The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

POLICY Quarterly

Volume 13 – Issue 1 – February 2017

SPECIAL ISSUE

Global Studies
The Challenge of Governance in the 21st Century

The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

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ISSN: 2324-1098 (Print)

ISSN: 2324-1101 (Online)

Volume 13, Issue 1 – February 2017

Copy Editor: Rachel Barrowman

Design & Layout: Aleck Yee

Production: Alltex Design

Proof Reader: Vic Lipski

VICTORIA UNIVERSITY OF WELLINGTON

Institute for Governance and Policy Studies

A research institute of the School of Government

Editorial Note

Whereas the November 2016 issue of *Policy Quarterly* focused on local government, this issue takes a global perspective. In particular, it explores the major challenges facing humanity in the 21st century, and it does so through the lens of 'global studies'. The articles are mostly based on papers presented at a conference at Victoria University of Wellington in late July 2016 entitled 'We the Peoples: global citizenship and constitutionalism'. The conference was co-sponsored by the Institute for Governance and Policy Studies, the New Zealand Centre for Global Studies, the United Nations Association of New Zealand and the New Zealand National Commission for UNESCO.

As Kennedy Graham discusses in his introductory article, the concept of 'global studies' differs from that of 'international relations' in several important ways. As the name suggests, global studies is fundamentally concerned with societal issues at a planetary scale. The focus is transnational – it deals with matters that affect humanity as a whole, not merely those of specific communities, regions or sectors. By contrast, international relations embraces both global and sub-global concerns, the latter including a multiplicity of regional and bilateral issues and a vast array of complex and evolving interstate relationships.

Just as global studies and international relations differ on the crucial dimension of scale, so too they have contrasting orientations. International relations typically focuses on nation states and national interests; it tends to view issues from a country perspective. Global studies, on the other hand, deals with the interests of the entire human family – or what might be called the long-term common good of the 'global village'. The question is how humanity – via the mechanisms of nation states, international organisations, multinational businesses, civil society bodies, global networks, associations of cities and social media – can best protect vital global public goods, such as a stable climate system and healthy oceans, and ensure global justice, peace and security. How, in other words, can humanity agree upon, and live within, safe planetary boundaries and build the institutions and frameworks required for a fair, inclusive and sustainable future for generations to come.

Such challenges are not new, but they have become increasingly pressing as a result of 'the great acceleration' in human activity. This began with the industrial revolution in the 18th century, but sped up dramatically after the Second World War. Notable changes have included the doubling of the global population since the late 1950s, an enormous expansion in productivity and the aggregate output of goods and services, dramatic advances in technology and a huge increase in humanity's destruction and degradation of biosphere.

Indeed, so great has been the human impact on Earth in recent times that many leading scientists now contend that a new geological epoch – the Anthropocene – has begun. This assessment is based on evidence that human beings have become the largest driver of changes in the planet's biodiversity, biogeography, geomorphology and the climate system. Not only has humanity's ecological footprint dramatically lengthened, it has also widened and deepened. We now possess the capacity to destroy vast numbers of species and ecosystems, radically transform the Earth's climate, and impair critical life-support systems. If citizens and their governments fail to recognise such threats or are unwilling to mitigate them because of short-term political pressures, narrow national interests or commercial imperatives, the long-term consequences will be grim. Much irreversible damage will be inflicted on critical biophysical systems and future generations will be left with a large and unsustainable ecological debt.

A fundamental question, therefore, is how humanity can govern the Anthropocene epoch responsibly. What new global institutions and policy processes are needed and how are they to be forged?

At the end of 2015 there was a mood of optimism. In September 2015 world leaders gathered in New York and unanimously endorsed the United Nations Sustainable Development Goals, setting an ambitious agenda for 2030. (See the contribution of Graham Hassall and Marjan van den Belt in this issue of *Policy Quarterly*.) Three months later, in Paris, a new and significant global agreement on climate change was negotiated (the details of which are discussed by Adrian Macey in this issue).

But significant political events during 2016 have darkened the global horizon. As 2017 begins, equity markets may be buoyant, but the search for solutions to humanity's global problems has become harder. Dictatorial, and sometimes brutal, leaders have gained ascendancy in various parts of the world. Populist movements, spurred on by decades of rising inequality and understandable concerns about large-scale flows of migrants and refugees, have gained traction in Europe and the United States. Long-standing political movements, especially on the centre-left, are in disarray. Terrorist attacks remain an ever-present threat.

The victories of Brexit and Trump signal a significant, and possibly decisive, shift in global politics – a turn away from globalisation, internationalisation, multilateralism and humanitarianism. We have entered a period of heightened uncertainty and, in all likelihood, greater instability, as discussed by various contributors in this issue of *Policy Quarterly*. There are many risks. Amongst these are that broader global identities and goals will succumb to narrow, particularistic ones. Petty nationalisms and sectional interests will prevail over wider transnational concerns. Countries will turn inward, their peoples becoming more insular and anxious.

A related risk is that the time horizons of governments will shrink. Pressing day-to-day concerns will increasingly override long-term interests. And short-term economic forces – the quest for jobs – will take centre stage at the expense of ecological concerns and long-term sustainability.

Responding to these forces and navigating the uncertain waters ahead will be challenging. But as the contributors to this issue of *Policy Quarterly* highlight, the vision of a global community – one committed to compassionate justice and strong sustainability – is far from extinguished. Despite the fiercer headwinds, the quest for a better world must, and will, continue.

I am grateful to each of the contributors, and especially Kennedy Graham for his thoughtful oversight and editorial assistance. The articles here provide informed, discerning and timely perspectives on critical global issues. They deserve our careful reflection.

Jonathan Boston, Editor

Kennedy Graham

Global Studies and the New Zealand Centre: meaning and potential

Introduction

Things change with the passage of time. In the late decades of the 20th century, international relations were naturally founded on 20th-century thought – the nation state as dominant actor; sovereign equality as central principle; international organisation as neutral arena; political-military strategy as guarantor of peace and security; self-determination, economic and social development and human rights as emerging norms. The United Nations Charter was the lodestar, despite the paralysis of the Cold War. The challenge was to make the charter work politically.

Kennedy Graham, a former diplomat, United Nations official and academic, is the founding director of the New Zealand Centre for Global Studies and a member of the New Zealand Parliament.

In the early 21st century the world is different. The nation state is surrounded by other actors on the world stage, equally potent: corporations with global reach, civil society with a global conscience, mega-cities with global ties. Sovereign equality of the nation state remains defiant, yet is increasingly under siege. International peace has mutated into global security. Self-determination is evolving into 'multi-layered jurisdiction'. Rights are twinned with responsibility, and individual criminal liability has entered the hallowed precinct of international law. Economic growth wrestles with the imperative of sustainability within a 'safe operating space for humanity'. Inter-regional migration further complicates the phenomenon of global change. In 1993 the UN secretary general observed that 'the first truly global era' had begun.[1] Economic globalisation, the threat of a 'nuclear winter' affecting the planet after major conflict, ozone depletion and climate change, and 'limits to growth' had formed a new mosaic on the human canvas.

Not only is the world different today, but the means of interpreting and understanding it have changed. The information age has morphed into the digital age of instantaneous knowledge and 'post-truth' uncertainty. The statist political-legal nature of international affairs is ceding to a new global dynamic, driven by technology and social media. The UN Charter is scrutinised critically as to whether it is 'fit for purpose'; indeed, so is the entire UN–Bretton Woods system, and even the place and role of international organisation itself.

There is a difference … between global studies as taught in a university for students and degree-awarding purposes, and as researched in a think-tank for policy advice to governments and international organisations.

The current decade is witness to two global revolutions, driven by the same dynamic but whose nature and future outcome are fundamentally different. One is the notion of a world uniting. The other is of a world dividing into fragmented units that belie such unity. Yet in both cases the same global dynamic remains, paradoxically, the underlying driver. It is therefore no surprise that 'global studies' has emerged in recent decades as an academic and policy field of enquiry. In this country in 2012, a group of colleagues from academia, government and media established the New Zealand Centre for Global Studies. The centre is a charitable educational trust, and operates as a research institute and think-tank. Its short experience to date persuades us, and I think others, that the field of global studies is a valid one, and that the centre has something useful to offer.

Global studies

Global studies and international relations are different, best seen as related but separate sub-disciplines. To some extent, global studies might be seen as having been born from international relations. To some extent it claims its own provenance from across many disciplines.

Universities describe international relations courses but often stop short of defining the concept. The international relations course, says Victoria, seeks 'to understand the political, economic and social interactions between states'.[2] As such, it addresses late 20th-century doctrine and actors. International relations courses cover theory, international security, development, human rights, the major powers, and New Zealand in world politics. Students must grasp relevant information, critically scrutinise the issues and develop policy positions. The method is analytical, reflecting a late-Westphalian approach to world politics, concentrating on the nation state.

Global studies differs in two critical ways: scale and perspective. First, the scale is global: international relations covering bilateral or regional politics are not within its focus; only issues that affect the planet and humanity as one group are considered. Secondly, the perspective is also global, analysing a global issue from the interests of humanity as a group, not any one country. In international relations there is a distinction between 'them' and 'us', between one's country and the rest of the world. In global studies there is always, and only, 'us'. To the extent that the role of a country is considered, it is in terms of how its 'legitimate national interest' derives from, and remains consistent with, the global interest, reflecting a post-Westphalian approach to world politics (Graham, 1999, pp.21-8).

Finally, it needs to be recognised that global studies does not embrace 'universalism' as necessarily an intrinsic good; it is not a universalist belief system as such. In that respect it differs from the universalism of classical ancient civilisations or the dogmatic and aggressive universalism of radical modern movements. Rather, it perceives the global concept in more evolutionary, legal-political terms, based on rational analysis.

As will be shown later, not all think-tanks claiming to be global in approach adopt these criteria with any rigour. It is a new field. But in the extent to which they do not, they fall short of a strict interpretation of global studies.

