgang Hein et al, eds, *Global Health Governance and the Fight Against HIV/AIDS* (New York: Palgrave Macmillan, 2007) at 146. The fund also provides a stronger role for developing countries.
[58] *Ibid* at 152.
[59] Moderación PortalSIDA, *We Are Soliciting Nominations,* online: http://www.portalsida.org/ news_details.aspx?ID=10634. The affected communities' delegation gathers nominations through an open call.

society. While most major decisions are based on consensus, in the absence of consensus each bloc must approve decisions by a two-thirds vote.[60] Civil society delegates can also play leadership roles, as the chair and vice-chair alternate between the blocs.[61] The Global Fund's Partnership Forum engages an even broader range of stakeholders.

The fund's arrangement for country-level participation is highly innovative. It requires that broadly representative Country Coordinating Mechanisms (CCMs) approve all grant applications and nominate grant recipients. CCMs also oversee grant implementation.[62] Fund guidelines require CCMs to "seek active engagement of all stakeholders relevant to the fight against the three diseases in their national context."[63] At least 40 percent of the CCM members should represent NGOs, people living with the target diseases, the private sector, and academic institutions.[64] Each constituency is to select its own representatives through a "documented, transparent process."[65] The fund supports CCMs financially and encourages grants to private recipients, thereby building civil society capacity. Its Community Systems Strengthening Framework facilitates participation by supporting community-based organizations.[66]

B.   Adaptation Fund (AF) and Climate Investment Funds

The AF grew out of the Kyoto Protocol, which requires that a share of proceeds from projects under the Clean Development Mechanism (CDM) be used to fund adaptation activities in particularly vulnerable developing countries.[67] In 2001, the parties to the Kyoto Protocol decided to create a fund, directed 2 percent of the proceeds of the CDM towards it, and invited developed states to make additional contributions. They finalized the AF governance structure in 2007.

This structure is highly state-centric. The AF Board (AFB) includes qualified representatives from sixteen states. Members "serve as government representatives," and the AFB is also accountable to the parties of the Kyoto Protocol.[68] The only provision for civil society involvement is that AFB meetings "shall be open to attendance, as observers … by UNFCCC accredited observers, except where otherwise decided by the AFB."[69] In December 2010, the AFB held its first formal dialogue with civil society observers.

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[60] *Global Fund By-Laws,* as amended 2 March 2011, Article 7.6, *Board,* online: http://www.theglobalfund.org/en/about/structures/board/.

[61] *Ibid,* Article 7.3.

[62] *Country Coordinating Mechanisms,* online: http://www.theglobalfund.org/en/ccm/.

[63] Global Fund, *Guidelines and Requirements for Country Coordinating Mechanisms,* online: http://www.theglobalfund.org/en/ccm/guidelines/ at para 43 [*Global Fund Guidelines*].

[64] *Ibid* at para 44.

[65] *Country Coordinating Mechanisms, supra* note 62.

[66] *Global Fund Guidelines, supra* note 63.

[67] Kyoto Protocol, 37 ILM 32 (1998), Article 12, para 8.

[68] Bali Climate Change Conference, *Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol: Decision 1/CMP.3: Adaptation Fund* (December 2007), online: http://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf.

[69] *Ibid.*

In project governance, the AF emphasizes the role of governments.[70] Projects should be based on national priorities and expressed in national strategies for sustainable development, poverty reduction, or adaptation.[71] And governments must endorse all funding proposals.[72] The AF does incorporate significant innovations, including direct access to funding and an independent revenue source.[73] And local stakeholders may be consulted about projects.[74] However, civil society participation is otherwise highly limited.[75]

The World Bank established the Climate Investment Funds (CIF) in 2008 in order "to bridge the financing and learning gap between now and a post-2012 global climate change agreement."[76] The CIF include the Clean Technology Fund (CTF) and the Strategic Climate Fund (SCF), which support the Pilot Program for Climate Resilience (PPCR) and other targeted programs. The CTF and SCF are governed by committees, which each include donor and recipient states in equal number.

The CIF committees initially made no significant provision for civil society engagement.[77] Following CSO calls for stakeholder involvement, however, the CTF committee provided for four "active observers" from civil society and two from the private sector—the SCF committee adds two from indigenous peoples. Only the PPCR sub-committee, however, includes an observer from a "community dependent on adaptation to secure livelihoods," which is equivalent to the Global Fund's affected communities. The CIF selected organizations to design and facilitate selection processes for each sector, and it has also held three Partnership Forums.[78] Unlike the GEF, however, the CIF makes no specific arrangements for civil society participation in project governance. It relies on the policies of the multilateral development banks that administer the CIF grants.[79]

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[70] *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund*, http://www.adaptation-fund.org/sites/default/files/OPG%20Revised%204.12%20 (with%20annexes).pdf. As this is written, the Adaptation Fund has approved twenty-four projects. *Funded Projects,* online http://www.adaptation-fund.org/funded_projects.

[71] *Accessing Resources from the Adaptation Fund: The Handbook,* online: http:// adaptation-fund.org/sites/default/files/AdaptationFund%20Handbook%20English.pdf at 7.

[72] *Operational Guidelines of the AF*, *supra* note 70 at para 20.

[73] German Watch and Brot für die Welt, *Making the Adaptation Fund Work for the Most Vulnerable People,* online: http://www.germanwatch.org/klima/adfund08.pdf.

[74] The AF application calls for applicants to "describe the consultative process, including the list of stakeholders consulted, undertaken during project preparations." *Project/Program Proposal,* online: http://www.adaptation-fund.org/system/files/Call%20 for%20Proposals%20Letter.pdf at Part II.H.

[75] International Institute for Environment and Development, *The Adaptation Fund: A Model for the Future?* (August 2009), online: http://www.germanwatch.org/klima/adbr09.pdf.

[76] *Climate Investment Funds: History,* online: http://www.climateinvestmentfunds.org/cif/designprocess.

[77] World Bank, International Union for the Conservation of Nature, *Review of Practices on NGO/SCO Participation and Recommended Measures for NGO Representation at Meetings of the CIF Trust Fund Committees* (January 2009), online: http://siteresources.worldbank.org/INTCC/Resources/Review_of_Practices_NGO-CSO_Particiaption_Final.pdf.

[78] *Climate Investment Funds, supra* note 76.

[79] At the 2011 Durban climate conference, the parties to the UN Framework Convention on

5. Summary

Table 5 summarizes the contrasts between the four pairings of health and environmental institutions analyzed in this article. The growing disparity in direct participation can be clearly seen in the top rows of the successive sections. In addition, the global health institutions now have at least equivalent arrangements for consultation at the international and country levels.

TABLE 5: SUMMARY OF GLOBAL HEALTH-ENVIRONMENT COMPARISONS

	WHO	UNEP
Direct participation	XXX	XXX
Consultation	Observers; Informal alliances	Observers; Forum; MGFC
Country level	CCs; GOARN	N/A

	UNAIDS	CSD
Direct participation	Board members; No decision role	XXX
Consultation	Observers	Special sessions; Other interactions
Country level	N/A	N/A

Climate Change, 31 ILM 849 (1992), approved governance arrangements for the Green Climate Fund (GCF), which will support mitigation and adaptation activities in developing countries. The GCF Board is made up of states, equally divided between North and South countries, and is responsible to the Conference of the Parties. The board is to make arrangements "to allow for effective participation by accredited observers in its meetings." Two representatives from civil society and two from the private sector will be invited "to participate as active observers." Each observer category will include representatives from the North and South. Participation in the GCF thus combines elements of the AF and the CIF. In addition, the board is "to promote the input and participation of stakeholders," including the private sector, NGOs, vulnerable groups, women, and indigenous peoples, "in the design, development and implementation of the strategies and activities" financed by the GCF. United Nations Framework Convention on Climate Change, Decision 3-/CP.17, *Launching the Green Climate Fund*, online: http://unfccc.int/2860.php. See Kenneth W Abbott and David Gartner, *The Green Climate Fund and the Future of Environmental Governance*, Earth System Governance Working Paper no 16, online: http://ssrn.com/abstract=1931066.

	GAVI	**GEF**
Direct participation	Designated board seats	XXX
Consultation	Constituency; Forum; Focal Point	NGO network; Observers; Consultations
Country level	Pilot CSO Funding	Consultation "as appropriate"

	Global Fund	**AF, CIF**
Direct participation	Broad stakeholder participation; Affected communities; Delegations; Voting Power	XXX
Consultation	Partnership Forum	AF: Observers CIF: Active observers; Partnership forum
Country level	CCMs; Financial Support	Limited Consultation

III.   Explaining Divergence

A variety of factors might explain the remarkable divergence in civil society participation between global health and environment institutions. Functionalist and normative accounts offer some insights, but neither provides an adequate explanation. An approach that combines three factors—civil society demand for participation, the institutional context in which institutions are founded, and path dependence—provides the most promising explanation.

One leading theory of participation turns on the functional benefits of civil society input, particularly information and expertise. Kal Raustiala, who analyzes the "participatory revolution" in environmental governance, argues that "NGO participation enhances the abilities of states to regulate globally," particularly because of the knowledge and expertise CSOs can contribute.[80] Other international relations scholars echo the importance of expertise.[81]

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[80] Raustiala, *supra* note 2 at 567.
[81] Miles Kahler, "Defining Accountability Up: The Global Economic Multilaterals," in David

However, a functional explanation based on expertise would predict the development of consultation arrangements, which enable intergovernmental institutions to gather information and knowledge from experts without disrupting their basic governance structures. This prediction tracks the development of consultative mechanisms in environmental institutions, but it does not account for the deeper participation in similar health institutions.[82] To be sure, responses to problems such as AIDS and malaria require significant expertise—scientific, social, and economic—but no more than responses to climate change or persistent organic pollutants.[83]

In addition, explanations based on expertise often emphasize CSO knowledge of local conditions. This approach would predict civil society involvement mainly in the planning and implementation of funded projects and other local actions. This prediction tracks the practices of financing institutions such as the GEF,[84] although even here the more extensive participation in the Global Fund's country coordinating mechanism is difficult to explain. Yet local knowledge does not account for civil society involvement in international decision-making, as in UNAIDS and the Global Fund.

A second leading explanation for civil society involvement focuses on the emergence and dissemination of a broad norm of participation. Constructivist scholars highlight how norms shape the behaviour and even the identities of states and other international actors. According to this account, a norm of participation could influence both international institutions and the states that create and govern them.[85] If norm entrepreneurs disseminate a participation norm over time, moreover, one would expect institutions to become gradually more inclusive. Steve Charnovitz argues along these lines that a duty to consult with CSOs has come to shape international governance.[86]

The principal difficulty with this explanation is its failure to account for differences across issue areas. Our analysis largely controls for norm development by comparing institutions created at similar times, yet we see a striking divergence between health and environment organizations. In addition, while global health shows a clear pattern of expanding civil society participation, the pattern is much more uneven in the environment. The AF, which became operational only in 2010, provides no direct civil society participation and minimal consultation procedures.[87] It is possible, however,

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Held and Mathias Koenig-Archibugi, eds, *Global Governance and Public Accountability* (Malden, MA: Blackwell, 2005) at 8-34.
[82] One Major Group, the scientific and technical community, is essentially defined by expertise.
[83] The WHO requires delegates to its governing bodies to be "technically qualified in the field of health." *Constitution of the World Health Organization*, 2006, Article 24.
[84] Jonas Talberg, *Explaining Transnational Access to International Institutions* (2008 Annual Convention of the International Studies Association), online: http://www.transdemos.se/publications/tallberg-isa.pdf.
[85] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int'l Org 887.
[86] Charnovitz, "Nongovernmental Organizations and International Law," *supra* note 1.
[87] The Green Climate Fund provides for slightly greater participation than the AF but less than

that a norm of participation may have emerged solely within the area of health, and we return to this point later in this article.

If neither a functionalist nor a broad normative account is sufficient, we must turn to other possible explanations. Based on the history of the organizations analyzed here, we suggest an explanation that incorporates three elements. The first two relate to (1) *demand* for participation and (2) characteristics that influence the *supply* of participation within founding institutions, while the final element is (3) *path dependence*, which involves continuities in participation over time.

1. Civil Society Demand

Demand by civil society for a direct role in decision-making appears to be a precondition for the emergence of participatory governance. In health, strong demand by people living with AIDS was a key factor in opening space for broader CSO participation. Demand by influential foundations reinforced its effect. Given the massive resources of the Gates Foundation, it is tempting to ascribe expanded non-state participation in health governance largely to the influence of this one organization. However, while the Gates Foundation played a central role in creating GAVI, the same is not true of UNAIDS, which was established just as the Gates Foundation was deciding to focus on global health,[88] or of the early civil society push to create the Global Fund. Moreover, while foundations are important participants in many recent health institutions, CSOs with far more limited resources have also gained participation in these organizations.

Civil society has been far less forceful in demanding direct participation in environmental institutions. Particularly notable is the limited demand from communities directly affected by environmental problems, such as the communities facing major climate change adaptation—analogous in many ways to demands from AIDS sufferers. The most likely explanation is the diffuse nature of such communities:[89] they are often numerous and widespread, have modest incentives to organize around environmental issues,[90] and are frequently poor. Such a group "is at a distinct disadvantage relative to concentrated groups with a preference for the … status quo: its resources are generally modest, knowledge about often technical and arcane regulatory issues is limited, and [its numbers are] too large to easily overcome the collective-action problem."[91]

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the CIF.

[88] Bill and Melinda Gates Foundation, *Foundation Timeline*, online: http://www.gatesfoundation.org/about/Pages/foundation-timeline.aspx.

[89] Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1961).

[90] Adaptation is a gradual process, with the most wrenching changes relatively far in the future. Before the widespread use of anti-retroviral drugs, the situation of AIDS sufferers was dramatically different.

[91] Walter Mattli and Ngaire Woods, "In Whose Benefit?" in Walter Mattli and Ngaire Woods, eds, *Explaining Regulatory Change in Global Politics in the Politics of Global Regulation* (New Jersey: Princeton University Press, 2009) at 1, 26.

2.   Institutional Context

The institutional context in which a new organization is created has profound effects on the structure of participation. It determines the degree to which the founders supply participation in response to civil society demand. As Walter Mattli and Ngaire Woods argue with regard to public interest regulation, institutional contexts that are open and transparent are likely to expand participation in response to demand; those that are exclusive and closed are likely to limit it.[92]

For example, UNAIDS grew out of the WHO Global Program on AIDS and a UN task force, which were both relatively open to civil society participation.[93] In contrast, the AF was established in an exclusively inter-state forum, focused primarily on North-South balance and institutional funding and resistant, or at least not welcoming, to CSO participation. Other environmental financing organizations, including the GEF and the CIF, grew out of the World Bank, which had well-established arrangements for consultation with civil society but which were primarily aimed at the project level.

3.   Path Dependence

Path dependence influences the development of institutions over time. Path dependence takes two different forms: within an individual institution and within the broader sector. In both cases, the path dependence theory emphasizes that relatively small decisions at critical junctures can be difficult to alter later.[94] Decisions on participation, for example, shape expectations for future action, the repertoire of arrangements considered by institutional designers, and the political influence of relevant groups.

The expectations generated by early decisions may also harden into norms within a given sector. Norm entrepreneurs who find these decisions appropriate or desirable (as well as the actors who benefit from them) may cast them in normative terms and seek to persuade others to follow them through a logic of appropriateness. Persuasion and dissemination are facilitated when decisions are embodied in institutions, which clarify their meaning and operation and create demonstration effects.[95] Norms that arise in this way may be confined to particular issue areas, such as global health, or to particular institutions, such as the European Union,[96] rather than being disseminated more broadly.

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[92] *Ibid* at 16.

[93] Jönsson, *supra* note 21.

[94] See Paul Pierson, "Increasing Returns, Path Dependence and the Study of Politics" (2000) 94 Am Pol Sc Rev 251.

[95] Finnemore and Sikkink, *supra* note 85.

[96] Sabine Saurugger, "The Social Construction of the 'Participatory Turn,' The European Union and 'Organized Civil Society'" (2010) 49 Eur J Political Research 471.

4. The Three Factors Illustrated

A. <u>UNAIDS</u>

The innovative structure of UNAIDS reflects the strong role of AIDS activists in promoting effective responses to the epidemic and demanding a seat at the table. In 1987, the United Nations designated the WHO as the "lead agency" in its response to the crisis. In 1988, AIDS advocacy NGOs won representation on the Global Management Committee of the WHO's Global Program on AIDS.[97] The program also worked closely with associations of affected persons, including the Global Network of People Living with AIDS, the International Council of AIDS Service Organizations, and the International Community of Women Living with HIV/AIDS. When infighting among the six UN agencies with AIDS programs led to calls for a new organization, notably by key donors, these groups demanded a role in planning.[98]

Nordic countries proposed that planning be shifted from the agencies to an independent, multi-stakeholder task force with CSO participation. The United Nations agreed, creating a task force that included three CSOs.[99] CSOs were thus directly involved from the design stage, making it difficult to exclude them from UNAIDS itself, despite opposition from some states. The six agencies and the secretary-general approved the task force's preferred approach—a joint, co-sponsored UN body, with responsibility equitably shared among agencies and with the participation of CSOs, albeit with non-voting status.

The CSOs' lack of a vote prevented the adoption of later proposals to expand their role. Notably in 2007, the CSO delegation to UNAIDS commissioned an independent report "to assess the current strengths and weaknesses of … civil society participation in the [board] and to identify improvements for the future."[100] This report recommended full voting rights for CSOs and urged UNAIDS to abandon formal approval of CSO representatives.[101] So far, the board has declined to adopt these recommendations. Yet the UNAIDS precedent made it politically difficult for subsequent health institutions to reduce civil society participation below the level established in UNAIDS. In fact, continued demand produced expanded participation over time.

The CSD emerged from a far more state-centric process. Although many CSOs participated in UNCED, which called for the establishment of the CSD, only states adopted the Rio Declaration and Agenda 21 or participated in the subsequent UNGA/ECOSOC process. In addition, while civil society sought

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[97] Jönsson and Soderholm, *supra* note 23 at 468.
[98] Dennis Altman, *UNAIDS: NGOs on Board and on the Board—Civil Society Engaging Multilateral Institutions: At the Crossroads* (Montreal: FIM, 1999).
[99] Knight, *supra* note 23 at 20.
[100] *Results of the Review of NGO/Civil Society Participation in the Programme Coordinating Board*, online: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/externaldocument/2007/review_ngo_participation_item_3.2_en.pdf.
[101] *Ibid.*

to be part of the sustainable development agenda, as reflected in the recognition of the MGs, demand did not extend to direct participation. Indeed, some CSOs were reluctant to participate in the CSD because of its weakness.[102] CSOs gained unusual access to the CSD, but only through consultative mechanisms (UNEP adopted similar measures). The failure of these organizations to move beyond the consultative model constrained expectations for participation in later environmental institutions.

B. GAVI

Like UNAIDS, GAVI involved non-state actors from the design stage, although these did not include NGOs. The first planning meeting hosted by the World Bank included UN agencies (UNICEF and the WHO), a private foundation (Rockefeller Foundation), and pharmaceutical companies (Pasteur, Merck, SmithKline, Wyeth, and the International Pharmaceutical Manufacturers Association).[103] These actors established a working group, which included UNICEF, the WHO, the World Bank, industry representatives, and the Rockefeller Foundation, "to work with all of the participants in the meeting and other partners in immunization to further elaborate the key issues which have been raised and to develop proposals on ways to move forward."[104]

The decision to establish GAVI as an independent organization, not as part of the WHO or the World Bank, facilitated private participation. The Gates Foundation assumed a central role after the WHO terminated its vaccine initiative. As a result, the Gates Foundation received a permanent board seat. The precedent set by UNAIDS, however, created expectations for participation among other actors as well. In response, GAVI also assigned leading NGOs and research institutes seats on its board.

After its founding, GAVI further strengthened civil society participation. Following a review of its governance structure, GAVI created "independent" board seats for expert individuals, in addition to constituency seats. Unusual among peer institutions, the GAVI board now includes five "unaffiliated" members.[105] At the 2009 Partners' Forum, civil society representatives issued a call to action, urging GAVI to double its CSO representation and create separate seats for northern and southern NGOs. The call to action also urged GAVI to require civil society participation in funded country-level programs and to create a direct funding process for national CSOs.[106] GAVI adopted some of these recommendations, strengthening stakeholder input and carrying out a pilot project to test financial support for CSO participation in

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[102] Stine Madland Kaasa, "The UN Commission on Sustainable Development: Which Mechanisms Explain Its Accomplishments?" (2007) 7:3 Global Envt'l Politics 107.
[103] William Muraskin, "The Last Years of CVI and the Birth of the GAVI," in Michael Reich, ed, *Public-Private Partnerships for Global Health,* Harvard Series on Population and International Health (Cambridge: Harvard University Press, 2002).
[104] *Ibid*.
[105] *GAVI Board Composition*, online: http://www.gavialliance.org/about/governance/gavi-board/composition/.
[106] GAVI Alliance, *Civil Society,* online: http://www.gavialliance.org/about/in_partnership/cso/index.php.

immunization programs, but it has not changed the makeup of the board.

In contrast, non-state actors made only limited demands for participation in the GEF and were not significantly involved in its design. The GEF's origin as a collaborative effort among the World Bank, UN agencies, and donor states and its initial operation as a World Bank program eliminated any real possibility for strong civil society participation. The GEF did, however, provide for civil society input on funded projects, following the World Bank's template. Over time, moreover, the GEF expanded its consultative arrangements along the lines set by the CSD.

C. Global Fund

Non-state actors were again centrally involved in the design of the Global Fund. In fact, the vision for the fund originated primarily within civil society. Early actions were driven by a bipartisan effort in the US Congress, catalyzed by civil society advocacy. In 2000, US representatives Barbara Lee (Democrat from California) and Jim Leach (Republican from Iowa) sponsored successful legislation to create a World Bank AIDS Trust Fund. In 2001, Secretary-General Kofi Annan's call for action at the UNGA's Special Session on AIDS created additional momentum. The G-8 soon pledged financial support for a fund structured as a private-public partnership.

The real work of designing the Global Fund, however, was carried out in a multi-stakeholder Transitional Working Group (TWG). The TWG included representatives of developed and developing countries, NGOs, foundations, UN agencies, and the private sector. Initial governance discussions focused on the importance of a relatively small board with donor country, recipient country, and civil society members.[107] Each constituency would select its own representatives. The TWG proposed a board with four non-state members, representing southern and northern NGOs, the private sector, and private foundations. A representative of persons living with the target diseases was later added. The affected communities seat was originally non-voting but was granted the right to vote following advocacy from the southern NGOs.[108]

The inclusion of CSOs in the planning group gave them a strong platform from which to demand participation in the fund and in country-level-funded activities through the CCMs. On the supply side, the decision to create an independent institution outside the World Bank was again crucial. The founders of the Global Fund drew on the precedents of UNAIDS and GAVI to further develop the multi-stakeholder model.

In contrast, the AF was a product of the state-centric Kyoto Protocol, with key planning decisions taken by the Kyoto Protocol's state parties. Discussions among the parties were dominated by conflict over the North-

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[107] *Final Report of the First Meeting of the Transitional Working Group to establish a Global Fund to fight AIDS, Tuberculosis, and Malaria*, Brussels, 11-12 October 2001, online: http://www.theglobalfund.org/en/board/twg/ at 3-4.
[108] Sonja Bartsch, "Southern Actors in Global Health Public-Private Partnerships: The Case of the Global Fund," in Sandra J MacLean, Sherri A Brown and Pieter Fourie, eds, *Health for Some: The Political Economy of Global Health Governance* (New York: Palgrave Macmillan, 2009) at 130 and 135.

South distribution of states on the board, the areas in which the AF would fund projects, and the size of its budget. Inter-governmental negotiations on a global health fund might be less contentious, but the dominant difference with the Global Fund's process appears to be the fact that negotiators kept the design of the AF within this fraught inter-state political environment, whereas the Global Fund was created in a far more open context. The political divide in the inter-governmental AF negotiations also muted civil society demand for participation.

The CIF was created by the donor state-dominated World Bank, which established state-based committees. By the late 2000s, however, a number of CSOs, inspired by the Global Fund, were calling for stakeholder participation. Germanwatch and CARE urged "active and meaningful participation by vulnerable populations and people in decision-making on adaptation at all levels."[109] Practical Action called for national bodies such as the CCMs to support community-based adaptation.[110] In response, the committees asked the Secretariat to propose a framework for civil society engagement, and it commissioned a study by International Union for the Conservation of Nature (IUCN).

The IUCN examined the role of civil society in several international institutions, including the GEF, but drew particular inspiration from the Global Fund. In the short term, the IUCN recommended that civil society representatives be made "active observers" in all CIF committees, with the authority to speak, request that items be added to the agenda, and recommend experts to speak. Observers should represent constituencies, including communities affected by climate change, and they should be selected by, and speak on behalf of, their constituency. The CIF should also facilitate CSO participation. In the longer term, the IUCN recommended that the CIF gradually expand civil society participation, eventually authorizing full participation in decision-making, at least on specific matters.[111] The CIF adopted almost all of these short-term recommendations,[112] but it did not address the longer-term recommendations. Given the legacy of the CIF, a move to direct civil society participation in the near future would be surprising.

In sum, only where there was substantial *demand* from non-state actors for a direct role in decision-making has participation been extended beyond mere consultation. Only where the *institutional context* of formation was separated from inter-state forums and from an established consultative approach were direct participation arrangements adopted. And once a

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[109] CARE, German Watch and Bread for the World, *Pro-Poor Governance of Global Adaptation Funds* (2009), online: http://www.germanwatch.org/klima/ad-dis09.pdf.

[110] Practical Action, *Governance for Community-Based Adaption,* online: http://practicalaction.org/smoke/docs/climate_change/governance-for-community-based-adaptation.pdf.

[111] *IUCN Review of Practices, supra* note 48 at 17-18.

[112] *Guidelines for Inviting Representatives of Civil Society to Observe Meetings of the CIF Trust Fund Committees*, 20 April 2009, online: http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/guidelines_for_inviting_reps_of_civil_society_to_cif_tfc_meetings_042009.pdf.

pattern of participation was established, it became the baseline from which subsequent institutional design decisions could proceed. Civil society participation in UNAIDS[113] created expectations, precedents, political influence, and nascent normative understandings that contributed to the multi-stakeholder approach of GAVI, which in turn influenced the even more participatory structure of the Global Fund. In environmental organizations, in contrast, the unbroken legacy of consultative relationships still sets the outer limits of institutional imagination.

IV.   Evaluating Participation

The success of participatory health institutions challenges traditional assumptions about the appropriate role for non-state actors in international governance. Direct participation appears to enhance legitimacy, deliberation and decision-making, and effectiveness. The observer and consultation mechanisms of environmental institutions, while valuable, appear less successful in leveraging the full potential of civil society. We conclude that direct participation would increase civil society contributions to environmental and other international institutions, especially along the dimensions of legitimacy, deliberation, and effectiveness.

1.   *Legitimacy*

Legitimacy is "the justification of authority," and it is essential as environment and global health institutions claim increasing governance authority over non-state actors and communities as well as over states.[114] Scholars highlight two major forms: "input" and "output" legitimacy.[115] Input legitimacy relates to the quality of an institution's decision-making processes.[116] Some scholars focus on the participatory nature of institutional processes under this heading and treat transparency, accountability, and other procedural elements separately. "Output legitimacy" relates to the effectiveness of an institution's decisions and actions.[117] We examine input

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[113] CSOs had also participated in health partnerships hosted by the WHO, such as Roll Back Malaria (RBM). Participation in these partnerships has also expanded; RBM now includes seven constituencies with full voting rights, including NGOs, foundations, and research bodies. Roll Back Malaria, The RBM Partnership Board, online: http://www.rbm.who.int/mechanisms/partnershipboard.html.

[114] Bodansky, "The Legitimacy of International Governance," *supra* note 1 at 600-1. Legitimacy may be a factual question (do the relevant actors view an institution as legitimate?) or a normative one (how strong are the justifications offered?). These questions are interrelated in practice, and we treat them together here. *Ibid* at 601-2. Compare with Steven Bernstein, "Legitimacy in Intergovernmental and Nonstate Global Governance" (2011) 18 Rev Int'l Pol Econ 17 at 20.

[115] Fritz W Scharpf, "Economic Integration, Democracy and the Welfare State" (1997) 4 J Eur Public Pol'y 18.

[116] Legal authority is also an element of input legitimacy.

[117] See, for example, Karin Bäckstrand, "Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development" (2006) 12 Eur J Int'l Rel 467; Klaus Dieter Wolf, *Private Actors and the Legitimacy of Governance beyond the State: Conceptional Outlines and Empirical Explorations*, online: http://www.politikwissenschaft.tu-darmstadt.de/fileadmin/pg/media/papers/civil.pdf at 12. Bodansky, *supra* note 1 at 612, follows

legitimacy here and in the next subsection and output legitimacy in the third subsection.

Civil society participation can contribute to input legitimacy by involving stakeholders in decision-making, enhancing institutional credibility, and expanding transparency and accountability. These elements are extremely important for legitimacy in the international system, where true democratic procedures—the most widely accepted legitimacy criterion—have yet to penetrate:[118] "the social and political conditions for democracy are not met at the global level and there is no reason to think that they will be in the foreseeable future."[119]

First, stakeholder involvement enhances institutional legitimacy. As communities and interests affected by an organization's actions are involved in its decisions, they gain a sense of ownership, increasing their willingness to grant authority to the institution.[120] More broadly, stakeholder involvement is one of the "participatory, deliberative practices" that endow institutions with a degree of democratic legitimacy even without true electoral procedures under the deliberative tradition in democratic theory.[121] Such practices are the most feasible way to build more robust democracy at the international level.[122] In addition, participation by multiple, countervailing interests—such as NGOs, business groups, and technical experts—helps prevent any one interest from capturing (or being seen as capturing) the institution.[123]

Second, CSOs are viewed as highly credible on issues of public policy. In surveys of public trust conducted since 2000, CSOs perform better than government, business, or the media in terms of providing credible information on the environment, health, and human rights.[124] Trust in CSOs stems in large part from their "moral authority … directly linked to claims that they represent the common good in global affairs as well as the 'voices

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the three-part approach with different designations.

[118] Bernstein, *supra* note 2 at 147; Bodansky, *supra* note 1 at 617-19; Charnovitz, *supra* note 1; Thomas Risse, "Transnational Governance and Legitimacy," in *Governance and Democracy: Comparing National, European and International Experiences* (Abingdon: Routledge, 2006) at 183: "Including non-state actors in global governance is also meant to increase the external accountability of states. Trisectoral public policy networks and global public private partnerships are precisely meant to close the participatory gap identified by critics of international regimes."

[119] Allen Buchanan and Robert O Keohane, "The Legitimacy of Global Governance Institutions" (2006) 20 Ethics & Int'l Affairs 405 at 416.

[120] Bodansky, *supra* note 1 at 617; Risse, *supra* note 118.

[121] Bernstein, *supra* note 2 at 147. The leading conceptions of democracy are the liberal or aggregative, the republican or communitarian, and the deliberative or cosmopolitan. Henrik Fryman and Ulrike Mörth, "Soft Law and Three Notions of Democracy: The Case of the EU," in Ulrike Mörth, ed, *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Northampton, MA: Edward Elgar Publishing, 2004) at 155 and 157.

[122] Gráinne de Búrca, "Developing Democracy beyond the State" (2008) 46 Colum J Transnat'l L 221.

[123] Abbott and Snidal, "Strengthening International Regulation," *supra* note 1 at 554.

[124] World Bank, *Issues and Options for Improving Engagement between the World Bank and Civil Society Organizations* (2005) at 20.

of the weak and powerless.'"[125] This is one of "the real and genuine pillars of the legitimacy of private actors' participatory claims."[126] In the case of the Global Fund, for example, northern and southern NGOs draw legitimacy from representing "the interests of those people who are at the centre of the activities of the [fund]: the people affected by diseases, ill-health and poverty in developing countries."[127] CSOs may contribute their credibility to institutions in which they participate. This benefit, however, is less likely to attach to institutions that merely solicit civil society views through external mechanisms, such as partnership fairs or pre-meeting consultations, than to those that include civil society in actual decision-making.

Third, accountability is a key element of legitimacy.[128] Accountability may be internal, from an agent to its principals, or external, from an institution to the groups affected by its decisions. With respect to internal accountability, global health institutions—and some environmental institutions—have made significant strides. Starting with UNAIDS, CSOs have been allowed to select the organizations that would represent them. In the Global Fund, each civil society constituency operates a full nomination and selection process.[129] The fund also reserves separate board seats for northern and southern CSOs. Constituency processes that are sufficiently broad go some way to answering the concern that CSOs are only accountable to small numbers of members and donors, most of whom are from Western nations.[130] Undoubtedly, however, additional efforts are needed to ensure that southern voices are adequately represented.[131]

Global health institutions devote significant resources to supporting selection processes and facilitating other interactions with civil society—for example, through communications focal points.[132] Health institutions also operate broad stakeholder consultation processes, which increase transparency and serve as a check on CSO accountability. In addition, the Global Fund mandates transparent country-level constituency procedures for CCMs. Achieving the desired level of civil society participation has been

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[125] Risse, *supra* note 118. See Wolf, *supra* note 117 at 17: "[A] credible commitment to basic norms or to the general welfare."

[126] Wolf, *supra* note 117 at 17.

[127] Bartsch, *supra* note 108 at 134.

[128] Thomas Hale, "Transparency, Accountability and Global Governance" (2008) 18 Global Governance 73.

[129] In fact, "[o]nly the three civil-society delegations have truly open and transparent selection processes which involve public nominations and voting." *Turning the Page from Emergency to Sustainability,* Final Report of the High-Level Independent Review Panel on Fiduciary Controls and Oversight Mechanisms of the Global Fund to Fight AIDS, Tuberculosis, and Malaria (2011), online: http://www.theglobalfund.org/en/highlevelpanel/report/.

[130] Risse, *supra* note 118.

[131] For other perspectives on how to foster greater accountability of CSOs, see Kenneth Anderson, "What NGO Accountability Means and Does Not Mean" (2009) 103 Am J Int'l L 170; L David Brown, *Creating Credibility: Legitimacy and Accountability for Transnational Civil Society* (Sterlin, VA: Kumarian Press, 2008); Mary Kay Gugerty and Aseem Prakash, eds, *Voluntary Regulation of NGOs and Nonprofits: An Introduction to the Club Framework* (New York: Cambridge University Press, 2010).

[132] Again, the same is true of environmental institutions such as the GEF.

challenging, although constituency processes have steadily improved.[133] Yet by including affected communities and supporting community organizations, CCMs are broadening internal accountability. To be sure, national and international constituency procedures are far from perfect, but they remain in their infancy.[134] They already provide for "contestability" within civil society.[135] Over time, they can be expected to evolve in the direction of greater accountability.