A survey of global think-tanks

The first exploration into global studies appears to be the University of Georgia's Centre for Global Policy Studies, established in the late 1970s – a truly pioneering work (Bertsch, 1982). The centre sought to develop a conceptual framework for 'global thinking'. There is a difference, however, between global studies as taught in a university for students and degree-awarding purposes, and as researched in a think-tank for policy advice to governments and international organisations.

Many universities offer an academic focus on global affairs in one form or another. Some offer student courses: Seton Hall (Centre for UN and Global Governance), Columbia (Centre on Global Economic Governance), Boston (Pardee School of Global Governance), Purdue (Global Policy Research Institute), Harvard (Institute for Global Law and Policy), Yale (Centre for the Study of Globalisation), California (Institute on Global Conflict and Cooperation), Griffith (International Political Economy and Global Governance Studies), Toronto (Munck School of Global Affairs), and the European University Institute (Global Governance Programme) in Florence. India hosts the Jindal Global University in New Delhi. Others maintain research centres for established scholars within a field of focus: Stockholm's Environment

Institute (SEI) and Resilience Centre (SRC), Cambridge's Global Security Programme (now ceased), Oxford's Future of Humanity Institute, with a focus on existential risk management, and CUNY's Global Center for the Responsibility to Protect.

Some think-tanks operate independently of universities. One of the best known was the Earth Policy Institute in Washington, which operated with distinction for four decades before folding with the retirement of its founder. The World Resources Institute, also in Washington, is perhaps the most recognised research body on global sustainability. Canada's International Institute for Sustainable Development, in Winnipeg, is an independent, non-profit organisation that 'provides practical solutions to the challenges of integrating environmental and social priorities with economic development'. It has offices in Canada, the US and Switzerland and receives operational support from the governments of Canada and Manitoba, and project support from other governments and UN agencies. The Stockholm-based Global Challenges Foundation publishes a series of articles on the subject of 'global catastrophic risks'.

Some think-tanks are global not only in focus but in engagement. Perhaps the best known, the Club of Rome (whose secretariat is currently in Switzerland), describes itself as a 'group of world citizens, sharing a common concern for the future of humanity'. It consists of former political leaders, UN and government officials, scientists, economists and business leaders. Its mission is 'to act as a global catalyst for change through the identification and analysis of the crucial problems facing humanity and the communication of such problems to the most important public and private decision-makers as well as to the general public'.

Equally prestigious is the German Advisory Council on Global Change, an independent scientific advisory body set up by the German government in advance of the 1992 Rio Summit. Among its goals, the WGBU analyses the global environment, evaluates research on global change, provides early warning and assesses policies for sustainable development. Similarly, Austria's International Institute for Applied Systems Analysis has, since 1972, conducted 'policy-oriented research into problems of a global nature that are too large or too complex to be solved by a single country or academic discipline'.

Others operate as a media centre for the promotion of global research, such as the Centre for Research on Globalization in Quebec. Melbourne's RMIT operates a Centre for Global Research, studying globalisation and social change with a thematic focus on conflict, development and governance, including down to the local level. Still others focus on specific thematic areas: the Centre on Religion and Global Affairs (in London, Beirut and Accra), the Hague Institute for Global Justice, and the Institute of Global Finance, located within the Business School of the University of New South Wales.

A number focus specifically on global governance, however:

- Global Governance Institute (Brussels), an independent, non-profit think-tank;
- Global Policy Forum (New York, Berlin), an independent, non-profit think-tank monitoring the work of the United Nations and scrutinising global policy-making;
- Security Council Report (New York), supported by foundations and governments and monitoring the work of the UN Security Council;
- Global Public Policy Institute (Berlin), an independent, non-profit think-tank funded by foundations, UN agencies, the European Commission and various governments; its mission is to 'improve global governance through research, policy advice and debate';
- World Policy Institute (New York), a 'non-partisan' body that 'develops and champions innovative policies that require a progressive and global point of view': it seeks solutions to achieve an inclusive and sustainable global market economy, engaged global civic participation and effective governance, and collaborative approaches to national and global security.

> … think-tanks now operate in a variety of political systems, engage in a range of policy-related activities, and comprise a diverse set of institutions that have varied organisational form.

Probably the most established body in the field is the Academic Council on the United Nations. ACUNS is a 'global professional association of educational and research institutions, individual scholars, and practitioners active in the work and study of the United Nations'. It promotes teaching on these topics and dialogue among academics, practitioners, civil society and students. It produces the well-regarded journal *Global Governance*.

Then there are the informal networks focusing on global change and global problems. Examples are the Global Governance Futures programme, which is jointly supported by foundations in Germany, the US, Japan and India, bringing selected young students together to map out future directions for humanity, in specific areas, several decades ahead; and the Global Solutions Network, an online learning programme open to anyone, supported by various foundations, business and government entities in North America.

This array of entities offers a rich source of research and policy analysis/advocacy. To quote Bertsch:

> What do these challenges and opportunities facing global think-tanks and structurally independent public policy networks mean for the creation of truly global public policy? … The policy problems that must absolutely be addressed in this global way include global warming and carbon emissions concerns, natural disasters recovery, health crisis responses, responses to global terrorist units and threats, and now the organization of financial policy and regulatory architecture. (ibid., p.116)

Some governments have moved to reflect the global scale in their thinking. Global Affairs Canada is a triple 'super-department comprising ministerial warrants for foreign affairs, international trade and international development'. The US State Department maintains offices in various global areas: global partnerships (for business), global criminal justice, global health diplomacy and global youth issues. The European Commission maintains an inter-agency 'global approach to migration and mobility'. No other country appears to do anything similar. In New Zealand, one political party has, since 2012, changed its 'foreign affairs' portfolio to 'global affairs'. These initiatives, of course, are far removed from the essence of global think-tanks, but they do reflect a quantum shift in policy scale within some national governments and political parties.

But the phenomenon of global think-tanks has taken off. As one study has noted, think-tanks now operate in a variety of political systems, engage in a range of policy-related activities, and comprise a diverse set of institutions that have varied organisational form. Over 6,000 academically-oriented research institutions (similar in nature to universities, but without students), contract research organisations, policy advocates and political party-affiliated think-tanks can now be found in 169 countries (ibid., p.4). This is generally welcomed by the policy-making community:

> For policy-makers, the expansion of think-tanks across the globe has been a boon to the need for precise, time-sensitive information and multidisciplinary problem-solving approaches. Global policy has been and continues to be revolutionised by the budding ability of global think-tanks and policy networks to establish locations in politically-closed areas, to connect grassroots civil society forces, and field researchers with policy-makers, and to take on global policy tasks such as the environment, international finance, and international security that cannot be effectively addressed by domestically-oriented government or policy research institutions. (McGann and Sabatini, 2011, p.2; see also McGann, 2007, 2009)

The [New Zealand Centre's] board is supported by an international advisory panel of eight eminent persons around the world, in the US, Austria, Germany, the UK and Australia.

The New Zealand Centre

The New Zealand Centre for Global Studies was established in 2012 as an educational, charitable, non-profit trust, registered with Charities Services. It operates as an independent research institute and think-tank. The centre is governed by a board of trustees: 11 individuals resident in New Zealand. The board is supported by an international advisory panel of eight eminent persons around the world, in the US, Austria, Germany, the UK and Australia. The centre is located on Waiheke Island. It has a small secretariat comprising a part-time director, treasurer and secretary, and project advisers.

Mission

The centre's stated purposes are:

- to encourage and facilitate informed interdisciplinary research into global affairs in the 21st century, and the challenges for New Zealand in playing an insightful and constructive role proportionate to size; and
- to publish and circulate such research for the purpose of education and the benefit of the international and domestic community within the areas of focus.[3]

In pursuit of these purposes, the centre undertakes research into world civilisations and cultures, the history of human ideas and the rule of international law, with a view to gaining insight into reform of the United Nations and Bretton Woods systems in the context of global constitutionalism and governance.

The goal of these activities is to inform analysis of international institutions in the context of global governance, with special attention to the UN and Bretton Woods systems; amendment of the UN Charter in the context of the concept of global constitutionalism; and analysis of contemporary global challenges and problems, in the context of global governance and inter-generational justice and employing the concepts of planetary interest, legitimate national interest and legitimate global power.

Special attention is given to the following areas:

- sustainability, including the relationship between environmental and economic goals in the context of an optimal global population reflecting Earth's carrying capacity and bio-spherical planetary boundaries, having regard to jurisdictional responsibilities over national territories and the global commons;
- use of armed force and possession of weaponry optimal for global stability through the maintenance

of international peace and security, envisaging a trend from collective security to a global security system;
- universal human rights, with equal attention to civil, political, economic, environmental, social and cultural rights, reflecting common human values;
- the peaceful and responsible use of outer space and other celestial bodies.

The centre also extends its research to the role of New Zealand in global affairs. This involves analysis of New Zealand policy in the areas of focus, in the context of comparative studies of other countries and New Zealand's aspiration to act as a 'responsible global citizen'; and study of the changing relationship between New Zealand's foreign policy and domestic policy in the areas of focus.

Work programme

The centre maintains the following work programme:

- lectures: it has held three annual Waiheke global affairs lectures, and also visiting lectures by eminent scholars;[4]
- conferences: it has collaborated with various New Zealand bodies, including Victoria University, the Royal Society of New Zealand, the New Zealand Commission for UNESCO and the International Law Association, in holding conferences on global public goods, global citizenship and global constitutionalism;[5]
- seminars and retreats for secondary school students on 'global citizenship';[6]
- research reports by board members, international advisers and students;[7]
- internships, to date at Auckland University and Heidelberg University.[8]

Board members and researchers in the centre explore questions such as the following:

- What are the global challenges faced by humanity in the early 21st century, and how do they differ from traditional challenges in international relations?
- Is there a different method of political-diplomatic problem-solving with respect to global problems; if so, what is that method, and how is it to be prosecuted by nation states?
- Is the current international institutional architecture fit for purpose in addressing global problems; if not, is evolutionary reform feasible within institutions' implied powers, or is a more fundamental restructuring necessary?