On external accountability, transparency is especially important.[136] In institutions such as the Global Fund, civil society representatives have pressed for measures to increase transparency and accountability.[137] As a result, global health institutions appear to be outperforming environmental institutions on these measures. In 2011, the United Kingdom Department for International Development (DFID) reviewed forty-three multilateral organizations to which the United Kingdom contributes.[138] DFID assessed (1) "organizational strengths" (input legitimacy), of which transparency and accountability were major elements and (2) the "impact on … development and humanitarian objectives" (output legitimacy). It judged "value for money" across both areas. DFID rated the organizational strength of GAVI and the Global Fund as "strong," the highest rating given—GAVI received the highest rating of any organization.[139] The review highlighted the organizations' robust external transparency and internal audit functions, singling out the Global Fund's decision to publish, and require grant recipients to publish, procurement data. In contrast, it rated the GEF and the CIF as only "satisfactory," criticizing both for limited transparency in particular areas.

A separate review of the quality of international assistance by the Center for Global Development and the Brookings Institution also found recent

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[133] Global Fund, *Country Coordinating Mechanism Model: Governance and Civil Society Participation*, online: http://www.theglobalfund.org/en/ccm/documents/reports/.

[134] Bartsch, *supra* note 108 at 140 (limited transparency in Global Fund selection processes), 136 (representation problems in CCMs).

[135] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 56-58 (calling for contestability among potential civil society participants by analogy to contestable markets).

[136] Robert O Keohane, "Global Governance and Democratic Accountability," in David Held and Mathias Koenig-Archibugi, eds, *Taming Globalization* (Oxford: Government and Opposition Ltd, 2003) at 130-59; Ronald B Mitchell, "Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-based and Education-based Transparency Policies" (2011) 70 Ecological Economics 1882.

[137] International Center for Research on Women, *Civil Society Participation in Global Fund Governance: What Difference Does It Make?* (2004) at 2-3, online: http://www.theglobalfund.org/en/library/evaluationlibrary/positionpapers/. In addition to a strong transparency policy, civil society representatives on the fund's board were largely responsible for the requirement of a formal review of the fund, with the results publicly available. Global Fund, *An Evolving Partnership: The Global Fund and Civil Society in the Fight Against Aids, Tuberculosis and Malaria*, online: http://www.theglobalfund.org/en/publications/other/evolvingpartnership/ at 11.

[138] UK Department for International Development, *Multilateral Aid Review: Ensuring Maximum Value for Money for UK Aid through Multilateral Organizations* (March 2011), online: https://s3-eu-west-1.amazonaws.com/media.dfid.gov.uk/multilateral_aid_review_full_linked.pdf at iii.

[139] *Ibid* at 76.

global health institutions to outperform their peer environmental institutions. The Global Fund and GAVI received among the highest rankings for both transparency and learning, while the GEF was below average.[140] These two assessments strongly suggest that participatory governance is contributing to greater transparency and accountability.[141]

2. *Deliberation*

Involving civil society in institutional decision-making leads to a more robust deliberation. As noted earlier, deliberative democracy is an important alternative to representative democracy as a source of legitimacy,[142] although there is no consensus on the requirements for adequate deliberation and deliberation in many institutions is undoubtedly deficient.[143] Robust deliberation can also contribute to improved decision-making, increased effectiveness, and output legitimacy.[144]

Most concretely, participation enables non-state actors to contribute information and expertise that is valuable for policy formulation and legitimacy: "[K]ey information resides in the knowledge and mental models of stakeholders."[145] Much of this information can be tapped through consultative mechanisms. However, participation allows CSOs to bring subjective understandings of situations and issues, values, and normative commitments to bear along with more technical information and expertise. Moreover, while arrangements such as the GEF's pre-meeting consultations or the CSD's multi-stakeholder segments may allow CSOs to express understandings, values, and commitments, such mechanisms can evolve into "formalized rituals that restrict the non-state actors' impact."[146] For true deliberation, interactions must not be confined to "a sideshow that obscures where key decisions actually get made."[147] Direct participation allows CSOs to argue for their understandings, values, and commitments during decision-making, in the give and take that characterizes true deliberation.[148] When

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[140] Center for Global Development and Brookings Institution, *Quality of Official Development Assistance*, online: http://www.cgdev.org/userfiles/quoda/ QuODA_TransparencyLearning_Update_022211.pdf.

[141] See Bartsch, *supra* note 108 at 141 (the Global Fund's transparency and accountability is strong).

[142] Bernstein, *supra* note 2 at 147.

[143] Abbott and Snidal, *supra* note 1 at 556-57: "social groups possess highly uneven capacities for organization and collective action, systematically skewing participation."

[144] John S Dryzek and Hayley Stevenson, "Global Democracy and Earth System Governance" (2011) 70 Ecological Economics 1865; Asher Alkoby, "Global Networks and International Environmental Lawmaking: A Discourse Approach" (2008) 8 Chi J Int'l L 377at 388: "But there is some evidence to suggest that at least in some areas of global governance an inclusive process also produces more effective outcomes."

[145] Brian Walker et al, "Resilience Management in Social-Ecological Systems: A Working Hypothesis for a Participatory Approach" (2002) 6 Conservation Ecology 14.

[146] Franz Perrez, "How to Get Beyond the Zero-Sum Game Mentality between State and Non-State Actors in International Environmental Governance" (2009) 2 Consilience: The Journal of Sustainable Development 15, online: http://www.consiliencejournal.org/index.php/consilience/ article/view/95.

[147] Dryzek and Stevenson, *supra* note 144.

[148] Thomas Risse, "'Let's Argue!' Communicative Action in World Politics" (2000) 54

civil society representatives have a vote, moreover, their arguments are backed by political leverage.

The perspectives and judgments of CSOs are particularly valuable in deliberations on long-term issues. Civil society actors are often best placed to provide long-term perspectives because they face fewer political constraints than governments. Less fettered by the short-term political bargaining that governments must constantly engage in, CSOs can, for example, speak on behalf of future generations and prod governments to consider broad perspectives and focus on fundamental issues.[149] In addition, CSOs act as the "voices of the weak and powerless," who are under-represented in inter-governmental deliberations.[150] Again, while civil society can voice such perspectives during consultative procedures, without direct participation there is little reason to believe they will have a strong influence on decision-making.

CSOs can also serve as vertical "transmission belts," communicating the concerns, understandings, values, and norms—even the place- and context-specific knowledge—of smaller-scale communities, which might otherwise never reach international institutions.[151] Again, only direct participation ensures that these ideas will be effectively inserted into deliberation and decision-making. Even when civil society's arguments do not prevail, their participation introduces a broader range of ideas and values, stimulating innovative thinking.[152]

3. Effectiveness

Many of the impacts of participation that were just discussed also increase the effectiveness of international institutions, enhancing output, as well as input, legitimacy.[153] This is true, for example, of broad knowledge inputs, robust deliberation, external accountability, and stakeholder ownership. One important impact is on resource mobilization. Over the last decade, institutions with strong civil society participation have been among

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Int'l Org 39.

[149] Ann M Florini, "Transnational Civil Society," in Michael Edwards and John Gaventa, eds, *Global Citizen Action* (Boulder, CO: Lynne Rienner, 2001) at 39.

[150] Frank Biermann and Aarti Gupta, "Accountability and Legitimacy in Earth System Governance: A Research Framework" (2011) 70 Ecological Economics 1856.

[151] Patrizia Nanz and Jens Steffek, "Deliberation and Democracy in Global Governance: The Role of Civil Society," in Sophie Thoyer and Benoît Martimort-Asso, eds, *Participation for Sustainability in Trade* (London: Ashgate, 2007) at 61; Michael Zürn, "Democratic Governance Beyond the Nation-State: The EU and Other International Institutions" (2000) 6 Eur J Int'l Relations 183 at 198.

[152] Advisory Group, *Civil Society and Aid Effectiveness: A Synthesis of Advisory Group Regional Consultations and Related Processes, January-December 2007* (2008), online: http://siteresources.worldbank.org/ACCRAEXT/Resources/4700790-1208545462880/AG-CS-Synthisis-of-Consultations.pdf at 6; Jens Steffek and Patrizia Nanz, "Emergent Patterns of Civil Society Participation in Global and European Governance," in Claudia Kissling, Patrizia Nans and Jens Steffeck, eds, *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (New York: Palgrave Macmillan, 2007) at 28.

[153] Steinar Andresen and Ellen Hey, "The Effectiveness and Legitimacy of International Environmental Institutions (2005) 5 Int'l Envt'l Agreements 211 at 212.

the most successful at raising funds.[154]

Key to this success has been the development of engaged and empowered constituencies in donor countries.[155] Committed and empowered civil society groups often have far greater influence on donor governments than do international institutions, and they have exercised their influence successfully. For example, CSOs have consistently pushed for ambitious replenishments of the Global Fund, and, in many countries, they are the primary voice urging governments to expand funding.

Although varying degrees of transparency make comparisons difficult, resource mobilization appears to be stronger for the Global Fund and GAVI than for the GEF and the AF. Over nearly twenty years, the GEF Trust Fund has received replenishment commitments totalling US $16 billion.[156] GAVI, in just over half as many years, has received contributions and commitments of more than US $14 billion.[157] And in less than half the GEF's life span, the Global Fund has received over US $30 billion in pledges, of which nearly US $22 billion has been received.[158] In sharp contrast, the AF, over its several-year gestation period, has received contributions of only some US $119 million, as well as $173 million from the Clean Development Mechanism, comparing poorly to the early success of the health funds.[159] These data suggest that expanding participation might enhance resource mobilization for the AF and other environmental funds.

Although the Global Fund recently faced a shortfall in anticipated funding, its latest replenishment still surpassed that of peer environmental institutions such as the GEF. Both organizations implemented replenishments during the difficult economic conditions of 2010, but pledges to the Global Fund were three times those of the GEF.[160] The Global Fund was still forced to postpone a new round of grants due to the extent of its existing commitments, reflecting a cautious methodology for assessing future funding as well as the failure of some donors facing fiscal pressures to deliver on their pledges.[161] In a reflection of the value of the multi-

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[154] Karen Caines et al, *Assessing the Impact of Global Health Partnerships* (2004), online: http://www.dfidhealthrc.org/publications/global_initiatives/ GHP%20Synthesis%20Report.pdf at 10; Rene Loewenson, *Civil Society Influence on Global Health Policy* (April 2003), online: http://www.tarsc.org/WHOCSI/pdf/WHOTARSC4.pdf at 9.

[155] Global Fund, *Donors and Contributions*, online: http://www.theglobalfund.org/en/ about/donors/.

[156] *Record Funding for the Global Environment Facility*, online: http://www.thegef.org/ gef/node/3010.

[157] *Donor Contributions and Proceeds to GAVI*, http://www.gavialliance.org/funding/ donor-contributions-pledges/.

[158] *Pledges and Contributions*, online: http://www.theglobalfund.org/en/about/ donors/public/.

[159] *Adaptation Fund Trust Fund Financial Report, as of March 31, 2012*, online: http://fiftrustee.worldbank.org/webroot/data/AF_TR_1.pdf.

[160] *GEF-5 Replenishment Meetings & Documents* (2010), online: http://www.thegef.org/ gef/replenishment_meetings/1. Global Fund, *Third Replenishment, Second Meeting* (2010), online: http://www.theglobalfund.org/en/donors/replenishments/ thirdreplenishmentsecondmeeting/.

[161] Global Fund Observer, *Why the Global Fund Cancelled Round 11* (December 2011) at 2-3; Board Chair Cover Note, Audit and Investigations Reports Issued by Global Fund's Office

stakeholder model for resource mobilization, however, the Gates Foundation responded with a contribution of US $750 million, significantly more than it had contributed over the previous decade. Furthermore, the Global Fund's response to these challenges—appointing a high-level panel and initiating a series of structural reforms based on the panel's recommendations— demonstrates the flexibility and innovativeness of participatory institutions.

At the project level, initial evidence suggests that civil society participation can also improve implementation.[162] The World Bank's portfolio performance reports indicate that CSO involvement at the country and project levels lowers the risk of poor performance and improves effectiveness.[163] According to one study that reviewed development projects in forty-nine countries, projects were over six times more likely to be successful when participation was a core goal.[164] The sense of ownership created by participation in decision-making should likewise increase civil society's commitment to an institution's projects and policies.

The DFID review again suggests that global health institutions are outperforming environmental institutions. DFID described GAVI and the Global Fund (along with only seven other organizations) as offering "very good value for money," while the GEF and the CIF were found to provide only "good value for money."[165] The DFID evaluation drew on diverse evidence including survey data, independent studies of effectiveness, external evaluations, and reporting by the institutions themselves.[166] The analysis by the Center for Global Development and the Brookings Institution also assigned GAVI and the Global Fund top ratings for organizational efficiency, while the GEF was below average.[167]

A major criticism of civil society participation is the inefficiency that stakeholder involvement may create.[168] Yet participatory health institutions appear highly effective. By the end of 2011, the Global Fund was financing AIDS treatment for 3.3 million people and tuberculosis treatment for 8.2

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of the Inspector General (1 November 2011), online:
http://www.theglobalfund.org/en/oig/reports/.
[162] Liesbet Steer and Cecilie Wathne, "Donor Financing of Basic Education: Opportunities and Constraints" (2010) 30 Int'l J Educational Development 472 at 476; Kennedy M Maranga, *The Evolving Role of NGOs in Global Governance* (28 July 2010) at 8, online:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650163.
[163] Sabine Schlemmer-Schulte, "The Impact of Civil Society on the World Bank, The International Monetary Fund and the World Trade Organization: The Case of the World Bank" (2000-01) 7 ILSA J Int'l & Comp L 399 at 411, note 50.
[164] Jonathan Isham, Deepa Narayan, and Lant Pritchett, "Does Participation Improve Performance? Establishing Causality with Subjective Data" (1995) 9 World Bank Econ Rev 175 at 178, 185-86.
[165] DFID, *supra* note 143.
[166] *Ibid.* Although working with partners and a beneficiary voice were among the forty-one criteria for DFID's assessment of "value for money," these factors accounted for less than 5 percent of the overall score and were very unlikely to account for the significant differences between health and environmental institutions overall (at 112-13).
[167] Center for Global Development and Brookings Institution, *supra* note 145.
[168] See, for example, Jennifer Wallner, "Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency and Performance" (2008) 36 Policy Studies Journal 421; Bernstein, *supra* note 2 at 151.

million, reducing prevalence and mortality in many countries. It had distributed 230 million insecticide-treated bed nets, contributing to sharp reductions in malaria mortality in Africa. The Global Fund estimates that its efforts have helped prevent 5.7 million deaths.[169] Over ten years, GAVI has immunized some 288 million children. Vaccine coverage for hepatitis B has increased from under 20 percent to nearly 70 percent, while diphtheria-tetanus-pertussis coverage has increased by nearly one-third to 82 percent. The WHO estimates that GAVI's programs have prevented 5.5 million deaths.[170] To be sure, one cannot assess the counterfactual results of less participatory organizations, yet these results at least demonstrate that civil society participation need not prevent institutional effectiveness.

4.   Longer-Term Rewards and Risks

In addition to its impact on the legitimacy and effectiveness of specific institutions, civil society participation has the potential to catalyze broader transformations of governance at multiple scales. International institutions can serve as schools of democratic engagement, teaching and empowering non-state actors to participate in governance across diverse scales and issue areas.

Local and national impacts are particularly clear when international institutions promote civil society participation at these levels. The project-level input arranged by the GEF and other World Bank-affiliated organizations promotes relatively narrow and localized engagement and capacity. The Global Fund's CCM mechanism, in contrast, has the potential to lead to participation in national processes, build broader capacity, enhance country-wide networks, and expand civil society engagement in policy formulation.

Participation at the international level has equivalent benefits, which may spill over into other contexts. For example, civil society representatives on the Global Fund board contributed to the adoption of strong guidelines for stakeholder involvement at the country level,[171] leading recipient governments to open political processes to non-state actors. The fund's recent decision to invest in strengthening civil society participation—like GAVI's decision to provide direct support for CSO participation in strengthening national health systems[172]—should produce similar benefits. Over time, programs such as these could shift the relationships between civil society and governments.

Just as participation produces broad benefits, however, so too may it pose risks. Foremost are the risks that participation will co-opt civil society representatives and that unrepresentative slices of civil society may capture

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[169] *Ibid*.

[170] *Key Indicators: Measuring the Alliance's Progress against Its Four Strategic Goals*, online: http://www.gavialliance.org/performance/global_results/ GAVI_Alliance___Results_2008___Vaccines.php.

[171] Global Fund, *supra* note 142.

[172] *Civil society organization support*, online: http://www.gavialliance.org/support/cso/.

the space for participation. Co-optation involves CSOs abandoning their independent, often critical roles by assimilating into the norms and practices of institutions dominated by status quo states. It is essential that some CSOs maintain a "critical distance" from decision-making—their watchdog role improves governance and legitimacy.[173] Capture, in contrast, involves a narrow, unrepresentative segment of civil society gaining control of participation mechanisms, excluding actors with different perspectives and values.

While co-optation and capture are both reasonable concerns, the rapidly evolving mechanisms of civil society participation can be important buffers. Constituency procedures offer potentially significant protections. Any structure in which representatives are disconnected from their constituencies risks inadequate accountability. Constituency nomination and selection mechanisms, however, link representatives to their diverse constituencies, increasing accountability and providing a bulwark against capture by a single faction. Similarly, such mechanisms allow stakeholders to recall representatives who become co-opted or pursue self-interest or the interests of particular organizations rather than those of the constituency while maintaining their own critical distance.[174]

Constituency mechanisms can also provide other important benefits. First, they support the development of leadership within the constituency. One successful approach is the selection of alternate representatives, who learn the practices of the constituency and the institution before succeeding the sitting representatives. Second, constituency mechanisms build civil society capacity. In this case, a useful model is the communications focal point, which is tasked to promote information exchanges and other interactions within diverse and geographically dispersed constituencies and to support individual participants in global processes. Pioneered by the Global Fund, this approach has since been adopted by UNAIDS and GAVI.[175] Finally, constituency mechanisms enhance the legitimacy of civil society participants and, thus, of the entire institution.

V.   Conclusion

The optimal design of international institutions to confront twenty-first-century global challenges is an increasingly urgent question. In addressing the challenge of climate change, for example, civil society participation remains controversial. Despite the pioneering roles of the CSD, the GEF, and other environmental institutions in expanding participation, the AF, the CIF, and

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[173] Dryzek and Stevenson, *supra* note 144.

[174] To be sure, delegation procedures pose their own problems. For example, they may exclude diffuse or poorly organized interests, becoming themselves a larger form of cooptation. These procedures remain in their infancy and must be carefully supervised to maximize their contributions. See Arthur Benz and Yannis Papadopoulos, "Introduction: Governance and Democracy: Concepts and Key Issues," in Benz and Papadopoulos, eds, *Governance and Democracy: Comparing National, European and International Experiences* (London: Routledge, 2006) at 8.

[175] Gartner, *supra* note 1.

the new Green Climate Fund all reject multi-stakeholder governance in favour of state-centric governance. Yet the evidence from the new generation of global health institutions strongly suggests that this turn away from participation is ill-advised. From transparency to resource mobilization, health institutions are outperforming environmental institutions in many crucial areas. While direct participation alone is unlikely to fully account for this performance gap, it is a central feature of the emerging model of global health governance.

The importance of civil society demand in explaining the divergence between health and the environment suggests that CSOs themselves will significantly shape the future of global governance. For example, efforts to organize and represent diffuse communities such as those affected by climate change could spark reforms similar to the ones initiated by the AIDS movement. Yet demand alone is insufficient. The limits of imagination are shaped by institutional contexts, most inherited from an earlier century, and by path dependence within institutions and issue areas. As a result, participatory institutions are more likely to emerge outside of twentieth-century institutions such as the United Nations and the World Bank.

Further research is needed to understand how well the lessons of global health and the environment on the link between direct participation and institutional performance can be translated into other areas. While research on international institutions often focuses on a single institution or, at best, a single sector, cross-sectoral comparisons provide additional explanatory leverage and normative insight and offer broader governance lessons. While there are strong reasons to believe that civil society demand, institutional context, and path dependence will matter in diverse fields, their balance may differ depending on the characteristics of issues and institutional contexts. Inquiries such as these should be a major area for future research on international governance.

Solidarity in a Disaggregated World
Universal Jurisdiction and the Evolution of Sovereignty

CARLY NYST[*]

A country isn't a rock. It's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult! Before the people of the world, let it now be noted that here, in our decision, this is what we stand for: justice, truth, and the value of a single human being.

— Judge Dan Haywood, played by Spencer Tracy, delivering the Court's verdict in *Judgment at Nuremberg* (1961)

I.   Introduction

The norm of state sovereignty has enjoyed a lengthy, albeit precarious, tenure as the *grundnorm* of the international system.[1] Since the Peace of Westphalia in 1648, the protections flowing from claims of state sovereignty have been the jealous preserve of states, serving to insulate both sinister and benevolent rulers alike. While challenges to traditional conceptions of sovereignty have always existed alongside claims to its pre-eminence, the

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[1] See William Aceves, "Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation" (2001-02) 25 Hastings Int'l & Comp L Rev 261; Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment" (2002) 43 Harv Int'l L J 1.

invocation of sovereignty by states and sovereignty's constitutive nature in the international system have become increasingly contested notions.[2]

One of the more considerable challenges to the primacy of the sovereignty norm has been the development and entrenchment of international law. Despite the arguments of predominantly realist theorists to the contrary,[3] this paper proceeds on the assumption that international law today both regulates and constitutes interstate relationships.[4] Such relationships are more than crude systemic interactions—they are part of a distinctive social practice, in which actors' identities both shape, and are shaped by, international legal norms.[5] This process is indicative of the existence of an international society,[6] whereby actors "conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions."[7] The twentieth century saw the fortification of international law as a key institution, and the latter half of the century witnessed the emergence of international law's most important, yet controversial, embodiments—human rights and duties—and individual criminal responsibility for their violation. Unlike earlier conceptions of international law, human rights and international criminal law go further than regulating the relations between states—they engage the rights and duties of individuals. They undermine what Hedley Bull labels "[t]he basic compact of coexistence between states, expressed in the exchange of recognition of sovereign jurisdictions … a conspiracy of silence entered into by governments about the rights and duties of their respective citizens."[8] The norms of human rights and international criminal law exist in defiance of the norm of state sovereignty.[9]

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[2] See Stephen D Krasner, *Sovereignty: Organised Hypocrisy* (Princeton, NJ: Princeton University Press, 1999); Jean L Cohen, "Whose Sovereignty? Empire versus International Law" (2004) 18 Ethics & Int'l Affairs 1; Thomas G Weiss and Jarat Chopra, "Sovereignty under Siege: From Intervention to Humanitarian Space," in Gene M Lyons and Michael Mastanduno, eds, *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: John Hopkins University Press, 1995); Austin Sarat and Stuart Scheingold, eds, *Cause Lawyering and the State in a Global Era* (Oxford: Oxford University Press, 2001); Gene M Lyons and Michael Mastanduno, "State Sovereignty and International Intervention: Reflections on the Present and Prospects for the Future," in Lyons and Mastanduno, *ibid* at 250; Jack Donnelly, "State Sovereignty and International Intervention: The Case of Human Rights," in Lyons and Mastanduno, *ibid* at 115.

[3] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

[4] Nardin, *Law, Morality and the Relations of States* (Princeton, NJ: Princeton University Press, 1983); Thomas Risse, Stephen C Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

[5] Caroline Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches" (2004) 10 Eur J Int'l Relations 357.

[6] David R Mapel and Terry Nardin, eds, *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1998).

[7] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave, 1977) at 13.

[8] *Ibid* at 80.

[9] The relationship between the disciplines of international law and international relations is a complex one, which is more appropriately addressed elsewhere. To begin, see Gerry Simpson, "Duelling Agendas: International Relations and International Law (Again)" (2004-2005) 1 J Int'l L & Int'l Rel 61; and Anne-Marie Slaughter-Burley, "International Law and International

A number of offences under international criminal law purport to attract universal jurisdiction, the principle by which every state has jurisdiction over an offence recognized as being of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended.[10] The doctrine is as heavily contested as it is widely advocated, and its successful invocations (most notably, the attempt to extradite former Chilean president Augusto Pinochet from the United Kingdom to stand trial in Spain) have been as spectacular as those that have failed, including multiple aborted attempts to try high-ranking members of the Bush administration in courts throughout Europe. Ten years after the House of Lords' decision in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3) (Ex Parte Pinochet),* lawyers, academics, and states continue to engage in heated debate about the legal foundation of the doctrine, its legitimate usage, and its potential exploitation.[11] Even as increasing numbers call for its abandonment, attempts by lawyers to commence prosecutions founded in the doctrine proliferate.[12]

The doctrine of universal jurisdiction poses substantial conceptual and practical challenges to widely held notions of sovereignty in international relations. This article seeks to place the doctrine in the context of debates about the changing nature of the norm of sovereignty. The article is comprised of three sections. First, the history of the doctrine of universal jurisdiction will be surveyed in order to ascertain the extent of its establishment within states. Particular attention will be given to the way in which universal jurisdiction illustrates the tensions between order and justice, in the sense addressed by Hedley Bull.[13] Second, this study will look at the changing contours of the norm of sovereignty. Anne-Marie Slaughter's disaggregation thesis will be analyzed and applied to the networks of international lawyers who are driving universal jurisdiction.[14] The article will propose that Slaughter's disaggregation thesis provides an appropriate lens though which to analyze the role of international lawyers, working as transnational advocacy networks, in promoting normative change. Finally, this study will seek to join the solidarist-pluralist debate within the English

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Relations Theory: A Dual Agenda" (1993) 87:2 Am J Int'l L 205.

[10] Kenneth C Randall, "Universal Jurisdiction under International Law" (1987-88) 66 Texas L Rev 785 at 788.

[11] *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3),* [2000] 1 AC 147. This article will provide only a brief overview of these debates for it is primarily concerned with universal jurisdiction as a concept and practice, rather than its legal contours and insufficiencies. It will provide a broad understanding of how the universal jurisdiction came to be in order to ascertain how it fits into international relations today.

[12] Diane Morrison and Justus Reid Weiner, "Curbing Enthusiasm for Universal Jurisdiction" (2010) 4 Berkeley J Int'l L Publicist 1, online: http://bjil.typepad.com/publicist/vol-4-spring-2010/; Alan M Dershowitz, *The Hypocrisy of 'Universal Jurisdiction,'* Hudson New York Institute (6 October 2009), online: http://www.hudson-ny.org/848/the-hypocrisy-of-universal-jurisdiction; Luc Reydams, "The Rise and Fall of Universal Jurisdiction," in William A Schabas and Nadia Bernaz, eds, *Routledge Handbook of International Criminal Law* (London: Routledge, 2010) at 33.

[13] Bull, *supra* note 7.

[14] Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

School, by questioning whether the continued application of universal jurisdiction through the pursuits of international lawyers is sufficient evidence to support a contention that international society is moving towards greater solidarity.

This study seeks to conduct a nuanced, albeit brief, examination of the doctrine of universal jurisdiction, the norms with which it engages, the way in which such norms evolve, and the implications for international society. It will contend that the continued existence of universal jurisdiction constitutes compelling evidence that the fundamental concepts underpinning the doctrine—human rights and individual criminal responsibility—have become constitutive of modern sovereignty. It is further argued that universal jurisdiction is a clear example of the way in which non-state actors can fundamentally alter the principles and dynamics of international society and the norms by which it is constituted. Finally, this article will propose that the doctrine of universal jurisdiction provides an appropriate platform upon which to analyze the pluralist-solidarity debate in international relations.

II.   The Development of Universal Jurisdiction

1. *From Pirates to Pinochet*

The House of Lords' watershed decision in *Ex Parte Pinochet* that "crimes prohibited by international law attract universal jurisdiction under customary international law" subject to certain conditions, prompted a great deal of cautious optimism among proponents of human rights and international criminal responsibility.[15] Advocates, activists, and academics dedicated to advancing such causes saw the decision as "a real step forward in international human rights law," which constituted "a quite remarkable challenge to the norms of the Westphalia System."[16] To the extent that this "was a moment when international law seemed to plunge forward rather than advance at its more usual lumbering pace,"[17] many observed it as the fulfilment of a project that began at Nuremberg, one directed at pulling back the "curtain of sovereignty" to hold individuals accountable for their actions.[18] Yet restraint was the order of the day. There was a sense not only

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[15] *Ex Parte Pinochet, supra* note 11 at 275 (per Lord Millet). However, it is recognized that the House of Lords judgment must be considered, at best, opaque. No obvious *ratio decidendi* was apparent in the judgment, and the Lords did not take a unified stance the issue of universal jurisdiction. For example, Lord Browne-Wilkinson concluded that universal jurisdiction was applicable in Great Britain with respect to the crime of torture only by virtue of relevant statutory authorities (at 200).

[16] Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002) at 218.

[17] Diane F Orentlicher, "Universal Jurisdiction after Pinochet: Prospects and Perils" (Paper delivered at the UC Irvine as part of the Symposium Series Prosecuting Perpetrators: International Accountability for War Crimes and Human Rights Abuses 21, February 2003) [unpublished], online: http://www.cgpacs.uci.edu/files/cgpacs/docs/2010/
working_papers/diane_orentlicher_universal_jurisdiction.pdf.

[18] Henry T King, Jr, "Realities, Prospects, War Crimes and Crimes against Humanity: The

that universal jurisdiction stood "poised to become an integral, albeit supplemental, component of the emerging international justice system"[19] but also that it was still in its nascent stages, ripe for exploitation and abuse.[20] Nevertheless, the effective invocation of the doctrine of universal jurisdiction in *Ex Parte Pinochet* represented a monumental breakthrough.

According to Madeline Morris, this breakthrough has been constructed by international lawyers in the pursuit of "a vaulting ambition," hastily created by overlooking facts or drawing exaggerated and flawed analogies.[21] Others, too, have analyzed at length the arguably flawed foundations of the doctrine, drawing from this analysis their criticism of its current application. Commentators point to the misinterpretation and misappropriation of work by Grotius and Vattel, whom Luc Reydams notes in fact "wanted to make sovereignty a workable organised principle" and "would cringe at the contemporary interpretation of [their] words."[22] The conceptual divergences between Grotius and Vattel are relevant: while both observed the existence of a moral community of mankind, only Grotius believed that community should be given priority over the community of states.[23] This difference undermines appeals to the well-established authority of the doctrine, that "universal jurisdiction was legal lore, it had always existed 'out there'— scattered in the writings of … legal-philosophers."[24] In fact, the development of the doctrine was influenced by these understandings—or misunderstandings—of writings on natural law. The categorization by Vattel of pirates as *hostis humani generis* (the enemies of all humanity), who were thus excluded from the principle that "the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories," was transposed onto those committing war crimes, crimes against humanity, and genocide.[25] This transposition disregarded Vattel's own position in opposing the application of universal jurisdiction outside the context of piracy,[26] and employed shaky analogous reasoning between piracy and international crimes, the former only applying to private acts and excluding the official acts of states.[27]

Nevertheless, it was upon these dubious foundations that the principle of universal jurisdiction materialized to form the basis of the jurisdiction exercised by the International Military Tribunal (IMT) at Nuremberg—an

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Nuremberg Precedent" (2001) 35:2 New Eng L Rev 282.

[19] Bruce Broomhall, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law" (2000-01) 35:2 New Eng L Rev 399.

[20] Madeline H Morris, "Universal Jurisdiction in a Divided World: Conference Remarks" (2000-01) 35 New Eng L Rev 337.

[21] *Ibid* at 339.

[22] Reydams, *supra* note 12 at 341-42.

[23] Andrew Linklater and Hidemi Suganami, *The English School of International Relations: A Contemporary Reassessment* (Cambridge: Cambridge University Press, 2006) at 63.

[24] Reydams, *supra* note 12 at 339.

[25] Emerich de Vattel, *Law of Nations or the Principles of Natural Law, Book 1: Of Nations Considered in Themselves* (1758) at para 233.

[26] Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations" (2004) 45 Harvard Int'l L J 1.

[27] Morris, *supra* note 20 at 345.

advancement captured in chief American prosecutor Robert Jackson's declaration before the court that "the real complaining party at your bar is civilisation."[28] The court itself held that in establishing the IMT, the signatory powers had "done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[29] The UN secretary-general later considered whether this statement implied that the signatory powers' jurisdiction was premised on the protective principle—to the extent that relevant crimes threatened the security of each of them—but concluded that "it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state."[30] A number of other post-war trials subsequently affirmed this approach to crimes committed during World War II, including the *Amelo Trial (Trial of Otto Sandrock and Three Others)* before the British Military Court for the trial of war criminals in the Netherlands,[31] the *General Wagener case* the Supreme Military Tribunal of Italy,[32] the trial of *Klauss Barbie* in the French Criminal Court of Cassation,[33] and *Attorney General of Israel v Eichmann* before the Supreme Court of Israel, which held that the application of universal jurisdiction "has for some time been moving beyond the international crime of piracy" and consequently was "logically applicable also to all such criminal acts of commission or omission which constitute offences under the laws of nations."[34]

This post-war gradual crystallization of universal jurisdiction and human rights norms saw the doctrine's positivist foundations laid in the form of the 1949 Geneva Conventions, which 194 states have now ratified.[35] (The inclusion of universal jurisdiction in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide was met with resistance from a number of states, and, as such, the convention instead

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[28] *Ibid.*

[29] *International Military Tribunal (Nuremberg) Judgments and Sentences* (London: Her Majesty's Stationary Office, 1946) at 216.

[30] *The Charter and Judgement of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Do A/CN.4/5 (1949) at 38.

[31] The court stated, "under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed." *Amelo Trial (Trial of Otto Sandrock and Three Others)*, British Military Court for the Trial of War Criminals in the Netherlands, held at the Court House, Amelo, Holland, on 24-26 November 1945, Case no 3, Law Reports on Trials of War Criminals, United Nations War Crimes Commission.

[32] The tribunal stated: "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one … The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be." *Rivista Penale,* Supreme Military Tribunal, Italy (1950) 753 at 757.

[33] Judgment of 6 October 1983, Cass Crim (1984) DS Jur 113, GP Nos 352-54 at 121 (18-20 December 1983).

[34] *Attorney General of Israel v Eichmann*, 1962 SC Isrl, 26 ILR 277.

[35] *Geneva Conventions*, 12 August 1949, 1125 UNTS 3.

provides for the jurisdiction of an international penal tribunal.[36]) Today, a large majority of states are party to, and have ratified, a number of treaties that provide for universal jurisdiction, including the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the 1977 Protocol Additional to the Geneva Conventions, the 1982 Convention on the Law of the Sea, the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and a number of the terrorism treaties enacted throughout the 1970s and 1980s.[37] Although the Rome Statute of the International Criminal Court (Rome Statute) does not explicitly incorporate universal jurisdiction (an omission that arguably creates a statutory gap precluding a truly global international criminal justice system), most states parties have provided for universal jurisdiction to some extent as part of implementing the provisions of the statute at the national level.[38]

Although the United States currently only recognizes universal criminal jurisdiction in its own courts with respect to piracy,[39] slavery,[40] and torture,[41] the principle of universal jurisdiction was incorporated in 1987 in the *Third Restatement of the Foreign Relations Law of the United States.*[42] The US approach to the doctrine since this time has been characterized by varying degrees of tolerance. The Clinton administration exerted considerable effort to encourage foreign governments with universal jurisdiction legislation to exercise their powers with respect to former Cambodian leader Pol Pot, Kurdish rebel leader Ocalan, and senior leaders of Saddam Hussein's Iraqi leadership,[43] yet it vigorously opposed the incorporation of universal jurisdiction into the Rome Statute at the Rome conference in 1998.[44] The Bush administration, itself the subject of numerous universal jurisdiction prosecution attempts,[45] criticized the politicized use of the doctrine in

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[36] *Convention for the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

[37] Morris, *supra* note 20; *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243; *Protocol Additional to the Geneva Conventions of 12 August 1949*, 8 June 1977, 1125 UNTS 3; *UN Convention on the Law of the Sea*, 21 ILM 1261 (1982); *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

[38] Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool* (2010), online: http://www.amnesty.org/en/library/asset/ IOR53/015/2010/en/72ab4ccf-4407-42d3-8cfb-46ad6aada059/ior530152010en.pdf. Rome Statute of the International Criminal Court, 1 July 2002, UN Doc A/CONF.183/9 (2002).