Questions addressed in this issue of *Policy Quarterly*

In this collection of articles, board members of the centre explore the above questions in relation to a selection of specific issues. The overarching question linking the articles is this: can a form of 21st-century global governance be developed that is politically innovative enough for radical diplomatic change to solve global problems while remaining anchored to the traditional principles of the 20th century for the pursuit of legitimate national interests? In addressing this question, we have sought to develop a conceptual framework and a logical thread through our articles.

First, we explore the methodology that might underpin the particular sub-discipline of global studies that is relevant to the 21st century. Graham reviews the theoretical approaches for international relations (realism; liberal realism; political idealism). He proposes that 'rational idealism' is the appropriate approach for global studies, based not on normative considerations (what 'ought to be' for a better life) but on a political concept of the 'imperative' (what 'needs to be' for survival).

Second, we explore the institutional structures on which the international community has been based since the mid-20th century. Underpinning any response to the global challenge is the relationship of the three branches of government – legislative, judicial and executive – at the global level. The Westphalian system of international relations reflects an undeveloped system of global governance, with the nation states dominant and their executive branch of government pre-eminent in the conduct of relations among them. Hassall explores this ultimate challenge, in particular the relationship between the IPU (Inter-Parliamentary Union) and UN systems – the world's legislatures and the world's executives. Oram assesses the capacity of contemporary global economic institutions to address the challenge of global sustainability by reshaping traditional 20th-century economic orthodoxy (both neoclassical and neo-liberal) towards new thinking in 'ecological economics'. In light of the history of the International Monetary Fund, World Bank and World Trade Organization, and their evolution since the 1970s in particular, a variety of pertinent questions are raised for further enquiry, not least the vexed relationship between international finance and trade, and economic growth and carrying capacity.

> Universal peace … will not be realised without the strengthening of enforceable international law and the capacity of global judicial institutions to investigate and prosecute, and convict or acquit.

Third, we delve into the specific global challenges, and how the world is responding, and might yet respond, with innovative political thinking. We address the challenges posed to the global commons, particularly the atmosphere and the oceans, by modern technology and traditional national rivalry. With regard to climate change, Macey describes the 2015 Paris Agreement as a new model

of governance through an 'enhanced transparency framework' that is neither 'top-down' nor 'bottom-up'. With respect to the oceans, Currie foresees a binding instrument that protects marine biological diversity, moving from the 'freedom of exploitation' model to a 'benefit-sharing' model of governance. Bosselmann and Taylor extend this thinking. Bosselmann envisions a system of governance that respects the 'planetary boundaries', contending that the key to governing the commons is a shift from competitive nation state behaviour to a system of 'Earth governance'. Pursuant to that, Taylor develops a legal-ethical framework that would facilitate such a shift. Hassall and van den Belt then relate that approach to the new Sustainable Development Agenda adopted by the UN General Assembly in 2015, with its 17 Social Development Goals. Global public policy networks, they note, are providing the framework for advancing the goals through coordinated action among public and private sectors and civil society.

Finally, we address the more traditional problem confronting the international community, the face-off between war and peace, and between law and order, a problem rendered more complicated through globalisation. The distinction in the UN Charter between the 'operational' concept of international peace and security, for which the Security Council has primary responsibility, and the 'aspirational' concept of universal peace which the General Assembly must nurture, has been largely overlooked in practical politics. Clements explores this in the context of a quantitative measurement of peace, and a moral critique of the challenges to peace in today's fragmenting world. He sees the need for a universal cosmopolitan culture, based on a moral concern for the welfare of the global community, nurtured through a concept of 'global citizenship' that has an ethical, even spiritual, dimension.

Universal peace of this kind, however, will not be realised without the strengthening of enforceable international law and the capacity of global judicial institutions to investigate and prosecute, and convict or acquit. Gallavin and Graham scrutinise the International Criminal Court, exploring the distinction between state responsibility (a political obligation for non-violation of the UN Charter) and individual criminal liability (a legal obligation for non-violation of the Rome Statute). The modern concept of individual criminal liability is further explored by Boister, who considers 'good' and 'bad' global citizens, and how the fabric of global law might be strengthened to deal with this distinction in future.

> [The New Zealand Centre for Global studies will … address] the future more than the past, asking where to from here for the global community.

Together these articles seek to commence the intellectual journey within New Zealand towards global thinking in the 21st century, in the context of developing values, refining principles and reforming institutions towards a system of legitimate and effective global governance for the global age. The aim has been to locate personal visions of long-term possibility within political judgements of short-term feasibility.

The articles were drafted during the period of the US election campaign and have been finalised since. The outcome of the US election and those elsewhere, along with the UK's Brexit decision, reinforce the earlier observation of two global revolutions being under way: one of unification; one of fragmentation. The articles that follow avoid the surface politics of UN member states, whether the US, China or Russia, an EU country or any other. The focus of global studies is not on internal electoral phenomena but rather on the underlying global trends and themes that affect the nascent global community. That is not to deny the link between them, but rather to recognise that national and regional politics are, to a considerable extent, a function of global trends, and that the primary focus of the sub-discipline is the imperative of survival. Political fragmentation is its own form of globalisation.

Conclusion

The New Zealand Centre for Global Studies is new. The philosophical and conceptual basis that underpins it rests on pioneering effort over the past quarter-century by leading thinkers around the world in many disciplines, developing a new paradigm for addressing the problems of the global era and seeking innovative and time-relevant ways of solving them. For its part, the centre is reaching out to similar institutions around the world, while seeking collaborative activities with institutions in New Zealand.

Global studies is qualitatively different from international relations. It addresses the future more than the past, asking where to from here for the global community. It adopts heroic assumptions that are open to traditional positivist and realist critique. It embraces an idealist view of current institutional and legal reform on the premise that current principles, institutions and methods are not fit for purpose in the 21st century. The academic field is new; it raises questions, developing hypothesis and vision by way of response, rather than answering them for immediate policy. The solutions are for the future.

1 UN Chronicle, 39 (1), March 1993, front cover. Three years later the secretary general spoke of the trend in 'criminal globalization', such as the traffic in illegal drugs, terrorism and money-laundering. Breaking these trends, he said, would require 'global awareness, global commitment and global action' ('United Nations daily highlights', 31 May 1996).

2 '[A]n introduction to the principal concepts, issues and theoretical debates within the field of International Relations. Topics covered include: power, diplomacy, the United Nations, arms control, terrorism, developmental politics, civil society and international political economy', 'Introduction to international relations', http://www.victoria.ac.nz/hppi/study/courses/political-science-and-international-relations/intp-113; 'Politics and international relations', http://www.victoria.ac.nz/

study/programmes-courses/subjects/political-science-and-international-relations.

3 New Zealand Centre for Global Studies trust deed, article 4, https://www.register.charities.govt.nz/CharitiesRegister/ViewCharity?accountId=b4805f42-7579-e211-84ab-00155d0d1916&searchId=31a4c54f-c358-4cfa-947b-bb9c927a2758.

4 Waiheke Lecture 1, 'Planetary boundaries: concept and implications for global governance', Professor Klaus Bosselman, May 2014; Waiheke Lecture 2, 'Global governance and the UN Security Council: fit for purpose?', Professor Ramesh Thakur, March 2015; Waiheke Lecture 3, 'Global society and the challenges of governance', Professor Geoffrey Palmer, May 2016: http://nzcgs.org.nz/waiheke-global-studies-lecture-series/; Professor Roger Clark, 'Making aggression a leadership crime in 2017: the Rome Statute and the Kampala Amendment', and response by the attorney-general, Chris Finlayson, July 2016, http://nzcgs.org.nz/news-and-events.

5 'Global governance, the global commons and public goods: state of play', May 2014; 'We the peoples: global citizenship and constitutionalism', August 2016, http://nzcgs.org.nz/conferences/.

6 Internship seminar on the 'Securitisation of global health', 2015, http://nzcgs.org.nz/internships/; secondary school student conferences and retreat on 'global citizenship', November 2013, August 2016, http://nzcgs.org.nz/global-citizenship-education/.

7 Dr Kennedy Graham, 'Global governance and the UN Security Council', May 2015; Professor Neil Boister, 'Building criminal accountability at the global level: the historical experience of a small island state', April 2016, http://nzcgs.org.nz/research-papers/.

8 Internship reports: http://nzcgs.org.nz/internships/.

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Kennedy Graham

Global Studies METHODOLOGY

It was shown in the previous article that global studies is qualitatively different from international relations, as a separate sub-discipline. It then becomes necessary to be clear about the defining criteria, the theoretical approaches adopted and the thematic scope of subject matter employed in global studies. This, in turn, raises epistemological issues that may need to be addressed.

Criteria

The two criteria identified in the first article – global scale and global community – are naturally contestable. Can each be taken as a given, or must global studies adopt them as assumptions for heuristic purposes only?

Of the two criteria, the first is taken in the early 21st century as a given, a self-evident fact. Humanity faces challenges of global scale, whose impacts affect the planet and are beyond national resolution. The second criterion requires a hypothesis: the existence of a global community. Can such an assertion provide a sufficiently robust foundation for analytical and prescriptive work by a think-tank? This invites exploration of several related concepts: citizenship, community, society and polity (Graham, 2015, ch.10).

The concept of 'citizenship' has two meanings:

- the state of being vested with the rights, privileges and duties of a citizen;
- the character of an individual viewed as a member of society; behaviour in terms of the duties, obligations and functions of a citizen.[1]

The distinction is important; a person may exhibit behavioural characteristics independent of whether s/he is of that particular state of being. This raises the question of whether a person can acquire and exhibit behavioural characteristics pertaining to a state of being which does not actually exist, or at least which is not fully developed.

These nuances are of critical application at the global level to the concepts of community, society and polity.

- A 'community' is defined as a social group of any size with three characteristics: its inhabitants reside in a specific locality; they share in government; and they have a common cultural and historical heritage.
- A 'society' is stronger, being defined as a community that has evolved certain stronger governmental characteristics.
- A 'polity' is stronger again: the condition of being constituted as a state or other organised community or body; a particular form or system of government.

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Thus, a community is a precondition of a society, which is a precondition of a polity. In this schema, a person could be a member of a society without being a citizen of that society's non-existent polity. Clearly, no global polity exists, but a global community of peoples may be said to exist, though perhaps not yet a 'global society'. Thus, a person could be a member of a global community without necessarily being a member of a global polity.