[39] *United States v Smith,* 18 US (5 Wheat) 153 at 162 (1820).

[40] *United States v La Jeune Eugenie,* 1822 CCD Mass, 26 Fed Case 832 at 843.

[41] *Extraterritorial Torture Statute*, 1994, 18 USC (1994) at ss 2340 and 2340A.

[42] *Third Restatement of the Foreign Relations Law of the United States* (1987) at para 404: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present."

[43] David Scheffer, "Opening Address" (2000-01) 35 New Eng L Rev 233.

[44] Bartram S Brown, "The Evolving Concept of Universal Jurisdiction" (2000-01) 35:2 New Eng L Rev 383.

[45] This includes attempts to prosecute Dick Cheney and Colin Powell in Belgium (2003); Donald Rumsfeld (2004) and Alberto Gonzales (2006) in Germany; and Donald Rumsfeld in France

Belgium[46] but hosted the prosecution, under universal jurisdiction, of Charles "Chuckie" Taylor, the son of former Liberian president Charles Taylor, for the crime of torture and actively supported the international criminal tribunals in Rwanda and Yugoslavia.[47] Early in the Obama presidency the administration reiterated its commitment, in principle, to individual accountability for atrocities, and since that time has continued to facilitate and sustain the work of the International Criminal Court in Uganda, Kenya and Libya. [48]

2.   *Universal Jurisdiction Today: Retreat or Resurgence?*

Following the success, for universal jurisdiction proponents, in *Ex Parte Pinochet*, there was a renewed interest in the potentialities of universal jurisdiction. In 2001, the Princeton Principles on Universal Jurisdiction were endorsed by scholars and jurists convening at Princeton University.[49] In the decade since then, complaints and prosecutions in Belgium, Spain, the Netherlands, Argentina, France, Germany, Senegal, New Zealand, and the United Kingdom have sought to establish criminal responsibility for crimes committed in, *inter alia*, the former Yugoslavia,[50] Rwanda,[51] Iraq,[52] Mauritania,[53] Chad,[54] Afghanistan,[55] Congo Brazzaville,[56] Zimbabwe,[57]

(2007). See Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008" (2009) 30 Michigan J Int'l L 927.

[46] Andreas Fischer-Lescano, "Global Constitutional Struggles," in Wolfgang Kalek, Michael Ratner, Tobias Singelnstein and Peter Weiss, eds, *International Prosecution of Human Rights Crimes* (Berlin: Springer-Verlag, 2007) at 22.

[47] Pursuant to the *Extraterritorial Torture Statute*, *supra* note 40 at ss 2340 and 2340A. See Elise Keppler, Shirley Jean, and J Paxton Marshall, "First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr." (26 August 2008), online: Human Rights Watch, http://www.hrw.org/pub/2008/ij/
HRB_Chuckie_Taylor.pdf.

[48] Stephen Kaufman, *New U.S. Cooperation on International Criminal Court* (US Department of State, Bureau of International Information Programs, 2010) at 1, online:
http://www.america.gov/st/peacesec-english/2010/June/20100602160754esnamfuak0.744
8694.html&distid=ucs; David Scheffer, "America's Embrace of the Internatioanl Criminal Court," *Jurist – Forum*, 2 July 2012, online: http://jurist.org/forum/2012/07/dan-scheffer-us-icc.php.

[49] *Princeton Principles on Universal Jurisdiction,* Program in Law and Public Affairs, Princeton University, 2001, online: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

[50] From 1999 to 2003, German practitioners investigated 128 cases of crimes committed in the former Yugoslavia. See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (2006), online: http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe (D).

[51] Including the Butare Four case in Belgium (2001); the "Rwandan Generals" case in Spain (2005); Etienne Nzabonimana and Samuel Ndashykirwa in Belgium (2005); Ignace Murwanashyaka and Straton Musoni in Germany (2009); Wencelas Munyeshyaka in France (ongoing); Callixte Mbarushimana in France (ongoing).

[52] Nizar Khazraji in Denmark (2002); George HW Bush, General Norman Schwarzkopf, and General Tommy Franks in Belgium (2003).

[53] Ely Ould Dah in France (2005).

[54] Hissene Habre in Senegal (2005 to 2008).

[55] Faryadi Zardad in the United Kingdom (2005), the "Afghan Generals case" in the Netherlands (2005).

[56] Jean-Francois Ndengue in France (2004).

[57] Robert Mugabe in France (2003).

Algeria,[58] Tunisia,[59] Peru,[60] Argentina,[61] Guatemala,[62] Tibet,[63] the United States,[64] and the Occupied Palestinian Territories.[65] Yet concurrent to the proliferation of complaints and prosecutions have been a number of state initiatives that have suggested an uncertainty towards universal jurisdiction akin to that of the United States. Multiple prosecutions have been discontinued due to concerns about the diplomatic ramifications.[66] After incurring the wrath of Donald Rumsfeld in 2003, Belgium repealed its extensive universal jurisdiction legislation, incorporating international crimes into the Belgium Criminal Code, thereby restricting the jurisdiction exercisable by Belgian courts to active and passive personality.[67] Spain introduced similar legislation in 2010,[68] and, in April 2010, Spanish Judge Balthazar Garzón, a man congratulated and criticized by many for breathing life into universal jurisdiction legislation in Spain, was indicted for commencing an investigation into atrocities committed under the Franco dictatorship, acts that are covered by a 1977 amnesty law.[69] In late 2008, the African Union-European Union (AU-EU) Ministerial Troika commissioned an expert report on the principle of universal jurisdiction discussing the calls by African states for the discontinuation of European prosecutions of African offenders under the principle of universal jurisdiction. The doctrine has also been the subject of controversy in the United Kingdom after an arrest warrant was issued in Britain for Israel's former foreign minister, Tzipi Livni, days before she was due to fly to London in 2010.[70] Consequently, the British government commenced a consultation process aimed at generating legislative restrictions on the use of the doctrine, and, in September 2010, Parliament passed the Police Reform and Social Responsibility Act,

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[58] Khaled Nezzar in France (2001).

[59] Khaled Ben Said in France (2001).

[60] Alberto Fujimori in Spain (2009) and Adolfo Scilingo in Spain (2005).

[61] Richardo Miguel Cavallo in Spain (2006).

[62] The "Guatemalan Generals case" in Spain (2005).

[63] The "Tibetan Genocide case" in Spain (2006).

[64] The "Bush Six case" in Spain (2009).

[65] Ariel Sharon in Belgium (2001-03), Moshe Ya'alon in New Zealand (2006); Shaul Mofaz (2004), Dono Almog (2005), Ehud Barak (2009), and Tzipi Livini in the United Kingdom (2009); Salah Shehade in Spain (2010).

[66] Naomi Roht-Arriaza, "The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction," in Kalek et al, *supra* note 46.

[67] Active personality jurisdiction applies when a national is accused of an extraterritorial crime; passive personality jurisdiction applies when a national is the victim of a territorial crime. *Criminal Code of the Kingdom of Belgium*, Article 7.

[68] *United States v Smith,* (1820) 18 US Wheat (5th) 153 at para 162.

[69] Marlise Simons, "Spain's Attorney General Opposes Prosecutions of 6 Bush Officials on Allowing Torture," *New York Times* (16 April 2009), online: http://www.nytimes.com/2009/04/17/world/europe/17spain.html. In May 2010, Garzón was suspended from judicial duties pending the outcome of his trial on the charges. Subsequently, the General Council of the Judicial Power of Spain granted a request from the International Criminal Court (ICC) for Garzón to be assigned as a consultant to the ICC for six months. See Hermione Gee, "Garzón Suspended, Will Move to ICC," *Radio Netherlands Worldwide* (14 May 2010).

[70] Natalie Hanman, "DPP May Get Veto Power over Arrest Warrants for War Crime Suspects," *The Guardian* (22 July 2010), online: http://www.guardian.co.uk/law/2010/jul/22/dpp-veto-arrest-warrants-war-crime.

containing provisions that require the consent of the director of public prosecutions prior to the issuance of an arrest warrant in a private prosecution under universal jurisdiction.[71]

These developments, for the most part, reflect concerns about the problems inherent in the application of universal jurisdiction. Such problems are the subject of extensive legal and theoretical debate that will not be fully documented in this article.[72] The debate is primarily a normative discourse about the proper relationship between law and politics. Universal jurisdiction's detractors, hailing overwhelmingly from the realist camp, fret about a doctrine that allows "legal principles to be used as weapons to settle political scores,"[73] amounting to "the judgement of one state's policies … in the courts of another state"[74] and thereby contravening the principle of sovereign equality inherent in the dictum *par in parem non habet imperium*.[75] The increased application of universal jurisdiction reflects a renewed commitment to "[t]he kind of idealism that Carr understood to be so damaging to international peace and stability in the interwar years," exemplifying a "failure to take seriously the contested nature of international norms, the importance of power, and the possibility of abuse exacerbated by the absence of democratic accountability."[76] Universal jurisdiction has the potential to be exploited by "ideologues and antagonists" intent on committing "lawfare" against countries such as the United States and Israel.[77] It connotes a preference for order over justice, promising to "lead to

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[71] *Police Reform and Social Responsibility Act*, 2011 c 13.
[72] See, for example, Georges Abi-Saab, "The Proper Role of Universal Jurisdiction" (2003) 1 J Int'l Crim J 596; Jörg Arnold, "Protection of Human Rights by Means of Criminal Law: On the Relationship between Criminal Law and Politics," in Kalek et al, *supra* note 46; Broomhall, *supra* note 19; Brown, *supra* note 44; Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1:3 J Int'l Crim J 589; Dershowitz, *supra* note 12; Benjamin B Ferencz, "A Nuremberg Prosecutor's Response to Henry Kissinger" (2001-2002) 8 Brown J World Aff 178; Fischer-Lescano, "Global Constitutional Struggles," *supra* note 46; Jack Goldsmith and Stephen D Krasner, "The Limits of Idealism" (2003) 132:1 Daedalus 47; King, *supra* note 18; Henry A Kissinger, "The Pitfalls of Universal Jurisdiction" (2001) 80:4 Foreign Aff 86; Kontorovich, *supra* note 26; Eugene Kontorovich, "The Inefficiency of Universal Jurisdiction," University of St Gallen Law School, Law and Economic Research Paper Series, Working Paper No 2007-14 (2007); Morris, *supra* note 20; Morrison and Weiner, *supra* note 12; Orentlicher, *supra* note 17; Randall, *supra* note 10; Reydams, *supra* note 12; Roht-Arriaza, *supra* note 66; Kenneth Roth, "The Case for Universal Jurisdiction" (September/October 2001) 80:5 Foreign Aff 150; Leila Nadya Sadat, "Redefining Universal Jurisdiction" (2000-2001) 35 N Eng L Rev 241; Scheffer, *supra* note 43; JD van der Vyver, "Universal jurisdiction in international criminal law" (1999) 24 S African Yearbook Int'l L 107; Michael Verhaeghe, "The Political Funeral Procession for the Belgian UJ Statute," in Kalek et al, *supra* note 46.
[73] Kissinger, *ibid* at 88.
[74] Morris, *supra* note 20 at 354.
[75] An equal has no power over an equal. The principle was discussed in *Ex Parte Pinochet*, *supra* note 11 (per Lord Millet): "The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; *par in parem non habet imperiu*m. States were obliged to abstain from interfering in the internal affairs of one another."
[76] Goldsmith and Krasner, *supra* note 72.
[77] Michael Chertoff, "The Responsibility to Contain: Protecting Sovereignty under International

more chaos in the international system."[78]

However, contrary to observations that "the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes," the doctrine has proved resilient.[79] International chaos has yet to ensue despite a clear proliferation of complaints and prosecutions under the doctrine.[80] An increasing number of states have introduced universal jurisdiction for genocide, crimes against humanity, and war crimes, most through implementing legislation adopted as part of the ratification of the Rome Statute.[81] By 2004, more than 100 states had domestic legislation authorizing universal jurisdiction, fourteen states had initiated cases, and high-level courts in twelve of those states had upheld the authority of the doctrine.[82] The 2009 AU-EU Ministerial Troika, which called for the tempering of the application of universal jurisdiction, nevertheless agreed that "all states should strive to put an end to impunity for genocide, crimes against humanity, war crimes and torture, and prosecute those responsible for such crimes."[83] In considering the scope and application of the doctrine in its sixty-fifth session in September 2009, the UN General Assembly reiterated its commitment to the responsible and judicious application of universal jurisdiction consistent with international law and resolved to remain seized of the matter in forthcoming sessions.[84] Organizations such as the Madrid-based Associatión Pro Derechos Humanos de Espana (APDHE), the Paris-based Ligue des Droits de L'Homme (FIDH), the Berlin-based European Centre for Constitutional and Human Rights (ECCHR), Human Rights Watch, and Amnesty International remain engaged in universal jurisdiction litigation and activism, and universal jurisdiction prosecutions continue to proliferate.

Hedley Bull contends:

Law" (2009) 88:1 Foreign Aff 130; Morrison and Weiner, *supra* note 12; Dershowitz, *supra* note 12; Anne Herzberg, *Lawfare: Exploitation of Courts in the Arab-Israeli Conflict*, NGO Monitor Reports (7 December 2010).

[78] Scheffer, *supra* note 43.

[79] Cassese, *supra* note 72.

[80] It is accepted that many such complaints are dismissed and prosecutions discontinued due to political considerations and even executive interference. The scope of this article does not include an examination of the accuracy of claims about the politicized nature of the doctrine or the manipulation of universal jurisdiction to achieve other ends, although such claims do warrant further research: "In most of its modern applications, universal jurisdiction has functioned essentially as intended" (Morris, *supra* note 20 at 357). For the purposes of this article, it is accepted that the intended use of the doctrine is as stated by its proponents: to protect human rights through individual criminal accountability.

[81] For example, Germany adopted the *German Code of Crimes against International Law*, and South Africa adopted the *Implementation of the Rome Statute of the International Criminal Court Act*, both of which came into force on 30 June 2002.

[82] Darren Hawkins, "Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms" (2004) 48 Int'l Studies Q 779.

[83] Council of the European Union, *AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction Report*, Doc 8672/1/09 REV 1 (Brussels, April 2009), online: http://www.ulb.ac.be/droit/cdi/Site/Accueil/ 52A70C06-DF54-4A45-B69D-B82CFF0E8C3D_files/Rapport_UA_UE_ENG.pdf at 40.

[84] *UN General Assembly Resolution 65/33 on the Scope and Application of the Principle of Universal Jurisdiction* (10 January 2011).

> If international society were really to treat human justice as primary and coexistence as secondary … then in a situation in which there is no agreement as to what human rights are or in what hierarchy of priorities they should be arranged, the result could only be to undermine international order.[85]

Universal jurisdiction has persevered in the face of a norm that should dispense with it—state sovereignty. The result has not been disorder but, rather, the increased entrenchment of the norms of human rights and international criminal responsibility. This development is part of a movement that puts into question the absoluteness of Bull's order and justice paradigm. How can we understand the continued existence and application of universal jurisdiction, a principle with the pursuit of justice at its core, alongside order? It is the contention of this study that the entrenchment of universal jurisdiction serves as evidence that the norms of human rights and international criminal justice have become, like state sovereignty, constitutive of international society. The process by which this transformation has occurred will be the focus of the next section.

III.   International Lawyers in a Disaggregated World

1.   Conceptualizing Sovereignty: From Erosion to Evolution

The contested nature of the norm of sovereignty is, perhaps, its only feature that is widely agreed upon.[86] Arguments about the contours of sovereignty and its relationship with other norms are so well worn in the disciplines of international relations and international law that it is neither practicable nor necessary to canvass them here.[87] This article accepts that the ever-increasing challenges to traditional conceptions of the norm of sovereignty are reflective of the changing nature of the norm, which is indicative of its status as a rule that both constitutes and is constituted by international society. Thus, this article rejects Stephen Krasner's argument that the international system has no such constitutive rules.[88] It is contended that the norm of sovereignty is so widely accepted within international society that it is constitutive of its identity, which is so taken for granted that "it is easy to overlook the extent to which [it is] both presupposed by and an ongoing artefact of practice."[89] Far from being a result of rationalist calculations or embedded social structures, sovereignty "exists by virtue of the intersubjective meanings that conjure it into existence."[90]

Adopting such a constructivist approach reorients the sovereignty

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[85] Bull, *supra* note 7.
[86] Alexander Wendt and Robert Duvall, "Sovereignty and the UFO" (2008) 36:4 Political Theory 607.
[87] Sarat and Scheingold, *supra* note 2.
[88] Krasner, *supra* note 2.
[89] Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 Int'l Organization 391 at 413.
[90] Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000) at 22.

debate away from a binary discourse of Westphalian sovereignty contrasted against a post-Westphalian cosmopolitan community. This stance eschews the more ingrained formations of sovereignty as autonomy that have come to characterize the discipline of international relations. To the extent that autonomy was ever a part of the contours of state sovereignty, it is no longer "fundamental, nor adequate as a justification of either the supposedly derivative principles of non-intervention and self-determination or the moral objections to imperialism and economic dependence."[91] Thus, as "[t]he rights of sovereign states, and of sovereign peoples or nations, derive from the rules of the international community or society and are limited by them," this evolution of sovereignty reflects a change in the rules of the international community.[92]

It does not necessarily follow, of course, that sovereignty loses its meaning or force—that meaning has simply changed under the influence of other rules, such as international law. The existence of transnational and supranational jurisdictional claims does not warrant a conclusion that autonomy is excluded from the range of rights a state can claim by virtue of its sovereignty but, rather, that autonomy is now only one among a number of such claims. Accordingly, it is no longer fruitful to cast the norms of sovereignty and human rights in a simple dichotomous relationship. Rather,

> we must sever political autonomy from the idea of comprehensive jurisdiction and realise that the apparent antinomy between sovereignty and human rights or between state sovereignty and multiple sources of international law is based on an anachronistic conception of the former as absolute.[93]

This reconceptualization of sovereignty helps to overcome a primary failure of rationalist international relations theory, that "it does not have a motor of change, or that the motor of change—such as state self-interest, or changing power capabilities—is impoverished, and cannot explain the sources or nature of … international change."[94] Sovereignty is "a shared set of understandings and expectations about state authority that is reinforced by practices"; as these practices and understandings have changed so too have the common conceptualizations of sovereignty.[95] Thus, the introduction and expansion of the norms of human rights and individual criminal responsibility, rather than eroding sovereignty, have induced its evolution. Bull's observation that "carried to its logical extreme, the doctrine of human rights and duties is subversive of the whole principle that mankind should be organised as a society of sovereign states,"[96] is based on an assumption

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[91] Charles R Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979) at 69.
[92] Hedley Bull, *Justice in International Relations: The Hagey Lectures* (United Kingdom: University of Waterloo Publications Distribution Service, 1984) at 11.
[93] Cohen, *supra* note 2 at 16.
[94] Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998) at 213.
[95] *Ibid* at 37.
[96] Bull, *supra* note 7 at 13.

that the two norms are mutually exclusive. When viewed, instead, as the subject of a communicative process through which they are continually defined, "[i]nternational human rights norms … become constitutive for modern statehood; they increasingly define what is meant to be a 'state' thereby placing growing limits on another constitutive element of modern statehood, 'national sovereignty.'"[97] Rather than there being a "zero-sum" contest between sovereignty and human rights, "the discussion can become about the contestable boundaries that define and exclude 'legitimate' actions that can be performed by sovereign entities."[98]

The evolved nature of sovereignty is vividly illustrated and evidenced by the widespread acceptance and application of universal jurisdiction. The fundamental concepts underpinning universal jurisdiction are antithetical to a traditional understanding of sovereignty as autonomy. In a world where the former exists, the latter logically cannot. Whereas states previously may have rejected, and reacted with force to, any attempt by an outsider to exercise jurisdiction over matters within their territory, now a majority of states accept—at least in principle—that international law mandates such infringements upon their sovereignty. This is a telling sign that the norms of human rights and individual criminal responsibility have indeed reached prescriptive status, such that they are "a standard of appropriate behaviour for any state which seeks to view itself, and be viewed by others, as a respected member of the international community."[99] States now allow and support universal jurisdiction because it represents the manifestation of norms and values that form the contours of international society.

2. The Disaggregation of the State and Transnational Advocacy Networks

It is impossible to understand how these norms have come to be constitutive of international society unless we extend our conception of the actors that participate in international relations. A fruitful framework for such analysis is Anne-Marie Slaughter's reconceptualization of the unitary state as disaggregated. By viewing international society through the framework of disaggregation, new international networks can be perceived—networks that are driving the development of new norms and principles reshaping international relations. Slaughter contends that the forces of globalization—and its correlative effects on communication and technology—have greatly increased the connectedness and impact of horizontal and vertical government networks, the former linking together regulatory, judicial, and legislative officials from different states and the latter connecting sub-state actors with supranational institutions.[100] This complex web of actors has the potential to harness the coercive power of the state and aid in the evolution of the norm of sovereignty. Horizontal judicial

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[97] Risse, Ropp and Sikkink, *supra* note 4 at 236.
[98] David Jason Karp, "The Utopia and Reality of Sovereignty: Social Reality, Normative International Relations and 'Organised Hypocrisy'" (2008) 34:2 Rev Int'l Studies 313 at 332.
[99] Fehl, *supra* note 5 at 372.
[100] Slaughter, *supra* note 14.

networks, for instance, are facilitating the growth of an increasingly global constitutional jurisprudence through, *inter alia*, constitutional cross-fertilization, private transnational litigation, and face-to-face meetings of judges from around the world. These networks are constructing a global community of human rights law that has the potential to effect norm socialization. Slaughter sees vertical networks as having an even greater impact on conceptions of state sovereignty, as they "pierce the shell of state sovereignty by making individual governmental institutions—courts, regulatory agencies, or even legislators—responsible for the implementation of rules created by a supranational institution."[101]

In restricting her focus to government networks, Slaughter misses a unique opportunity to take her thesis further and explore the role of non-state actors in the disaggregation of the state. Furthermore, Slaughter confines herself to an exploration of the ways in which networks contribute to order in international society, neglecting the question of how networks contribute to understandings of international society itself. In this sense, Slaughter's disaggregation thesis is not developed to its logical conclusion— that if the state is disaggregated, and if sovereignty is re-imagined as status, membership, or "connection to the rest of the world and the political ability to be an actor within it," then sovereignty also can be disaggregated.[102] She gives fleeting attention to such a possibility, recognizing that "[i]f sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist, then its devolution onto ministers, legislators and judges is not so difficult to imagine."[103]

This article recognizes the pertinence of Slaughter's disaggregation thesis and contends that its perspective should be broadened to take into account the transnational advocacy networks of non-state actors. Such networks possess influence, organization, and power equivalent to Slaughter's government networks and are equally able to "pierce the shell of state sovereignty."[104] Moreover, they play an even more vital role in the process of socialization whereby identities, values, and norms are the subject of argumentation and persuasion and, thus, have greater potential to change the nature of government institutions and thereby the identity of the state.

Joseph Nye and Robert Keohane were among the first to evaluate the role and impact of "transnational actors" in international relations. Their observation that non-state actors can "become actors in the international arena and competitors of the nation-state" is supported, to some degree, by Bull, who, in his seminal work *The Anarchical Society: A Study of Order in World Politics*, accepts that the state system is part of a wider world political system, a series of world-wide interactions encompassing networks of states

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[101] *Ibid* at 132.
[102] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 27.
[103] Slaughter, *supra* note 14 at 268.
[104] *Ibid* at 132.

and other political actors both above and below the state.[105] Within this world political system, argues Bull, non-state actors form relationships not only with the state but also with other non-state actors, such that these actors "have their being partly within the transnational nexus that bypasses the level of state-to-state relations."[106] However, while Bull believes that the role of transnational actors must inform, in part, the study of international relations, he reiterates that the existence of such phenomena is not indicative of the decline of the state system or the emergence of a cosmopolitan world society. For Bull, transnational relationships have made inroads into the state system in an uneven fashion, and it is impossible to derive from their continuation "any sense of common interest and common values, on the basis of which common rules and institutions may be built."[107] As such, the international relations discipline should continue to focus its analysis at the international society level.

Building on Nye and Keohane's analysis, and refuting Bull's conclusion, Margaret Keck and Kathryn Sikkink's groundbreaking examination of transnational advocacy networks reveals that "enough evidence of change in the relationships among actors, institutions, norms and ideals exists to make the world political system rather than an international society of states the appropriate level of analysis."[108] They see these networks as motivated by values rather than material concerns or professional norms, able "to mobilise information strategically to help create new issues and categories and to persuade, reassure and gain leverage over much more powerful organisations and governments."[109] By doing so, transnational advocacy networks bring new norms and discourses into policy debates and pressure actors to adopt new policies, acting as "norm entrepreneurs."[110] They form part of the socialization process, engaging governments in discursive processes of argumentation and persuasion.[111] These processes are a means of redefining traditional understandings of sovereignty, for "[w]hen a state recognises the legitimacy of international interventions and changes its domestic behaviour in response to international pressure, it reconstitutes the relationship between the state, its citizens, and international actors."[112]

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[105] Joseph S Nye, Jr, and Robert O Keohane, "Transnational Relations and World Politics: An Introduction" (1971) 25:3 Int'l Org 329 at 330; Bull, *supra* note 7.
[106] Bull, *supra* note 7 at 267.
[107] *Ibid* at 269.
[108] Keck and Sikkink, *supra* note 94 at 212.
[109] *Ibid* at 2.
[110] Hawkins, *supra* note 82.
[111] Risse, Ropp and Sikkink, *supra* note 4.
[112] Keck and Sikkink, *supra* note 94 at 37.

3.   *International Lawyers as Norm Entrepreneurs*

The promotion of the norms of human rights and individual criminal responsibility by international lawyers through universal jurisdiction prosecutions is a clear example of a transnational advocacy network promoting normative change and contributing to "the process of disaggregating and reconfiguring state power."[113] Like other forms of transnational advocacy networks examined by Keck and Sikkink, international lawyers working on universal jurisdiction litigation and advocacy prefer "principled ideas or values in motivating their formation."[114] They share an ideological commitment to human rights and individual criminal responsibility and a belief in the pre-eminence of laws and legal processes as vehicles for norm socialization. Mirroring Slaughter's horizontal governmental networks, this network of international lawyers shares ideas, theories, academic and legal writings, and a set of professional norms and understandings and holds conferences, symposia, and awards ceremonies.

The advocacy efforts and actions of international lawyers that precipitated the arrest of Augusto Pinochet in October 1998 vividly illustrate the way in which lawyers act as a transnational advocacy network. In her comprehensive book *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Naomi Roht-Arriaza describes how the prosecution of Pinochet was a culmination of the efforts of Chilean lawyers both in Chile and in exile, of lawyers connected to the Chilean and Argentinean diasporas, and of lawyers working in, or associated with, non-governmental organizations and the United Nations.[115] Action began almost immediately following the 1973 coup in Chile, as human rights abuses were documented and publicized by lawyers working with organizations such as the Comite Pro-Paz (later replaced with the Vincana de la Solidaridad). Domestic human rights lawyers, encountering closed channels in Chile, turned to the international stage, disseminating information through international advocacy campaigns, agitating for action with lobbying efforts at the Inter-American and UN commissions on human rights, and ultimately attempting to access the domestic judiciaries of foreign countries.[116] Pre-existing professional associations and networks served to facilitate knowledge sharing, enabling the lawyers to operate like an epistemic community, hosting conferences and strategy sessions. Lawyers with connections to the Chilean and Argentinean diasporas, and judges who had studied or attended conferences overseas, became entwined in the advocacy efforts. The network's focus on using legal processes to encourage change facilitated a prevalent role for lawyers and judges, which in turn encouraged other lawyers and judges to become involved and push cases forward. In this way, Roht-Arriaza opines, the actions of international lawyers clearly fit within

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[113] Sarat and Scheingold, *supra* note 2 at 10.
[114] Keck and Sikkink, *supra* note 94 at 1.
[115] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*
(Philadelphia, PA: University of Pennsylvania Press, 2005).
[116] *Ibid* at 210.

the "boomerang" framework described by Keck and Sikkink in relation to transnational advocacy networks, whereby change is spiral-like.

The Pinochet prosecution thus gave birth to a transnational advocacy network of international lawyers, committed to the doctrine of universal jurisdiction, which played a significant role in socialising the norms of human rights and individual criminal responsibility. Today, this network continues to thrive: there are dense exchanges of information and services, spearheaded by Amnesty International (which operates a universal jurisdiction project called No Safe Haven, documenting the status of universal jurisdiction in every state), the European Centre for Constitutional and Human Rights (which institutes and directs strategic universal jurisdiction litigation in German courts), and the US-based Center for Constitutional Rights (which operates an International Law and Accountability project). Lawyers from these organisations have been involved in significant universal jurisdiction cases such as *Ex Parte Pinochet* and a number of complaints against Bush Administration officials. The Princeton Project on Universal Jurisdiction, populated by renowned international lawyers and scholars such as Stephen Macedo, Garry Bass, William Butler, Richard Falk, M Cherif Bassiouni, and Diane Orentlicher, devised and published the Princeton Principles, intended to clarify the doctrine and guide lawyers and judges in its application. Well-known lawyers such as German Wolfgang Kalek, and Britons Michael Mansfield, Geoffrey Robertson, and Phillipe Sands, are bound by a common discourse and shared values with scores of other private and government lawyers and NGOs across the world. In a unified effort, they attempt to influence the terms and nature of the debate through instituting complaints, investigations and prosecutions, and publicising their activities.[117] They have also honoured and been honoured for the efforts of their peers: in 2011 Chadian lawyer Jaqueline Moudeina was awarded the Right Livelihood Award for her efforts to have former President of Chad Hissène Habré prosecuted under the universal jurisdiction doctrine in Senegal and Belgium.[118] Similarly, Spanish Judge Balthazar Garzón was awarded the inaugural Abraham Lincoln Brigade Archives/Puffin Foundation Award for his commitment to advancing the doctrine.[119]

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[117] See, for example, Michael Mansfield, "Government's move to curb universal jurisdiction sends wrong message," *The Guardian* (27 July 2010), online:
http://www.guardian.co.uk/law/2010/jul/27/universal-jurisdiction-law; Geoffrey Robertson, "Put the Pope in the Dock," *The Guardian* (2 April 2010), online:
http://www.guardian.co.uk/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law; Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); Geoffrey Robertson, "Dictator in the Dock," *The Guardian* (1 April 1999), online:
http://www.guardian.co.uk/world/1999/apr/01/pinochet.chile.
[118] See the Right Livelihood Award, 2011, online:
http://www.rightlivelihood.org/moudeina.html.
[119] See the Puffin Foundation, First Annual ALBA/Puffin Award for Human Rights Activism, 2011, online: http://www.puffinfoundation.org/
index.php?option=com_content&view=article&id=313&Itemid=142.

Lawyers have claimed "ownership of the human rights problem and have succeeded in establishing a virtual monopoly of knowledge (how the subject is framed) and power (what strategies of intervention are used)."[120] They have identified universal jurisdiction as the most fruitful legal means of exploiting the disaggregation of the state. Through compiling and exchanging information, internationalizing actors and resources, and convening conferences and other arenas for the strengthening of ties, international lawyers have come to resemble a transnational advocacy network. Theirs is a collective attempt to redefine the shared norms and practices of states with regard to sovereignty, human rights, and international criminal responsibility. Moreover, the work of international lawyers on universal jurisdiction is yielding tangible results: the extradition and indictment of both former and sitting heads of state, the continued expansion of the doctrine of universal jurisdiction to the crime of torture, the proliferation of legislation implementing universal jurisdiction, and the acceptance of its legitimacy in the statements and policies of state leaders. The deterrent effect of the doctrine is not easily quantified, nor appropriate to be canvassed in this article, but further research on this subject is warranted.

Slaughter proposes that government networks impact world order through three distinct mechanisms—convergence, compliance, and co-operation. International lawyers, as a transnational advocacy network, pursue similar practices. Like government networks, they "promote *convergence* of national laws and regulations" by promoting the adoption of universal jurisdiction laws and disseminating information about universal jurisdiction prosecutions.[121] For example, Amnesty International's No Safe Haven project documents the extent of the adoption of universal jurisdiction laws, in every country, across standardized categories, providing a platform for local lawyers and activists to draw from in undertaking domestic advocacy campaigns. International lawyers "foster *compliance* with existing treaties and other international agreements" by driving the prosecution of cases under international laws, and testing the legitimacy of principles of international law in domestic courts, of which *Ex Parte Pinochet* is a pertinent example.[122] Finally, international lawyers "improve the quality and depth of *cooperation* across nations."[123] They overcome problems of inaction in the international system by seeking to address the sources of disorder and disharmony with a bottom-up approach and, thus, assist states in overcoming political and practical obstacles to the enforcement of human rights.

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[120] Stanley Cohen, *Denial and Acknowledgment: The Impact of Information about Human Rights Violations* (Jerusalem, Israel: Center for Human Rights, Hebrew University, 1995) at 5.
[121] Slaughter, *supra* note 14 at 169 [emphasis added].
[122] *Ibid* at 169 [emphasis added].
[123] *Ibid* [emphasis added].

4.   The Disaggregation of Sovereignty?

Applying Keck and Sikkink's framework of transnational advocacy networks to Slaughter's disaggregation thesis enhances our understanding of the role of international lawyers in promoting the norms of human rights and individual criminal responsibility through universal jurisdiction. Moreover, it highlights that non-state transnational advocacy networks, such as government networks, are increasingly adopting the attributes of the state itself, to the extent that they, too, can be viewed as possessing "the capacity to participate in cooperative regimes in the collective interest of all states."[124] This development is especially evident if sovereignty is defined, as Abram Chayes and Antonia Handler Chayes do, as a "connection to the rest of the world and the political ability to be an actor within it."[125] Like Slaughter's governmental networks, international lawyers exercise both hard and soft power and exercise their functions through the legal systems of states that possess a sovereignty that is characterized, in part, by an acceptance of the norms of human rights and individual criminal responsibility. If judges, regulators, and legislators might derive separate sovereignty from participating in a similar process—exercising their functions through the institutions of a sovereign state—as Slaughter contemplates, why can transnational advocacy networks not do the same?

Such a proposition is of far greater impact and reach than can be adequately tested in a contribution of this scope. Yet if sovereignty today is no more than "a shared set of understandings and expectations about state authority that is reinforced by practices," then gradual alterations in the practices of non-state actors *vis-à-vis* the state will ultimately necessitate a consideration of whether sovereignty could indeed reside in transnational advocacy networks.[126] In the meantime, the very possibility of this transformation adds weight to the contention that transnational advocacy networks today play an integral role in the entrepreneurship of norms in international society. This conclusion poses further questions that are also relevantly illustrated through the study of the doctrine of universal jurisdiction. What inferences can be drawn from the successful efforts of international lawyers to promote the norms of human rights and individual criminal responsibility? Is there sufficient evidence to support a contention that states are moving away from a pluralist international society and towards a solidarist one? The following section will endeavour to address these questions.