The idea of a 'global community', then, that enables the acquisition of behavioural characteristics by a group of persons can credibly take hold. That being so, the idea of such a group exhibiting behavioural characteristics that reflect a global interest – the interest of the global community – can equally obtain. And there is nothing to prevent that group of persons encompassing all of humanity, in the most basic sense.[2] Indeed, in May 2016 the United Nations secretary general submitted an Agenda for Humanity which was adopted by governments at the World Humanitarian Summit. As he put it in his report:

> In 1941 ... leaders recognised the need for a fundamental change in the way they collectively managed threats to international peace and security. … While the challenges of today may differ, I believe we are approaching a similar point in history. … We need to restore trust in our global order. … [t]he World Humanitarian Summit presents an opportunity to affirm and renew our commitment to humanity … I ask global leaders to come to the World Humanitarian Summit prepared to assume their responsibilities for a new era in international relations, one in which safe-guarding humanity and promoting human progress drive our decision-making and collective actions. (Ban Ki-moon, 2016, paras 6, 7)

And:

> One Humanity: a vision for change. Such change requires a unified vision. In a globalised world, this vision needs to be inclusive and universal to bring people, communities and countries together … At a time when many are expressing doubt in the ability of the international community to live up to the promises of the Charter of the United Nations to end wars or to confront global challenges, we need, more than ever, to reaffirm the values that connect us. Our vision for change must therefore be grounded in the value that unites us: our common humanity. (ibid., para 15)

Given the explicit nature of the secretary general's call, and given the adoption by governments of the Agenda for Humanity, it is probably safe to assert that the concept of humanity, or otherwise the global community, is now accepted in customary international law.

The idea of an emerging global community may, therefore, be adopted as an assumption for academic enquiry in the field of global studies. An epistemic community of scholars and practitioners are working, today, on the basis of that premise. This critical thinking lays the foundation for further logical reasoning. Thus:

- an accepted definition of 'global citizenship' provides foundational conceptual clarity, which
- facilitates exploration of the philosophical foundations of a global community, including values, which
- informs the socio-psychological dimension of a sense of global identity and loyalty, which
- bestows a political status for a theory of global constitutionalism, which
- underwrites juridical concepts relevant to the global commons and transnational jurisdiction, which
- underpin institutional reform through the expression of global governance.

Theory

The interests of a global community are by definition different from the interests of a particular nation state. It follows, then, that the theoretical approach to analytical study and prescriptive reasoning employed in the field of global studies may be different from the traditional theory embraced in international relations.

Realism, the predominant school of thought in traditional international relations theory, formalises *realpolitik* statesmanship that derives from early modern Europe. The central assumption is that world politics is quintessentially a field of conflict among actors pursuing power. In its classical version, this is the natural order, humans being inherently self-centred, competitive and aggressive. Neorealism attributes the cause to the anarchical nature of the modern state system. Neo-classical realism sees both as causal factors.

Realism, the predominant school of thought in traditional international relations theory, formalises *realpolitik* statesmanship that derives from early modern Europe.

The realist approach to political affairs can be traced back over two millennia to Thucydides and Sun Tzu. In the early modern era it drew upon European thought – Machiavelli and Hobbes, then Metternicht. In the 20th century it drew largely on an American intellectual contribution – Kennan, Morganthau and Kissinger. It is no accident that such thought emerges from the major powers of the time. Contemporary exponents of realism in today's world include Xi, Putin, Erdogan, Duterte and Trump.

Realism is essentially positivist and analytical. It requires a rational, dispassionate interpretation and understanding of world affairs, and a

measured policy formulation for its navigation by nation states. It eschews normative considerations, taking the world as it comes. International organisations, being relatively new, offer merely an arena for competition in the name of 'common ends'. To the extent that realism is prescriptive, advice is tendered to the nation state on how to survive in a tough world, one that has been that way since time immemorial and is not about to change in the blink of a career.

A milder version of realism, the liberal English School, has been developed within the academic community by Hedley Bull and Barry Buzan: the international system, while anarchical in nature, nonetheless forms a society of states where common norms and interests underwrite a degree of order and stability.

The principal alternative theory, however, is political idealism. This embraces values, ideals, principles and goals, asserting their primacy over immediate realities, at least prescriptively: the world as it ought to be, rather than as it is. Political idealism is rooted in Kantian thought of the 18th century, with a structured liberalism securing a state of 'perpetual peace'. In the early 20th century the political idealism of Woodrow Wilson paved the way to international organisation in the League of Nations, with collective security as the doctrine underpinning peace and security. The United Nations, younger sibling of the League by only 25 years, followed this path, providing further glimpses of idealism in its charter ideals of universal peace, general and complete disarmament, universal human rights and self-determination, the rule of international law, and social progress, with better standards of life in larger freedom.

Yet the charter, having identified the common vision in the name of 'we the peoples', immediately delegates operation of the United Nations to their respective governments. It asserts sovereign equality of states as the central principle of the UN, with veto power on issues of peace and security accorded to five of the 193 members. So idealism in international relations theory scrutinises not the UN's visionary goals themselves but its institutional capacity to attain them.

For its part, global studies in its purest form adopts a theoretical approach best described as 'rational idealism'. Adopting the perspective of the global community for political judgement, it aspires to prescribe a methodology that produces policies not for a better world but for its protection. The goal focuses not on what 'ought to be' but on 'what needs to be'. The approach is not normative but imperative. During the entire Westphalian era, from the 17th to the 20th centuries, idealism rested on promoting the normative dimension to human life and society – how better to live together in peace, justice and equality. In the post-Westphalian, early-global epoch, idealism rests on a demonstrable imperative – how to survive as a species on a single, finite and fragile planet.

In the post-Westphalian, early-global epoch, idealism rests on a demonstrable imperative – how to survive as a species on a single, finite and fragile planet.

That is a tall order, but it reflects less hubris than rationality. Those engaged in global studies do not assert that any particular policy deriving from their work is necessarily correct. The point of academic, and indeed political, thought is the contestation of ideas and the potential falsification of policy prescription. But global studies as a sub-discipline rests on the theory that current international organisation and diplomatic method are unfit for purpose in solving global problems. That includes the essential nature of the 'anarchical state system', which needs fundamental change more than calibrated reform. Those remaining satisfied with the institutional status quo will be content to continue with traditional international relations theory.

There are, in fact, leading thinkers behind the theory of rational idealism. In the mid-20th century, Dag Hammarskjöld, described by US president John F. Kennedy as the 'greatest statesman of our century' (Linnér, 2007), developed a world view during his tenure as UN secretary general (1952–61) which rests on three central tenets:

- the United Nations as a dynamic institution, with an organic capacity to adapt to change;
- the charter as a 'living instrument', with teleological capacity for implied powers;
- humanity coming to 'self-consciousness' as a species through the United Nations. (Frölich, 2008)

Hammarskjöld is not alone; his pioneering statecraft has been augmented by leading intellectual contributions in the early 21st century. The ideas are shared by Allott, who writes of the 'self-constituting of international society' from the international community of states to a global community of peoples, and progression from 'international security' (a diplomatic concept) to 'international public order' (a constitutional concept) (Allott, 2001). It is found in the work of Macdonald and Johnston on world constitutionalism (Macdonald and Johnston, 2005), Fassbender's analysis of the UN Charter as an international constitution (Fassbender, 1998, 2009), and Frölich's exploration of Hammarskjöldian thought as a 'political philosophy of world organization' (Frölich, 2005, pp.130-45). These theorists provide the philosophical foundations of the theory of rational

idealism that are likely to cement global studies as a far-reaching and innovative field of enquiry.[3]

Scope

If the sub-discipline is global in scale, accepts the idea of a global community, and employs rational idealism as its theoretical approach, the question remains as to breadth of scope. There are three alternatives.

The narrow view is that global studies should remain coterminous with international relations in thematic scope, focusing essentially on the politics and law of contemporary international institutional architecture, and on the competing theories of globalisation and economic well-being. This results in the two sub-disciplines being nearly identical in focus, differing only in their defining criteria and theoretical approaches.

The broader view is that global studies is naturally all-encompassing. The only constraint is that of scale: anything sub-global is not in focus; but thematically there can be no constraint. Issues of global concern in a fast-changing world must naturally be subjected to scrutiny. Beyond economics and politics, diplomacy and law lie potential areas for analysis: social media, digital information, artificial intelligence, robotic substitution, genetic determination, species self-direction, even virtual reality. To some extent the current United Nations, through the General Assembly and specialised agencies, explores these issues, but again from a traditional Westphalian perspective. The juxtaposition of postmodern technology and an increasingly archaic diplomatic method is the cause of the dysfunctionality evident in contemporary global politics.

The broadest view is that beneath these phenomena is the role of humans on the planet and their place within the cosmos. Our knowledge of cosmic history, the nature of space, and the unresolved crisis in physics between the classical macro-model, the quantum world and gravity is now subject to continuous discovery. That includes the search for life elsewhere. Should these most fundamental issues of the human drama become 'politicised' under academic and political scrutiny? It is hard to see how they cannot in the burgeoning field of global studies.

Epistemology

This takes us to the edge – whether global studies should enter philosophical enquiry, exploring the question of absolute knowledge. Few may choose to do this, but it may be necessary if the broadest thematic view is adopted, with thought being devoted to the interdisciplinary foundations of the subject matter.

It has, for example, always been accepted that there should be a crossover in method and knowledge among the physical sciences. Many theorists in the past century have argued that this must apply even between the physical and the social sciences. E.O. Wilson contends that all knowledge is intrinsically unified: that behind disciplines as diverse as physics and biology, anthropology and the arts exist a small number of natural laws. Their interlocking within the context of causal explanation he calls consilience. The idea is that 'all tangible phenomena, from the birth of stars to the workings of social institutions, are based on material processes that are ultimately reducible, however long and tortuous the sequences, to the laws of physics' (Wilson, 1998, pp.8-9). This enables us, he argues, to link genes and culture together, allowing for the development of a set of epigenetic rules as the best means to make important advances in the understanding of human nature:

- genes prescribe epigenetic rules, which are the regularities of sensory perception and mental development which animate and channel the acquisition of culture;
- culture helps determine which of the prescribing genes survive and multiply from one generation to another;
- successful new genes alter the epigenetic rules of populations;
- the altered epigenetic rules change the direction and effectiveness of the channels of cultural acquisition. (ibid., pp.2-14,164-74, 210, 291-94, 325.)

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It is not yet clear whether global studies naturally extends its philosophical-psychological reach this far. But perhaps it does. Perhaps it draws from a branch of knowledge that might be termed 'global consciousness'. The underlying unity of knowledge, across all academic disciplines, is, probably inevitably, a precondition of an all-encompassing scope of enquiry in the field.

1 These definitions and those in the following paragraph are taken from www.dictionary.com.

2 See, for example, UN General Assembly, 2005, para 4 for a list of 'common human values' agreed by the international community of states representing 'we the peoples of the United Nations'.

3 Some theorists might seek to broaden the group to include normative fields of enquiry such as John Rawls' *A Theory of Justice*. But global studies, as noted, adopts the imperative approach (embracing philosophical, legal and political-institutional enquiry), not normative. Once the normative approach is included, the way is open to subjective argumentation, as would emanate from, for example, Amartya Sen, and even Rawls' own Harvard colleagues (Nozick, Walzer and Wolf).

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Graham Hassall

Reviewing Principles of Governance

branches of government at the global level

Introduction

The articles in this issue of *Policy Quarterly* explore the challenges facing humanity in the modern age, and the implications they hold for political and legal thought. The essence of global studies is to explore those implications from a new perspective, a new world view which assumes the existence of a global community – 'we the peoples' – whose common interests must be met by the international community of states collaborating together in qualitatively different ways. The thinking, therefore, extends to addressing the concept of global constitutionalism.

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The challenges identified – degradation of the commons and an ecological overshoot beyond the carrying capacity of the planet, dysfunction in the maintenance of international security and the illusory nature of universal peace, shortcomings in international law and the impunity enjoyed by states and leaders for manifest breaches – raise deep-seated questions pertaining to values, principles and institutions.

The values are embraced by the international community, in rudimentary fashion in the United Nations Charter, modernised in the 2005 World Summit Outcome Document and updated in the 2016 World Humanitarian Agenda. In recent years humanity is beginning to 'self-realise' and 'self-constitute', to cite Dag Hammarskjöld and Philip Allott. The principles remain largely incarcerated in the charter. More recent principles found in global declarations – the 1978 UN special session on nuclear disarmament (UNSSOD I), the 1992 Rio

Declaration on sustainability, the World Summit Outcome Document and the 2015 Sustainable Development Goals – have modified but not reshaped the basic principles of the charter.

The institutions remain quintessentially those created in the 1940s: the political institutions of the UN and the economic institutions of the Bretton Woods system. Whereas the stipulation of human values, and to to a lesser extent the principles, are more amenable to evolution because of their theoretical nature, any change to institutional structures is more intractable since they reflect and bestow power relationships.

> … it is institutional reform … to which we must turn if 21st-century politics is to keep pace with the increasingly fast-paced technological and social change around us.

It is not accidental that the nature of the UN Security Council and the General Assembly, of the International Monetary Fund and the World Bank, and of the International Court of Justice has scarcely altered in three quarters of a century.

Proposals for institutional reform, never mind restructuring, founder on implacable opposition from the major power-holders of the status quo. Yet it is institutional reform, and perhaps even restructuring, to which we must turn if 21st-century politics is to keep pace with the increasingly fast-paced technological and social change around us. This article examines the current nature of the major international institutions and their interrelationships.

Overview: the branches of government at the global level

At the national level of governance, it is generally recognised that there are three branches of government. The legislature creates the law. The executive implements policy within the law. The judiciary interprets and applies the law. Across civilisations, however, some fundamental divides prevail. First, the source of legitimacy is disputed: whether it is of divine or popular origin. Second, and partly as a result, the branches are seen as either integrated and unified, or discrete and separate: in one major civilisation the Divine is regarded as the source of authority for all three branches, and all three branches are accordingly integrated; in another the people bestow legitimacy, yet the three branches operate under a single, overarching secular structure; while in a third the people bestow legitimacy, and the branches are essentially separate. In one version all three branches are separate; in another the legislature and executive are partially merged while the judiciary remains independent.

At the global level of governance the relationships are rudimentary, almost shapeless. First, there is as yet no enduring consensus over the source of legitimacy. While the UN Charter begins in the name of 'we the peoples', there is an immediate sequential step in delegated power, instructing governments to act in their name 'for the common ends'. The charter may be in the name of the people of the United Nations but nowhere does it stipulate that the source of legitimacy and authority is the same people, and nowhere is there mention of the Divine. While that may appeal to some civilisational belief patterns, it does not command universal consensus. The lack of such a consensus in political discourse at the global level underlies much of the dysfunctionality and rancour among nation states today.

Second, when governments take over the UN system in the peoples' name, the action defaults to the executive branch of member governments. It is the diplomatic arm of the executives of the world that assemble at the UN in New York and Geneva and elsewhere to ply the trade of international relations. The legislatures are not to be seen in any formal context. They assemble collectively in a separate institution in Geneva, the Inter-Parliamentary Union (IPU). The IPU is an old and august institution, having preceded the League of Nations. It is only in the past two decades that it has formed any kind of meaningful relationship with the United Nations, and it still has no real relationship with the Bretton Woods system, this being left to an independent parliamentarian network.

Third, international law itself is not made by the countries' legislatures but rather by their executives. It is not the lawmakers assembled at the IPU in Geneva but the diplomats assembled under the authority of the UN who propose, negotiate and conclude international treaties. During the negotiating period, the executive branch largely ignores the legislative branch, the extent depending upon the particular governmental style and political convention within a country. Once a treaty is concluded and adopted, it is referred in each case by the executive to the legislature. Depending, again, on the country, the ensuing obligations under international law transfer directly and unaltered into domestic law, or they pass, laboriously and occasionally in modified form, through a constitutional firewall that separates international and domestic law. Either way, international law remains a focus and function of the executive branch of government.

Fourth, the relationship between the international judiciary and the UN system is complex. The principal body, the International Court of Justice, was established in 1945 by the United Nations Charter. It is empowered to decide contentious cases between states and offer advisory opinions on the application of international law. While it operates independently under its own statute (which is an 'integral part of the Charter'), its judges are elected jointly by the UN General Assembly and the Security Council. The more recent International Criminal Court, established under the Statute of Rome (1998), is empowered to decide cases of individual

criminality. The International Criminal Court has an intimate relationship with the Security Council, with the latter possessing the right of referral to the court and, in the case of aggression, the right of deferral.

These facts of international life make it clear how undeveloped constitutional life is at the international level. Constitutional life is what it is at the international level. That is to say, it is adequately developed in a Westphalian context. But when it comes to the idea of a global community the reality is constitutionally undeveloped. If we are to seek legitimacy in values, principles and institutions, the layout needs fundamental rethinking. This article focuses on one aspect of this dilemma: the relationship between the world's collective body of national legislatures, the IPU, and the body of national executives, the UN.

The legislature and the executive: the IPU–UN relationship

Exploration of the relationship between the Inter-Parliamentary Union and the United Nations contributes to our understanding of two fundamental theoretical problems in a supranational world: which institutions are best suited to the challenges of global governance; and how are the voices of citizens, and the interests, best represented in these global institutions? The starting premise is that the relationship between the two organisations has evolved into a partnership in which the UN has primacy, but that the true nature of the relationship should be one between two organisations of equal status and capacity. For this to occur, some fundamental review of the nature and application of international law may be required.

The Inter-Parliamentary Union was formed in 1889, 31 years before the first intergovernmental organisation (the League of Nations) and 56 years before the second generation (the United Nations). The League of Nations was seen as the first international organisation of universal scope. Its membership constituency was 42 'high contracting parties', comprising the governments not only of independent states but of dominions and colonies.

The status of the IPU in both Swiss law and international law has evolved. It has developed from a non-governmental organisation of individual parliamentarians in the 1880s into an international organisation of national parliaments (Albers, 2012, p.190). In the years prior to the First World War the IPU focused on the development of international arbitration law and on encouraging nation states to voluntarily adhere to legal norms where these were clearly delineated (Sabic, 2008). The change of membership in 2001 from national groups in parliaments to parliaments per se resulted in the IPU gaining recognition of its international personality by governments.

> In 1999 a legal opinion … concluded that the IPU … 'is an international parliamentary, political and representative organization' and it 'enjoys a significant measure of international personality'

The IPU's goals are to foster worldwide parliamentary dialogue, to work for peace and co-operation among peoples, and to work for the firm establishment of representative democracy. The IPU currently focuses on six themes of international concern: representative democracy; peace and security; sustainable development; human rights and humanitarian law; women in politics; and education, science and culture. These themes are, of course, broadly similar to those advanced within the United Nations.

Based on a headquarters agreement in 1971, the Swiss government recognises the personality and legal capacity of the IPU, and grants it a number of freedoms. The IPU is also recognised as a public international organisation in the United States, where it enjoys the privileges, exemptions and immunities conferred by the International Organizations Immunities Act and a corresponding presidential executive order (1998). The IPU had no meaningful relationship with the League of Nations, and for many years had little relationship with the United Nations. However, since the early 1990s it has sought a closer relationship with the UN, one described as 'providing the parliamentary dimension to the United Nations', and in 1996 a co-operation agreement was struck between the two.

In 1999 a legal opinion offered the view that the IPU 'enjoys special status in international law'. It concluded that the IPU 'is *sui generis*, that is, it is an international parliamentary, political and representative organization' and it 'enjoys a significant measure of international personality'. Even though the teachings of the most highly qualified publicists of the various nations are only subsidiary means for the determination of rules of law in international law (under article 38(1)(d) of the International Court of Justice statute), it can be assumed that the IPU has de facto acquired a special inter-parliamentary status, which is partly recognised *de jure*.