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[124] Anne-Marie Slaughter, "Sovereignty and Power in a Networked World Order" (2003) 40:2 Stan J Int'l L 283 at 327.
[125] Chayes and Chayes, *supra* note 102 at 27.
[126] Keck and Sikkink, *supra* note 94 at 37.

IV. From Sovereignty to Solidarity

To the extent that the English School of International Relations can be characterized as a cohesive body of international relations scholars,[127] its members are sharply divided on one central issue: whether international society is a practical or purposive association.[128] This doctrinal split is between the pluralists, who see international society as one of coexistence, allowing for a plurality of norms and values, and the solidarists, who hold that there exists a degree of consensus among states as to the content of such norms and values. The respective positions are defined by empirical judgments about the amount of solidarity existing among states and whether the degree of solidarity is sufficient to "make effective a relatively demanding system of international law."[129] A conclusion that international society is tending towards solidarism could only be reached if it were to be established that there exists an adequate global consensus on core norms. These norms would be those that preference loyalties to the community of humankind over loyalties to the state or nation.[130] Thus, the difference between solidarism and pluralism is that "the former gives moral priority to individual human persons whereas the latter … considers states to have moral priority."[131]

Bull first illustrates the conceptual divide with reference to the positions of Grotius and Oppenheim, whom Bull sees to be in diametric opposition on issues such as the place of war, the sources of law, and the status in society of individual human beings.[132] Bull observes that, for Oppenheim, "[i]ndividuals can and do have rights and duties in other systems of rules; but in the conversation among the Powers there is a convention of silence about the place in their society of their human subjects, any interruption of which is a kind of subversion." In contrast, for Grotius, "[t]he conception of a society formed by states and sovereigns is present in his thought; but its position is secondary to that of the universal community of mankind, and its legitimacy derivative from it."[133] In his earlier works, Bull prefers the

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[127] Contrast Linklater and Suganami, *supra* note 23 at 65.

[128] Christian Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

[129] Linklater and Suganami, *supra* note 23 at 64-65.

[130] Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

[131] Linklater and Suganami, *supra* note 23 at 64. A number of fundamental problems with the solidarist-pluralist conversation arise and, to the extent that they have been documented elsewhere, they are not canvassed in this article. (See, for example, Alex Bellamy, *International Society and Its Critics* (Oxford: Oxford University Press, 2005); Hedley Bull, "The Grotian Conception of International Society," in Herbert Butterfield and Martin Wight, eds, *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen and Unwin, 1966); Bull, *supra* note 7; Tim Dunne, "The New Agenda," in Bellamy, *ibid,* 65; Reus-Smit, *supra* note 125; Christian Reus-Smit, "The Constructivist Challenge after September 11," in Bellamy, *ibid*.) However, it is important to highlight the way in which solidarist and pluralists too frequently fail to distinguish between their normative and descriptive claims. When this occurs, the two sides of the argument are unable to confront each other on equal footing.

[132] Bull, *supra* note 128.

[133] *Ibid* at 68.

pluralist approach, as it places only minimal demands on international law and, thus, "seeks not to burden international law with a weight it cannot carry."[134] Bull sees the conception of a universal community of mankind as potentially destructive to international society in the absence of widespread consensus. States are united only with respect to the primary goals of avoiding violence, preserving property, and ensuring promises are kept. In this position, he is joined by Robert Jackson, who contends that while "states who are in a position to pursue and preserve international justice have a responsibility to do that whenever and wherever possible," they also "have a fundamental responsibility not to sacrifice or even jeopardise" international order and stability in the process.[135] Terry Nardin takes an even more restrictive view, seeing states as "associated with one another, if at all, only in respecting certain restrictions on how each may pursue his own purposes."[136] Hence, the pluralist position is firmly rooted in a conception of sovereignty as it relates to autonomy and is oriented around preferences of order over justice and loyalty to state over responsibility to humankind.

The solidarist camp eschews such preferences, holding that "individuals, not states, are the appropriate moral referent; empirically, they question the boundaries between international and world society, and they see evidence in contemporary international politics and law of the cosmopolitanisation of international society."[137] A solidarist society is one that develops forms of collective agency to move beyond the identification of practical rules to the identification and pursuit of collective goals.[138] Solidarism rejects the pluralist view that international society and law are a discrete social realm, in which "non-state actors do not fundamentally alter the basic principles and dynamics of the society of sovereign states,"[139] and, instead, perceives a "deep interpenetration of the society of states by non-state actors and processes, with profound implications … for state-society relations across the world."[140] This is the view that Bull comes to hold in his later writings, less than twenty years after his pronouncement that a Grotian conception of a solidarist world could be "said to be a scheme set over and against the facts."[141] Bull observes that, within the system of states, "the idea of rights and duties of the individual person has come to have a place, albeit an insecure one, and it is our responsibility to seek to extend it."[142]

Universal jurisdiction is a convenient point around which to assemble pluralist and solidarist arguments because, like humanitarian intervention (the issue of choice for those participating in this debate), it harnesses the

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[134] *Ibid* at 72.
[135] Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) at 291.
[136] Nardin, *supra* note 4 at 9.
[137] Reus-Smit, *supra* note 128 at 92.
[138] Bellamy, *supra* note 127 at 291.
[139] Reus-Smit, *supra* note 128 at 90-1.
[140] *Ibid* at 90.
[141] Bull, *supra* note 128 at 67.
[142] Bull, *supra* note 92 at 12.

norms of human rights and international criminal responsibility to justify the deprioritization of claims to sovereign autonomy, thereby posing "the conflict between order and justice in international relations in its starkest form."[143] The existence and continued usage of universal jurisdiction is persuasive evidence in favour of the solidarist cause. Unlike humanitarian intervention, with respect to which "solidarists have found it virtually impossible to demonstrate anything other than the faintest recognition that sovereign rights may be trumped," a study of universal jurisdiction complaints and prosecutions provides countless examples of the abridgement of traditional restrictions of territorial jurisdiction in the name of a community of humankind.[144] Universal jurisdiction allows for—indeed, is premised upon—the involvement of non-state actors, the extent of which is detailed earlier. Thus, a pluralist approach that ignores the way in which non-state actors affect the basic principles and dynamics of international society loses resonance and is unable to explain the development of the norms of human rights and individual criminal responsibility through the entrepreneurship of international lawyers. If the international criminal tribunals and the International Criminal Court, which derive their legal force through treaty and the Charter of the United Nations, "have greatly strengthened the solidarist vision of the universal culture of human rights," then the expansion of a doctrine that seeks to apply individual criminal accountability directly to individuals to protect the human rights of individuals must surely be construed as having crystallized that vision.[145] And where "[t]he normative foundation for the pluralist conception of the society of states is the assumption that states uphold plural conceptions of the good life," then a conscious and principled effort by states to impose restrictions on that plurality, through universal jurisdiction, must weigh in favour of a solidarist conception instead.[146]

This conclusion—that the principle of universal jurisdiction is evidence of international society moving towards greater solidarity—has important implications for the transnational advocacy networks of international lawyers who advance the cause. It strengthens the legitimacy of the doctrine and the norms that underlie it. Moreover, it has interesting implications for the solidarist-pluralist divide within the English school, giving weight to the solidarist contention that order and justice do not have to be viewed as locked in perennial tension but, rather, can be approached as mutually interdependent.[147] It assists in overcoming the deficit of agency that characterizes the solidarist-pluralist debate, such that "[s]tates might not have a choice between acting in pluralist or solidarist ways; rather, the question becomes one of how such norms are transmitted and

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[143] Nicholas J Wheeler, "Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention" (1992) 21:3 Millennium: J Int'l Studies 463 at 463.

[144] Bellamy, *supra* note 127 at 290.

[145] Linklater and Suganami, *supra* note 23 at 141. *Charter of the United Nations*, (1945) 39 AJIL 190.

[146] Wheeler, *supra* note 143 at 486.

[147] Wheeler, *supra* note 90.

internalised."[148] Those advancing the solidarist cause can look to the experience of international lawyers in transmitting and internalizing solidarist norms. Furthermore, using the doctrine of universal jurisdiction as a focal point might assist in responding to Andrew Linklater and Hidemi Suganami's concern that "the key issue here seems to be the legitimacy of the chosen means. This needs to be brought into the conception of solidarism to protect it against its possible degeneration into a self-serving doctrine."[149] To the extent that it is a widely accepted and expanding principle, universal jurisdiction may provide an example of a consensual, legitimate means of nurturing "those potentialities, perceptible in the world, which, when realised, will make it a more orderly and just place."[150]

Finally, a conclusion that universal jurisdiction can be equated with a solidarist development supports a "juridical," rather than "empirical," view of sovereignty.[151] Whereas for the empirical approach, surrender of states to shared norms, rules, and institutions would endanger "the very quality that defines them as states," a juridical approach is more akin to the one adopted in this article.[152] From a juridical perspective, "sovereignty is more of a social contract than an essentialist condition, and the terms in which it is understood are always open to negotiation," such that "there is no contradiction between development of human rights and sovereignty."[153] In the face of inescapable evidence of greater solidarity, the juridical approach allows for the retention of sovereignty, casting it as evolved rather than eroded. In doing so, it militates against an approach that considers human rights as threatening to the state and reveals the constitutive nature of its relationship with sovereignty.

V.   Conclusion

> The entire civilized world will follow closely what we do here. For this is not an ordinary trial by any means of the accepted, parochial sense. The avowed purpose of this tribunal is broader than the visiting of retribution on a few men. It is dedicated to the reconsecration of the temple of justice. It is dedicated to finding a code of justice the whole world will be responsible to.
>
> — Counsel for the defendant Herr Rolfe, played by Maximillian Schell, delivering his opening address in *Judgment at Nuremberg* (1961)

This quote from *Judgment at Nuremberg,* a penetrating fictionalization of *The Judges' Trial*[154] conducted by the International Military Tribunal in 1947,

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[148] Tim Dunne, *supra* note 128 at 74.

[149] Linklater and Suganami, *supra* note 23 at 271.

[150] *Ibid* at 271.

[151] Barry Buzan, *From International to World Society?: English School Theory and the Social Structure of Globalisation* (Cambridge, UK: Cambridge University Press, 2004).

[152] *Ibid* at 48.

[153] *Ibid* at 49.

[154] *The United States of America vs Josef Altstotter et al* 3 TWC 1 (1948), 6 LRTWC 1 (1948), 14 Ann Dig 278 (1948).

movingly illustrates both the promise and peril of prosecutions under universal jurisdiction. Such trials are brimming with the potential for transformation and unification, loyal to the task of protecting the community of humankind in the face of incomprehensible horrors. Yet, equally, they embody darker possibilities, for they seek to exploit the legitimacy of the law in pursuit of aims that are wider than, and foreign to, the law. In the name of a common morality, they defy the protections that for centuries have been the structure upon which a stable international order is built. In the absence of clear and universal consensus, universal jurisdiction prosecutions rest on no more than the faith that allegiances to the value of individual human beings run deeper than the strictures and spoils of that which the state most prizes—its sovereignty.

It is beneath this shadow that universal jurisdiction has, against all odds, persevered. Today it is recognized and legislated by a majority of states and forms part of the developing international criminal justice system. It is driven by a highly organized transnational advocacy network of international lawyers, who conceive of and institute prosecutions, conduct trials, and publicize their actions. Through the mechanisms of the state, these lawyers are influencing the development of state policy, shaping the relations and discussion of states, and contributing to the maintenance of international order through the enforcement of international law. They have identified the global consensus that war crimes, genocide, and crimes against humanity constitute crimes against all of humankind, and they have harnessed that consensus to overcome antiquated conceptions of territoriality and sovereignty to which states have long clung.

The resilience of universal jurisdiction, therefore, is indicative of the increasingly widespread acceptance of the norms of human rights and individual criminal responsibility. Universal jurisdiction is confirmation that sovereignty and human rights are no longer usefully conceived of as mutually exclusive. Rather, human rights have become constitutive of sovereignty. As the state has become disaggregated, power—and perhaps also sovereignty—has come to reside in both state and non-state actors, which are increasingly working through horizontal and vertical networks to effect the socialization of norms. International lawyers, working as transnational advocacy networks, represent one of the more effective manifestations of this phenomenon.

The role of lawyers in influencing the entrenchment of human rights and individual criminal responsibility suggests that international society is gradually forming consensus on norms and values, such that a higher degree of solidarity is emerging among states. Yet the development of consensus around norms, symbolized by universal jurisdiction, is hardly surprising when universal jurisdiction is equated with rejecting the murder of six million Jews in Europe, the imprisonment and torture of 30,000 Chileans by the Pinochet regime, or the killing and forced disappearance of 200,000 people in Guatemala. Agreement that such crimes so offend the community of humankind that they should be prosecuted in spite of traditional conceptions of sovereignty is increasingly commonplace. The challenge for

universal jurisdiction advocates is to seek to extend the doctrine to less visible and more contested human rights; the challenge for states will be to find consensus on the content of these rights. This is the next obstacle for universal jurisdiction, and it is one that will define both the fate of the doctrine and the potential for solidarity in international society in the decades to come.

The Liberal Project: East and West
SVEN M SPENGEMANN[*]

Roger D Congleton, *Perfecting Parliament: Reform, Liberalism and the Rise of Western Democracy* (Cambridge: Cambridge University Press, 2011).

Stephen J King, *The New Authoritarianism in the Middle East and North Africa* (Bloomington, IN: Indiana University Press, 2009).

The year 2011 was marked by the onset of the Arab Spring and the emergence of a series of protest movements in the established liberal democracies of North America and Europe. The Arab Spring is about the resentment of decades of political and economic oppression and the search for new political representation. The Western protest movements are less about a desire to part ways with democracy than about dissatisfaction with the outputs of a poorly regulated free market. Fundamentally, both are about the struggle for a more equitable distribution of wealth. Against this context, each of the two books reviewed here carries a message about sustainable liberalization that has become highly relevant. Roger Congleton's central thesis focuses on the incremental and essentially linear evolution of Western liberal reforms, with parallel contributions from the political and economic realms. Stephen King, in turn, chronicles recent efforts to democratize and liberalize the economies of the Middle East and North Africa (MENA), which have led to a concentration of wealth in the hands of ruling elites, the disempowerment of workers, and, subsequently, the rise and initial suppression of political Islam. Taken together, the two studies advance our understanding of the broader, conceptual context around the political transformations in the Arab world and allow for some tentative predictions.

Congleton's *Perfecting Parliament* develops a compelling approach to the mechanics of Western liberal constitutionalism. His central claim, framed as an interdisciplinary pivot between history and social science, is that liberal accomplishments of the eighteenth and nineteenth centuries are the result of a series of gradual developments, the evolutionary product of "fine-grained constitutional bargaining," rather than of revolutionary change and institutional rupture (266). The project of liberalism, in other words, cannot lay claim to the creation of political or social surprises.

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Congleton reviews the constitutional and institutional histories of the United Kingdom, Sweden, the Netherlands, Germany, Japan, and the United States. Pointing to the "king-and-council template" as the principal institutional mechanism around which reforms took place, he argues that the shift from monarchical rule to liberal constitutional democracy was realized through increased parliamentary authority and the election of parliamentarians by broad constituencies (266). Critical substantive reforms focused on land ownership, free trade, the abolition of slavery, public education, greater religious tolerance, and liberal constitutional reforms, including the expansion of suffrage. Congleton is careful to point out that each particular reform had to meet the interests of the office holders of the day, as only they were in a position to formally enact them.

Electoral reform movements were, in part, idealistic in nature and "partly pragmatic enterprises that favored shifts of policy-making authority to persons more likely to support particular reforms" (259). On other fronts, the breadth of the spectrum of liberal opinion, coupled with a largely non-doctrinaire approach and interest-based persuasion, meant that "conservative" policies very much remained in the picture among individual liberal reforms, each in itself a relatively minor development. This dynamic explains, among other outcomes, the survival of representative monarchies in several European countries. Had liberalism been a "truly revolutionary project with inflexible, radical goals," such incremental compromises could not have been realized (213). The overall "sustainability" of this co-operative, negotiated approach to reform is reflected in the fact that few liberal laws were repealed when conservative majorities were in power and that the supporting institutions remained robust over time.

Of particular contemporary relevance is Congleton's argument that political and economic reforms have joint explanatory value. During the nineteenth century, no countries industrialized without democratizing and no countries democratized without industrializing (601). While parliamentarians and their constituents may have seen greater direct benefit in economic liberalization than, for example, in the expansion of suffrage, the deeper causal relationships between economic and political forces remained complex and not immediately obvious. What is clear, argues Congleton, is that "[l]iberal reforms were not adopted simply to advance liberal ideals, but also in pursuit of profits and policy-making influence" (602). Substantive economic reforms were aimed at free trade, capitalization, and the rationalization of methods of production, but, crucially, they also included limitations on fraud and the abuse of market power. Such reforms could often only be advanced by forming coalitions of support substantially broader than the original group of advocates. Rational argument and persuasion were the central mechanisms. In essence, liberal reforms achieved a fragmentation and decentralization of both political and economic power.

King's *New Authoritarianism* carries a simple narrative with significant implications for the evolving path of the Arab Spring protests. King examines four regimes in the MENA region, Egypt, Algeria, Syria, and Tunisia, using four analytical components: policies, ruling coalitions,

institutions, and legitimacy. Following an initial period of "timid democratization" during the 1980s and 1990s, neo-liberal reforms led to the emergence of elites in these countries that favoured authoritarian approaches over the democratic empowerment of agricultural and industrial labourers. In contrast to reforms in Argentina, Spain, and Brazil, which succeeded because capitalists began to favour greater political openness through the influence of organized labour, regimes in the MENA region pursued a combination of single (ruling)-party democracy and patronage-based neo-liberal reforms (200).