The United Nations Millennium Declaration of 2000 (paragraph 30) noted the importance of relations between the United Nations and national parliaments, and encouraged such co-operation through the IPU (Sabic, p.264). In 2002 the IPU attained observer status at the General Assembly. This brought the right to circulate its official documents within various UN bodies, and marked the start of regular presentations by IPU representatives at sessions of the General Assembly, its subsidiary organs and major UN conferences and high-level events: no fewer than 170 IPU presentations were delivered to UN meetings between 2002 and 2016.

The IPU's objectives for the period 2012–17 include developing a parliamentary dimension to the work of the UN and other multilateral institutions, and building parliamentary support for international development goals (Inter-Parliamentary Union, 2011). The second of these objectives includes:

- contributing to and monitoring international negotiations and debates at the UN and related agencies;
- overseeing the enforcement of what is adopted by governments; and
- ensuring national compliance with international norms and the rule of law. (Second World Conference of Speakers of Parliament, 2005.)

In 2014 a partnership agreement between the IPU and the UN was drawn up, and this is currently under active consideration.

Notwithstanding these advances in the IPU's status, it remains unclear what precisely the relative status of the IPU is vis-à-vis the UN, and what source of international law might be applicable to determine this. Some uncharted political terrain perhaps lies ahead. The UN recognises that parliaments are responsible for giving effect to international commitments, and, as they comprise representatives of the people, are essential allies in educating the public on matters of peace and security, human rights, sustainable development and democracy. IPU global assemblies regularly include UN speakers, and have passed numerous resolutions on key global issues being addressed by the UN, from nuclear disarmament to specific conflict situations, trade, financing for development, and protecting and strengthening the rights of citizens in various situations (Filip, 2004, p.9). Between 2002 and 2014 the General Assembly passed 12 resolutions on its relationship with the IPU and received five reports from the secretary general. Yet there is a general sense of a lacuna in the IPU's global role, and a recognition that something needs to be done.

A United Nations Parliamentary Assembly

The question therefore arises as to whether a parliamentary assembly should be a direct component part of the UN system. The idea has been around since the League of Nations, and was revived in the 1990s. The logical alternatives are an 'evolution' of the IPU into such a body or the separate creation of a United Nations Parliamentary Assembly (Wikipedia, n.d.).

Despite the stronger ties now existing between the IPU and the UN system, there is no serious discussion about whether the IPU might undergo such an evolution. In the early 1990s the idea of a United Nations Parliamentary Assembly attracted interest in the Canadian parliament.[1] In 2007 an international civil society body, the Campaign for the Establishment of a United Nations Parliamentary Assembly, was established, and it has been increasingly active and influential in advocacy work to governments, parliaments and leaders. The same year the Pan African Parliament adopted a resolution calling for such an assembly. The campaign had the titular leadership of former UN secretary general Boutros Boutros-Ghali. In January 2016 the EU's high representative for foreign affairs and vice-president of the European Commission expressed personal support (UNPA Campaign Secretariat, 2016). In November 2016 former UN under-secretary general Ibrahim Gambari, having served as co-chair of the Commission on Global Security, Justice and Governance, also expressed support. But the idea does not figure, at least as yet, in discussions within the UN or within governments.

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Constitutionalism and the United Nations

Perhaps before these fundamental issues are resolved there is a need for discussion and dialogue on the question of constitutionalism at the global level.

The idea of the UN Charter as a prototype document for some form of global constitutionalism is as old as Hammarskjöldian thought of the mid-20th century, building on Wilsonian doctrinal precepts for the League of Nations. This has been given added philosophical depth in the writings of Philip Allott and others. The Commission on Global Governance in its 1995 report *Our Global Neighbourhood* devoted some attention to the question and a new genre of academic enquiry into global constitutionalism has emerged in the past few decades. Such enquiry, however, has not entered, or perhaps even reached, the fortress of intergovernmental thinking.

If one adheres to the classic Westphalian perspective on peoples and states, citizens receive their standing, their rights and protections from nation states, beyond which there is no higher source of sovereignty, and nation states retain all rights of engagement in international affairs. People are citizens of nations, and are represented solely by their nations in international organisations. In this view, Sabic points out, '[a] parliamentarian as an international actor remains a contradiction in terms' (Sabic, 2008, p.267). In the specific instance of international parliamentarianism, Jancic suggests 'that the traditional, inward-looking role of parliaments is gradually changing under the pressure of transnational policy challenges'; we now witness the 'trans-nationalization of policy making' and see that 'democracy is becoming a "global entitlement"' (Jancic, 2015, pp.198, 199). 'As the public becomes more aware of the extent of the global problems, and will increasingly demand efficient solutions from their governments and representatives', suggests Sabic, 'the investment of time and energy of parliamentarians, active in IPIs, will make ever more sense' (Sabic, 2008, p.268). Due to their 'double

mandate, whereby they are democratic representatives in both domestic and international arenas' (Jancic, 2015, p.205), members of national parliaments are, it turns out, in the first ranks of global citizens. Under the forces of globalism their duties to domestic constituents require their close consideration of global public policy challenges and imperatives.

Constitutional thinking is under way, however, at the regional level. Doctrinal development is more far-reaching than commonly supposed, not only in Europe but in Africa and America as well. The Organization of American States requires 'representative democracy' as its system of government for its member states. The Constitutive Act of the African Union empowers the union to intervene in 'grave circumstances' (genocide, war crimes, crimes against humanity), and the union recently requested its International Law Commission to examine the proposed international constitutional court. The European Court of Justice recently ruled that an EC regulation derived from a binding (chapter VII) resolution of the UN Security Council was unconstitutional in European law.[2] In a recent study, International IDEA has released insights into constitutionalism at the regional level in Africa, Asia, America, Europe and the Pacific. As the UN deputy secretary general put it in the foreword,

> The rule of law and constitutionalism are among the key principles and core mandates of many regional organizations … the Inter-regional Dialogue on Democracy, in particular through its meeting on the rule of law and constitutional governance and this resulting publication, has played a valuable role in advancing these intertwined, universal and global themes from the critically important regional perspective. (Corenillo and Sample, 2014)

The issues raised here penetrate deeply into established doctrine of political and legal thought, and traditional diplomatic method. That is not a reason to turn away from them. The 21st century is already proving to be an era of rapid and fundamental change, and issues of legitimacy and empowerment at the global level simply cannot be ignored. That is the challenge of the new sub-discipline known as global studies.

1 Eighth report of the Standing Committee on External Affairs and International Trade, House of Commons, Parliament of Canada, spring 1993, chaired by Jon Bosley.
2 Kadi v European Commission (2008).

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Rod Oram

Reviewing the Global Economy
the UN and Bretton Woods systems

Introduction: the perennial search for systems

Humankind has been searching for millennia for ways to govern itself at large scale and over great distances. Overwhelmingly, the dominant solution had been the creation of empires, defined as multi-ethnic or multinational states with political and/or military dominion over populations who are culturally and ethnically distinct from the ruling imperial ethnic group and its culture.[1] In the modern Westphalian era of the past several centuries, a hybrid system of governance around the world emerged, comprising the nation state (in Europe and the Americas) and international empires (across Africa, Asia and Oceania).

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In the last quarter of the 19th century, the industrial, trade and finance activities of those empires gave rise to unprecedented internationalisation of economic activity. This was the first recognisable era of globalisation – political and commercial entities starting to operate on an international scale. However, the great conflicts inherent within the system led to world war. The experience put paid to rudimentary globalisation and the monetary, trade and financial systems on which it depended.

Early 20th century: the failure of international economic planning

Post-World War One, various combinations of European and North American nations made six attempts in the 1920s and 1930s to re-establish what they took to be the three key planks of international economic co-operation: trade liberalisation, freedom of capital and fixed exchange rates. None was completely successful. The Paris Peace Conference of 1919 set a framework for restoring free

flows of trade and capital. The issue of fixed parities for currencies, however, remained unresolved because it was not a priority, and because the United States resisted. In Brussels in 1920, the League of Nations established an economic and financial section, but its powers were limited.

In Genoa in 1922 a group of mostly European countries re-established the gold standard for currencies. In Rome in 1930, the Bank of International Settlements was set up as 'the central banks' bank'. In London in 1933 the US again rejected a wider system of fixed parities. In London in 1936, the United Kingdom, the US and France signed a stabilisation pact, the Tripartite Agreement. It, too, failed to bed in.

The failure to establish an effective international trade, financial and monetary structure led to high tariffs and other damaging competitive policies. Economic nationalism became the main cause of the Great Depression, which lasted from 1929 for a decade. It was the longest, deepest and broadest depression of the 20th century: global GDP fell an estimated 15% (1929–32); international trade volume halved; unemployment rose as high as 33% (Garraty, 1986).

Mid-20th century: the architecture of Bretton Woods

In the early 1940s a process began on the monetary, fiscal and trade framework for a set of multilateral institutions that would incorporate the lessons of the previous two decades. The planning was overwhelmingly Anglo-American: in July 1944 the US and UK convened the International Monetary and Financial Conference at Bretton Woods, New Hampshire. Agreement was reached to create three multilateral institutions: a monetary authority, a development bank and an international trade organisation.

The first two – the International Monetary Fund and the World Bank (International Bank for Reconstruction and Development) – were established in 1945. The third failed to get agreement, with the US refusing to approve the trade body. The more modest General Agreement on Tariffs and Trade (GATT) came into existence in 1947.

Financial stability: the IMF

The IMF began operations in March 1947. The fund's capital, programmes and reach expanded rapidly over the following 20 years as North America and Europe enjoyed a post-war boom. During the 1960s the strong growth of the Japanese economy and development of other countries required the IMF to develop a bigger and broader-based capital structure. This led to the creation of special drawing rights, a basket of members' currencies, as the fund's key accounting 'currency' and capital.

By the late 1960s, however, the great expansion of the global economy, and great disparities between countries' economic, fiscal and trade performance, were generating considerable stress within the system of fixed-parity exchange rates, still backed by a vestigial connection to the gold standard. Under these pressures, the Bretton Woods architecture unravelled, beginning with the UK's devaluation by 14% against the US dollar in April 1967. The end of Bretton Woods came in August 1971 when the US terminated convertibility of the dollar to gold, devalued its currency, and imposed its first peacetime wage and price controls.