Supported by overriding international interest in the stability of the oil-rich region rather than in national democratic accountability or workers' rights, authoritarian regimes were able to rely on highly discretionary privatization policies to retain the support of elites and to keep organized labour out of the political framework. As popular dissatisfaction grew, the interests of workers were taken up by Islamic parties, which ushered in the rise of political Islam. Under what King terms the "new authoritarianism," MENA regimes responded by invoking nationalism, a residual "patina of continued populism" (for example, 181), and, most importantly, the threat of Islamic fundamentalism as the legitimation for a new phase of authoritarianism. The Arab Spring has proven this strategy to be futile, and Islamic parties now show substantial political gains at the ballot box.

Intensely political in their impact, the Arab Spring movements are not sustained by a love of democracy or other political ideology. They are about economic opportunity and the right to a better life in one of the world's materially richest areas. At the same time, challenges to the sustainability of each transition remain formidable and are no longer limited to militant opposition. While Congleton reminds us of the institutional robustness that Western liberalism has achieved in its evolution, King cautions that the Arab world is still missing the institutional and social foundations upon which liberalization could evolve in a sustainable fashion. In short, progress in the MENA region can be expected to remain non-linear and marked by political experimentation for some time. The ruptures of the Arab Spring represent but one important step in this process.

The challenge for both Congleton and King is the role of ideology as an element of opposition to liberalization or democratization. Congleton emphasizes the historically pragmatic, non-ideological approach of liberals, which he sees as having been instrumental to the success of the reform movements of the eighteenth and nineteenth centuries. However, for his theory to retain not only historical, but also social scientific, value, it would need to be testable 'in reverse.' Would factions that remain ideologically opposed to liberal democracy—adherents of various forms of John Rawls' "unreasonable comprehensive doctrine"—be able to claw back liberal gains not only through militant, revolutionary action but also through the more incremental steps of political opposition? This idea, of course, mirrors the fears expressed by those who remain skeptical about the Arab Spring—that is, that some groups would use democratic processes to pursue anti-democratic goals, including a reversion to single-party, autocratic rule and

the elimination of a constitutionally protected pluralism. For King, the challenge is similar. Once the forces of liberalism have broken the cycle of secular-autocracy-to-prevent-Islamist-autocracy, do the new regimes need to continue to treat "radical Islam," now one political faction among several, as an enemy of the system, a decision that may lead to new justifications of violence and repression? What, in other words, is the scope of tolerance for ideologically motivated opponents of liberal democracy? Congleton and King leave this question unanswered.

From a pragmatic perspective, it is fairly clear that the devolution of economic centralization will form a critical component of any definition of progress in the Middle East and North Africa, including a successful marginalization of radical political positions. The emergence of elite cronyism is an outcome that, following Congleton, Western liberal democracies have historically avoided—if we bracket claims of the recent "Occupy" movements—through anti-monopoly legislation and the criminalization of corrupt activity. King, in turn, argues that the protest movements of the Arab Spring would need to evolve into a plurality of permanent secular and religious advocacy groups, jointly focused on fragmenting the power structures of residual elites. In this respect, both works offer useful contributions to the debate around the Arab Spring, as initial expectations of rapid progress, fed through social media and embraced in particular by young, unemployed men, now begin to stand in contrast to more cautious predictions that Arab liberalism, too, will remain an incremental, evolutionary process. And fears that the protest movements have indeed swept in a new wave of system opponents, who would capitalize on a lack of progress in the distribution of wealth to forestall the further evolution of pluralism, will need to be tempered by the more optimistic view that moderate forces, focused on the creation of stable and effective coalitions, economic opportunity, and strong constitutional frameworks, will attract and retain popular confidence.

Genealogy, History, and Human Rights
KIRAN BANERJEE

Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, Harvard University Press, 2010).

In *The Last Utopia: Human Rights in History*, Samuel Moyn offers a compelling counter-history or genealogy of the genesis of human rights, one that upsets commonplace assumptions about this now ubiquitous concept. While many recent studies have offered careful reconstructions of the historical origins of human rights, *The Last Utopia* boldly proclaims that the genesis of human rights is not to be be traced to the ancient doctrine of stoicism nor to the revolutionary fervour of 1789 or even to the articulation of the Universal Declaration of Human Rights after World War II.[1] Rather, human rights as we understand them today emerged far more recently, only entering our broader conceptual vocabulary a generation ago.

To understand the central arguments of the book, we need to step back for a moment to look at its foundations, for at the core of *The Last Utopia* is an oft neglected methodological insight that bears repetition. At the bottom of Moyn's account is a Nietzschean refashioning of our historical sensibilities that emphasizes the role of contingency and accident as the catalysts for the emergence of concepts. This view of history as discontinuity, shared by thinkers as diverse as Michel Foucault and, apparently, Jorge Luis Borges, compels us to view human rights within a context of "warring tendencies and dead projects" (20) rather than of gods and demons and to give up the presumption that there was anything inevitable about the rise of human rights as our dominant utopian paradigm. The need for this approach lies in our all too frequent inclination to refashion history through our present, to construct past events into fitting precursors, contingent outcomes into necessities, and to indulge in mythologies of "deep roots" for our present ideals—habits replete in the contemporary historiography of human rights. Yet these habits have the troubling outcome of turning authentic history into the celebration and triumph of the present, while masking the fractures in, and limits of, our concepts. Thus, an important contribution of Moyn's work is to engage us in the project of critical history or genealogy and, in doing so,

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[1] *Universal Declaration of Human Rights*, GA Res 217(III) UN GAOR, 3rd Sess, Supp No 13 at 71, UN Doc A/810 (1948).

to bring forth a surprising counter-narrative for one of our most cherished ideals.

The findings of Moyn's study are striking. Not only do human rights have no true pre-twentieth-century precursors, but, as an ideal, they can only be said to emerge in the late 1970s. Apparent antecedents, such as the Atlantic revolutions of the eighteenth century, did not articulate our contemporary understanding of human rights as individual claims against the state but, rather, were concerned with creating spaces of citizenship in which rights were tightly entwined with nation and state building. What is more, the view that human rights arose from the horrors of the Holocaust in the immediate post-war era is a myth, as Moyn demonstrates. Rather, according to Moyn's alternate history, "without the transformative impact of events in the 1970s, human rights would not have become today's utopia, and there would be no movement around it" (7).

Equally striking is Moyn's account of the catalysts that allowed human rights to emerge at this moment. According to Moyn, it was only when other more transformative idealisms and political ideologies fell by the wayside or imploded—from socialism to anti-colonialism—that human rights could appear on the global scene. Thus, the rise of human rights is explained through the "collapse of other, prior utopias, both state and internationalist" (8), and made its appearance in the guise of a minimalist anti-politics, an attempt to substitute a plausible morality for failed politics. According to Moyn, human rights at birth were thus "defined as a pure alternative in an age of ideological betrayal and political collapse" (8). They represented the displacement of ambitious political projects with a minimalist morality of individual rights.

The book's opening chapter makes the case for why pre-twentieth century conceptions of rights ought not to be understood as antecedents to our current understanding of human rights. Much of this discussion focuses on the statist and nationalist grounding of these conceptions. Revolutionary rights are foremost about creating spaces of citizenship. In the following chapter, Moyn discusses the failure of human rights to emerge in the post-war period, what he terms the history of a non-event, pointing to the prominent role of emerging post-war powers as well as the United Nations in this conceptual stillbirth.

The third and most powerful chapter of the book offers a fascinating treatment of the end of formal colonialism alongside the advent and crisis of the post-colonial state. Moyn persuasively argues that the "new" human rights of this period reproduced the "original, collectivist direction of earlier rights talk" within a statist framework and that the collapse (in Western eyes) of anti-colonialism and self-determination as ideals opened a space for a nascent concept of human rights (107). His historicist account of the rearticulation of present and long past historical events—from the Haitian revolution to the South African anti-apartheid movement—through the prisms, first, of decolonization and, later, of human rights offers a telling illustration of the ideological displacement of prior frameworks by human rights. In the final chapter, the book takes up the remarkably late turn of

international law to the subject of human rights, which will likely be of interest to students of global politics. Moyn documents this shift by addressing the career of the well-known champion of human rights, Louis Henkin, and by tracing the initial reluctance of international lawyers to embracing the idea because of its perceived imbrications with anti-colonialism.

An intriguing leitmotif of the book concerns the implications of this counter-history for the fate of human rights today. By presenting the emergence of human rights as a sort of anti-politics, Moyn highlights the pronounced minimalism of the project at its inception. Yet once launched, human rights could not help but develop into a politics with maximalist aspirations. We need only consider the ways in which human rights have recently been pressed into the service of "humanitarian" wars of intervention to observe the troubling implications of this expansion. What is more, since human rights only represent one utopian frame among others in history, triumphing only negatively through the discrediting of alternative visions, it too may be superseded one day. While the grip of human rights on our utopian imagination may appear stronger than ever at present, the contingencies of its historical emergence highlight the possibility of alternative paths in the future.

Despite presenting a compelling counter-history of human rights, there are moments when the argument of *The Last Utopia* falters. One issue arises from an ambiguity in the book's central claim: is it that the concept of human rights itself only came into being in the not-distant past or is it that the idea only recently gained broad conceptual currency and pre-eminence? Moyn appears to waver between these two claims, focusing on the former when countering pre-twentieth-century accounts of human rights and relying on the latter when advancing the "breakout" date of human rights from the post-war era to the 1970s.

Moreover, readers are likely to be surprised by the radical narrowing of the concept of human rights that Moyn's argument requires. While the revolutionaries of 1789 may have thought they were declaring the rights of man, or the drafters of the Universal Declaration of Human Rights that they were articulating human rights, both groups were apparently mistaken. According to Moyn, these earlier conceptions did not fully distinguish individual and collective rights and, thus, could not cast human rights as rights against the state. At times, this discussion of the real meaning of human rights appears quite scholastic, driven more by the need to rewrite the birth date of human rights than by the important historical lessons that the volume proffers. However, the reader might wonder whether a history of discontinuity need be so concerned with origins. Might it not be more plausible to view human rights as a contested concept, with multivalent and politicized meanings?

Then again, the virtue of Moyn's book may lie less in what it establishes than in what it uproots. By allowing us to view human rights with a disenchanted gaze, Moyn invites us to take seriously the limits and possibilities of the contemporary human rights project. Neither the inevitable

unfolding of a centuries-long mission nor the revealing of a transcendent value, human rights are presented as an artifice of human agents, emerging in the context of a history riddled with contingency. Moreover, its ascendancy as the last remaining utopia does not foreclose the possibility that it may be superseded by a competing vision yet to come.

Despite tensions in Moyn's presentation, this volume will be of great interest to students of international politics and human rights. Aside from offering a much-needed response to the triumphalism and ahistoricism of contemporary understandings of human rights, *The Last Utopia* offers broader methodological lessons extending beyond the historiography of human rights for approaching the origins of concepts in other fields.

Promoting Contractor Accountability in Conflict Zones
Elena Baylis[*]

Laura A Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven: Yale University Press, 2011).

The scandals are notorious. Dyncorp employees trafficked girls and women into brothels while carrying out US government contracts in Bosnia (115).[1] Blackwater security personnel accompanying a US State Department convoy in Baghdad were accused of killing seventeen civilians by firing their weapons in the midst of a crowded square (1).[2] Abu Ghraib prisoners allege CACI International and Titan contractors abused them while working on behalf of the US government in Iraq (40).[3]

Several converging phenomena have contributed to these military contractor scandals. The first is the nature of the situation in which military contractors operate. The implementation of US foreign policy in conflict and post-conflict zones is incredibly complex. Multiple US agencies (the Department of Defense, the Department of State, and USAID, among others) share responsibility for American activities, which intersect imperfectly with the work of the counterpart agencies of other governments, the United Nations and other international organizations, and numerous non-governmental organizations (NGOs). Interagency and international relationships are riddled with overlapping responsibilities and conflicting interests, and turf wars are not uncommon. On the ground in conflict and post-conflict areas, staff turnover tends to be high and continuity low, and the socio-political situation is chaotic and often dangerous.

In addition, there has been a sweeping and fundamental shift towards the use of private contractors to implement US foreign policy, to the extent that private contractors have for several years outnumbered US troops in Afghanistan, for example (3).[4] Each agency has its own contracts with its own contractors, which may have their own subcontractors, and new

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[1] Kathryn Bolkovac and Cari Lynn, *The Whistleblower: Sex Trafficking, Military Contractors, and One Woman's Fight for Justice* (New York: Palgrave Macmillan, 2011); also dramatized in the movie, *The Whistleblower* (2010), online: http://www.imdb.com/title/tt0896872/.
[2] James Glanz and Alyssa J Rubin, "Blackwater Shootings 'Murder,' Iraq Says," *The New York Times*, 8 October 2007, online: http://www.nytimes.com/2007/10/08/world/middleeast/08blackwater.html.
[3] Greg Stohr, "Abu Ghraib Contractor Suit Draws US Supreme Court Interest," *Bloomberg News*, 4 October 2010, online: http://www.bloomberg.com/news/2010-10-04/abu-ghraib-case-involving-private-contractors-draws-top-court-s-interest.html.
[4] August Cole, "Afghanistan Contractors Outnumber US Troops," *Wall Street Journal* (22 August 2009), online: http://online.wsj.com/article/SB125089638739950599.html.

contractors and subcontractors may be hired when each contract period ends, further complicating the web of interagency and international relationships on the ground.

Finally, the legal and institutional frameworks meant to implement and oversee American interventions abroad were not designed for private contractors, while the frameworks meant for implementing and overseeing private contracting were not designed for contracts for these sorts of complex services. Neither regime has kept up with the transition to contractor-dominated military interventions (10-11).

Thus, headline-grabbing private security scandals are symptomatic of structural problems that threaten the integrity and effectiveness of US activities in conflict and post-conflict zones. Evidence of these problems can be found in the less sensational, but disturbingly frequent, reports of mismanagement and fraud by some contractors in Iraq and Afghanistan (70-71).[5]

Laura Dickinson's *Outsourcing War and Peace* takes us through and beyond the scandals, using them to draw us into her discussion of broader legal and policy concerns. This is an engaging book, which nimbly navigates several alternate theoretical frames while remaining grounded in real-world circumstances and producing pragmatic policy proposals. It examines a variety of means of potentially holding contractors accountable including retroactive criminal and tort remedies, as well as proactive measures such as changes to contracting terms and practices, steps to increase public participation, and changes to organizational structure within contracting companies. Throughout, Dickinson looks not just at laws and policies but also at institutional arrangements and other structural factors that determine whether and how the suggested laws and policies can be effectively implemented.

The book's discussion of the role of organizational culture is particularly intriguing. Reminiscent of Galit Sarfaty's study of human rights culture at the World Bank,[6] as well as the work of other legal anthropologists such as Sally Merry[7] and Annelise Riles,[8] Dickinson uses a series of interviews with military lawyers to surface the nuanced organizational behaviours and structures that regulate the everyday functioning of her subject. Drawing from organizational theory, she identifies features, such as shared values, that appear to promote military lawyers' success in attaining compliance

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[5] This review is not intended as an indictment of contractors as such. As in any other line of business, some contracting companies and some of the individuals they employ are responsible, honest, and genuinely attempting to work towards their contract goals, while others are not. Rather, the focus of this review is on the contextual and structural factors that make it relatively easy for irresponsible, dishonest, and abusive individuals and companies to operate unchecked as well as on the consequences for US foreign policy.

[6] Galit Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank" (2009) 103 Am J Int'l L 647.

[7] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

[8] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press 2011).

with the law from the troops with whom they work. These traits might, accordingly, be beneficially introduced into the private companies that do overlapping work.

As Dickinson notes, "organizational culture is one of the most significant factors in determining whether actors will behave in preferred ways and pursue jobs in accordance with preferred norms and values" (152). However, accessing an organization's culture is difficult, and thus we legal scholars frequently limit ourselves to analyzing more readily available texts, such as court decisions, laws, regulations, or public events recorded in newspapers or other public media. As such, Dickinson's detailed exploration of how rules regulating military conduct are implemented on a day-to-day basis is particularly valuable.

Several of the ideas touched on in this book warrant further exploration beyond what was possible here in light of the book's length, thematic focus, and policy-oriented purpose. Dickinson's suggestion that an organization's structure could be strategically tweaked to affect its culture is one of these. A comprehensive investigation of military contractors' organizational culture and the implications for organizational change would extend and test this proposal. It could also provide us with a model for evaluating the role of private contractors in US foreign affairs more broadly.

Thematically, the book is concerned primarily with promoting adherence to our "core public values," which Dickinson defines as "including a fundamental respect for human dignity—human rights, human security, and the idea that the use of force has certain limits, even during armed conflict—transparency, and public participation" (3). Thus, other important questions, such as program effectiveness and efficient use of funds, are not front and centre in this volume, although the types of reforms Dickinson suggests would inevitably impact those concerns as well. An analysis of these subjects would be another valuable extension of Dickinson's work, but such an investigation would require a robust assessment of how her proposals would function in the context of the incredible complexity of conflict and post-conflict environments.

One of the factors that tends to push Dickinson from dwelling unduly on the complexity of the political and social environments she addresses, however, is also one of the qualities of this book that I very much enjoyed—its relentless focus on the possible. Throughout, Dickenson proposes moderate, specific reforms that could improve contractors' adherence to public values, without claiming that those measures will be a panacea. As should be evident from this review, her book offers ample food for thought and ideas for further exploration. It should be read by anyone interested in understanding the issues behind the military contractor scandals that increasingly capture our headlines.