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Within two years the currencies of most developed economies were floating. This fundamental transformation increased pressure on governments and central banks to manage national economies on policies that were deemed by investors, capital markets and foreign exchange traders to be suitable for this increasingly open globalised economy. The IMF rapidly became the leading arbiter on these issues, exercising great influence through its advice, its financial support for economies in difficulties, and the policy conditions it attached to such support.

Economic development: the World Bank

The World Bank exercised many of the same policy prescriptions through its funding of national economic development. Its first loan in 1947 set conditions foreshadowing the institution's even stricter disciplines imposed on subsequent borrowers. It closely monitored how a borrowing country spent the funds; it required the government to produce a balanced budget; and it gave priority for repaying to the bank over other creditors.

Once the Marshall Plan was in place for European countries, the bank shifted its focus beyond Europe, expanding its remit in the late 1960s to finance infrastructure. From 1974 to 1980 it focused on meeting the basic needs of the developing world. During the 1980s it emphasised lending to service Third World debt and for economic structural adjustment policies. Following severe criticism of the adverse environmental impact of its strategies, however, the bank began from 1989 to bring non-governmental organisations and other environmental groups into its processes. After the United Nations instituted the Millennium Development Goals in 2000, the bank oriented most of its programmes to helping countries progress towards the goals.

From 1980 until the global financial crisis in 2007–09 the bank experienced a shift in economic philosophy. But such changes reflected differing views on the nature of development and how to deliver help to countries rather than on the underlying economic rationale, which remained strongly US-centric.

Trade liberalisation: GATT and the WTO

As noted, GATT came into effect in October 1947, under the auspices of the United Nations. In fact, GATT oversaw an enormous expansion in trade liberalisation. Some simple metrics tell the story:

- The first GATT negotiating round in 1947 involved 23 countries, lasted seven months and delivered reductions on 45,000 tariffs affecting US$10 billion of trade.
- The sixth, the Kennedy round, began in 1964, involved 48 countries, lasted 37 months and achieved tariff concessions of US$40 billion of trade.
- The eighth, the Uruguay round, started in 1986, involved 123 countries, tackled tariff and non-tariff barriers, created the World Trade Organisation as GATT's successor and lasted 87 months.
- The ninth, the Doha round, started in 2001 and involved 159 countries. For four years it unsuccessfully tackled tariffs, non-tariff barriers, agriculture, labour, environmental issues, investment, competition, intellectual property and transparency issues before excessive complexity and multiple deadlocks caused it to fall into a nine-year coma of inactivity. The WTO finally declared it dead in December 2015. (Wikipedia, n.d.; Financial Times, 2015)

The failure of the Doha round has occasioned an historic, and perhaps fateful, regression from global to sub-global negotiation context. While the WTO is still useful as a trade rules and arbitration body, albeit a painfully slow and tortuous one, trade liberalisation has retrenched into a plethora of bilateral and regional multilateral agreements. Yet these too now seemed to have reached a stalemate. The EU and the US have lost sufficient political support at home to progress the Transatlantic Trade and Investment Partnership, and President Donald Trump has withdrawn the US from the Trans-Pacific Partnership Agreement, making almost certain its failure to come into effect in any form.

For its part, China is establishing new financial and economic entities to serve as alternatives to those long established under earlier Western leadership. These include:

- negotiations on the Regional Comprehensive Economic Partnership as a counter to TPPA;
- the Asian Infrastructure Investment Bank, which is backed by 36 other states, including New Zealand, but rejected by the US, Canada and Japan;
- One Belt, One Road, its strategy for aid-backed western expansion of road and shipping lanes across Asia and ultimately to Europe;
- a global inter-bank payments system; and
- international exchanges and markets based in China for oil, gold and other commodities.

Late 20th century: crisis in the Bretton Woods system

In the final three decades of the 20th century the emerging global economy wrestled with a series of interlocking crises: currency instability, resource stress, unequal debt distribution and emerging trade protectionism.

Through this period the IMF remained the unwavering developer, and enforcer, of the orthodox economic view of the world derived from the Bretton Woods system. Such orthodoxy, known as the Washington Consensus, was comprised of a list of policies:

1. fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP;
2. redirection of public spending from subsidies ('especially indiscriminate subsidies') toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment;
3. tax reform, broadening the tax base and adopting moderate marginal tax rates;
4. interest rates that are market-determined and positive (but moderate) in real terms;
5. competitive exchange rates;
6. trade liberalisation: liberalisation of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.), any trade protection to be provided by low and relatively uniform tariffs;
7. liberalisation of inward foreign direct investment;
8. privatisation of state enterprises;
9. deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
10. legal security for property rights.

The impact of these tenets has occasioned considerable controversy. Stiglitz described the consensus as 'a blend of ideology and bad science' (Stiglitz, 2002). And Rogoff also commented as follows:

> As the two Bretton Woods sisters turn 60, the tough love of the International Monetary Fund and even the free love of the World Bank go largely unrequited. Nowadays the twins, never universally admired, are constantly attacked from the left, from the right, from the centre and,

Following the global financial crisis, … the IMF … was widely and heavily criticised for failing to adequately understand and police markets.

sometimes, by each other. (Rogoff, 2004)

Early 21st century (part one): tinkering with orthodoxy

The early decades of the 21st century have witnessed a struggle by the architects of economic policy, steeped in Bretton Woods orthodoxy yet aware of its inadequacies in the face of a burgeoning global economy, to steer a course between defensively tinkering with the current institutions and contemplating fundamental reform.

For its part, the IMF continued to evolve to keep pace with the rapid growth and increasing complexity of the global economy and its markets. To that end, for example, it established its international capital markets department in March 2001, and began surveillance of international markets. Following the global financial crisis, however, the IMF, in common with other national and international financial regulators, was widely and heavily criticised for failing to adequately understand and police markets. Reviewing its performance after the onset of the crisis, the IMF focused its response in five broad ways:

- creating a crisis firewall: to meet ever increasing financing needs of countries hit by the global financial crisis and to help strengthen global economic and financial stability, the fund greatly bolstered its lending capacity after the onset of the crisis. This was done by increasing quota subscriptions of member countries and by securing large borrowing agreements;
- stepping up crisis lending: the IMF overhauled its lending framework to make it better suited to country needs, giving greater emphasis to crisis prevention and streamlining programme conditionality. Since the start of the crisis the IMF committed well over US$700 billion in financing to its member countries;
- helping the world's poorest: the IMF undertook an unprecedented reform of its policies toward low-income countries and quadrupled resources devoted to concessional lending;
- sharpening IMF analysis and policy advice: the IMF provided risk analysis and policy advice to help member countries overcome by the challenges of and spillovers from the global economic crisis. It also implemented several major initiatives to strengthen and to adapt surveillance to a more globalised and interconnected world, taking into account lessons learned from the crisis;
- reforming the IMF's governance: to strengthen its legitimacy, in April 2008 and November 2010 the IMF agreed on wide-ranging governance reforms to reflect the increasing importance of emerging market countries. The reforms also ensured that smaller developing countries would retain their influence in the IMF. (IMF, 2016a)

However, the IMF's progress is not as complete as it suggests. While its member countries agreed in 2010 to double the IMF's capital, increase its borrowing and lending power and rejig its voting rights, this has not fully taken effect because of US opposition. The main stumbling block is the resulting dilution of the US stake below 15%, which would remove the US veto power.

Despite US intransigence, the IMF has continued to adapt as the global economy evolves. In November 2015 its members accepted China's renminbi as a reserve currency, giving it a weighting of 10.92% in the basket of currencies comprising the IMF's special drawing rights.

As Lastra noted, financial institutions are only global in good times; they retrench to national frontiers when things turn sour (Lastra, 2010). This state of affairs has to change if financial institutions and markets can credibly claim to be global.

Early 21st century (part two): addressing fundamental change

The challenges that the international monetary and financial system faces in the early 21st century are different from those which the Bretton Woods system confronted in the mid-20th. Then, there were narrow issues of exchange rate stability and convertibility, trade and economic development involving a small range of countries. Today there are many broader, deeper and truly global issues of capital and trade flows, and of capital markets and financial system supervision. These current challenges have been heightened by the global financial crisis and its long-drawn-out impact on the global economy. There are, as Wolf observes, many unsolved issues in financial systems and economies. These are not inevitable but rather the predictable results of policy failures that will have long-term consequences (Wolf, 2014).

As Lastra noted, financial institutions are only global in good times; they retrench to national frontiers when things turn sour …

The extensive evidence includes historically low, and negative, interest rates, which suggest monetary policy is no longer effective at stimulating economic activity (*Economist*, 2016a); weak growth of trade and national economies, as the IMF reported in its October 2016 forecasts (IMF, 2016b); low growth of productivity; and rising debt. Two reports by the McKinsey Global Institute shed light on this landscape:

- Two thirds of households in 25 advanced economies suffered flat or falling real incomes between 2005 and 2014, affecting some 540 million people. (Dobbs et al., 2016)
- Global debt increased during the global financial crisis (from US$142 trillion in 2007 to US$199 trillion in 2014), and debt's share of global

> GDP rose from 269% to 286%. China's debt quadrupled over that period, and government debt rose in 75% of countries and for 80% of households. (Dobbs et al., 2015)

Above all these issues have, in recent decades, taken on an intense ecological context which humankind has never before experienced on a global scale. Climate change, loss of biodiversity, acidification of oceans, and excessive nitrogen and phosphorous flows from the use of artificial fertilisers in farming are among the biophysical planetary boundaries we are comprehensively breaching, the Stockholm Resilience Centre reports.[2] As the World Economic Forum put it:

> Global risks materialize in new and unexpected ways and are becoming more imminent as their consequences reach people, institutions and economies. We witness the effects of climate change in the rising frequency and intensity of water shortages, floods and storms worldwide. Stable societies are becoming increasingly fragmented in many regions of the world, and we note a weak global economy that is again facing headwinds. (World Economic Forum, 2016)

The World Economic Forum identifies the risks of the greatest likelihood and with greatest impact as failure of climate change mitigation and adaptation, water crises, large-scale involuntary migration, fiscal crises, asset bubbles, unemployment or under employment, profound social instability, interstate conflict and cyberattacks. Such is the impact of these ecological pressures, human activity is now the determining factor in planetary change. To mark this, the International Geological Congress has begun the process for declaring this epoch the Anthropocene (*Economist*, 2016b). Fundamental change is urgently needed to help the ecosystem recover. As Gus Speth, former chief of the United Nations Development Programme, has noted:

> I used to think the top environmental problems were biodiversity loss, ecosystem collapse and climate change. I thought that with 30 years of good science we could address those problems. But I was wrong. The top environmental problems are selfishness, greed and apathy … and to deal with those we need a spiritual and cultural transformation. We scientists don't know how to do that. (Speth, 2013)

The challenge before us, to develop a well-functioning global economy that operates efficiently, alleviates poverty and operates within the safe planetary boundaries, is immense.

The UN and Bretton Woods: one system or two?

As humanity increasingly perceives the planet to be small, finite and fragile, and as the Anthropocene imposes an unyielding responsibility upon us to find our own destiny, an underlying question unavoidably arises: what were the reasons for the fateful decisions of the mid-20th century to create two, separate multilateral institutional systems, the United Nations for political and military management and the Bretton Woods for economic and financial management? If the world is one, why are there two institutional systems?

As with Bretton Woods, the UN system was a child of wartime planning of the early 1940s. Determined not to repeat the grave mistakes of the peace and economic restoration process after the World War One, Western leaders devoted substantial efforts from the early 1940s to designing and negotiating new global economic and political systems. More quickly than Bretton Woods, however, the UN system responded to the emerging global problems and the dawning of the Anthropocene. From the late 1980s on, the UN began wrestling with the intensely complex and interdependent issues of human development and ecosystem integrity. This work led to the United Nations Conference on Environment and Development convened in Rio de Janeiro in June 1992. The Earth Summit produced three key documents:

- the Rio Declaration on Environment and Development;
- Agenda 21, a voluntary, non-binding sustainability action plan for the UN, its agencies and member governments; and
- the Forest Principles, a non-binding set of principles for forest management.

It also created the Rio Convention, a suite of three legally binding agreements which were opened for signature: the Convention on Biological Diversity, the Framework Convention on Climate Change and the UN Convention to Combat Desertification.

The UN and its member states struggled woefully in the following years to generate meaningful momentum on their non-binding Rio decisions. One of the most critical examples was the tortuous and inadequate progress on climate change. By 2000, however, the UN did agree on its eight Millennium Development Goals. These included eradication of extreme poverty, achieving universal primary education and ensuring environmental sustainability by 2015. There was substantial progress on some of the goals, particularly poverty reduction, by the 2015 deadline. But economic, environmental, social and cultural sustainability remained a distant dream.

Seeking to build on these achievements, the UN devised its vastly more comprehensive programme entitled 'Transforming the world: the 2030 Agenda for Sustainable Development'. Adopted by member nations in September 2015,

it consists of 17 Sustainable Development Goals, backed by 169 targets. The Sustainable Development Goals are an admirable attempt to help people and societies, institutions and governments work on the extremely numerous, complex and interdependent issues of human development and ecological integrity. For its part, the UN is making unprecedented efforts to co-ordinate more than 50 of its agencies and the original Bretton Woods institutions on these herculean tasks.

Yet, while these economic, environmental and social challenges are truly global, constructive responses to them will inevitably be local. But in turn communities need local, national, international and global mechanisms to encourage, guide, prod and require action. Then an infinitely large number of local changes can aggregate into truly global progress towards sustainability. Such a view of the world suggests fertile territory for global studies. For example:

1. How can nations help their citizens achieve a deeper understanding of the interlinked human, ecological and economic challenges their communities face?
2. How can nations learn to address and integrate these human, ecological and economic imperatives in their societies?
3. How can nations learn to build on such new approaches to achieve a far greater speed, scale and complexity of change?
4. How can nations apply these understandings to create and agree on new international systems, treaties, programmes and other measures to fast-forward progress?
5. How can institutions such as the UN, its agencies and allied entities such as the IMF, World Bank and the World Trade Organisation massively reinvent themselves so they can help lead these transformations?
6. What new technologies, such as ubiquitous communications, can help create new channels, informal systems and formal structures to empower individuals and their communities in ways local and international?
7. How will companies, markets and capitalism itself evolve rapidly so they can be ethical and effective forces for positive change?
8. What attributes of people and organisations might help guide such work?

The challenge before us, to develop a well-functioning global economy that operates efficiently, alleviates poverty and operates within the safe planetary boundaries, is immense. The New Zealand Centre for Global Studies is well placed to explore the above issues.

> The greatest challenge we face is a philosophical one: understanding that this civilization is already dead. The sooner we confront our situation and realise that there is nothing we can do to save ourselves, the sooner we can get down to the difficult task of adapting, with mortal humility, to the new reality. (Scranton, 2015)

1 *Oxford English Reference Dictionary*, 2nd edn, 2001, p.461.

2 http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html.

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Adrian Macey

The Atmosphere
the Paris Agreement and global governance

The 2015 Paris Agreement on climate change set a remarkable precedent for speed of entry into force of a global treaty. With the threshold of 55 parties and 55% of greenhouse gas emissions being reached within a year of its adoption, the agreement entered into force before the following Conference of the Parties (COP22) in Marrakech (November 2016). By the end of COP22 there were over a hundred ratifications.[1] This was both a vote of confidence in the agreement and a sign of the strong international commitment to tackle climate change. Less obvious is the fact that the agreement reflects a new model of international governance of climate change, in which the role of the central legal instrument has changed. It is yet to be tested, but these early signs of confidence augur well.

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In the earlier days of climate change negotiations, with the impetus coming largely from the Western powers, there was a widely shared assumption that a legally binding instrument was necessary to address this global commons problem. According to this view, it was axiomatic that to be effective, and to deal with the 'free-rider' problem, a compliance mechanism with sanctions was needed. Another assumption was that any agreement needed to be 'top-down', a term frequently used in and around the negotiations, but somewhat lacking in precision. The ultimate expression of 'top-down' perhaps was the referral of climate change to the United Nations Security Council,[2] the highest authority among states. It also included the concept that legal obligations would cascade down to individual states from the global level, distributed according to a burden-sharing principle.

The first and still the core international treaty on climate change, the United Nations Framework Convention on Climate Change (UNFCCC), only partly

satisfied these requirements. It was 'top-down' in that it defined the problem and set out some global goals. It included a burden-sharing principle, 'common but differentiated responsibilities and respective capabilities' (known as CBDR, but more correctly CBDR-RC, to give full weight to 'respective capabilities', an aspect that was later to become important in the negotiations). While the convention contains a general legal obligation on all parties to take action on climate change, this is not expressed in state-specific or quantified obligations, unlike the treaties on ozone or acid rain which had been seen as models.

The second climate change treaty, the Kyoto Protocol, came closer to satisfying the early assumptions through a quantified collective (but not global) goal, quantified, country-specific commitments and a compliance mechanism with sanctions. But these applied only to Annex I parties, broadly speaking those who were in the OECD in 1990 and the economies in transition of Eastern Europe. It was intended as a first step, with industrialised countries taking the lead. But it was adopted without a clear route towards expanding the number of parties with commitments, so could not hope to achieve the core objective of the convention. Of course the failure of the United States to ratify meant that the protocol could not fully achieve even its more limited objective.

Shortcomings of the top-down model

Difficulties with the top-down model were apparent when the Kyoto Protocol's trigger point for negotiating further commitments was reached in 2005. Extending legally binding obligations to all parties proved a huge obstacle. The first attempt led to a two-track negotiation of unequal legal status, with one element being the further legally binding commitments under the protocol for Annex I parties, the other a 'cooperative dialogue on long term cooperative action' under the convention (LCA), with any new commitments excluded. The two tracks persisted, with the second one gaining status as a full negotiation only from 2007.[3]

Given the formidable obstacle that neither the United States nor China, the world's two biggest emitters, could accept legally binding obligations, there was little prospect that a fully universal climate regime could replicate the Kyoto model. There were other difficulties too. Climate change reaches far more deeply and widely into sensitive areas of domestic policies than the environmental precedents of ozone and acid rain. Some states rejected the limitations on sovereignty that a binding commitment would entail. They were also reluctant to make 'targets and timetables' commitments far into the future because of the many uncertainties and risks they saw. If, despite these kinds of concerns, states are pushed into adopting binding commitments, they will be cautious and any targets will be conservative.

Given the formidable obstacle that neither the United States nor China ... could accept legally binding obligations, there was little prospect that a fully universal climate regime could replicate the Kyoto model.

Notwithstanding the manifest problems with the Kyoto model, many parties wanted to pursue it, with the European Union and the small island states prominent, and the latter prepared to break ranks with the G77, which was dominated by the larger states.

Another obstacle was that it was proving impossible to agree on burden-sharing criteria. In a context of a long-term agreement, some common understanding on burden-sharing is critical. There was then, as now, no shortage of burden-sharing methods, the subject of much work by academics. But all are problematic in the real world; none would be considered 'fair' by all countries. For example, basing the burden-sharing on per capita emissions, as many advocate, would directly oppose the two most populous countries, China and India; it suits the latter but not the former. Any burden-sharing principle is subject to challenge by countries listing 'national circumstances', for the most part to demonstrate the difficulties they would face in meeting an ambitious target. New Zealand's list includes its high percentages of renewable electricity and of emissions from agriculture.

What of the convention's CBDR principle? On the face of it this could be used to apply fairly to all parties, especially when full weight is given to 'respective capabilities'. Unfortunately, the principle had a legacy in the negotiations that was synonymous with the dichotomy of Annex I parties with binding quantified commitments and all other parties without them. There was a disincentive on parties to agree to shift from the commitment-free zone, hence the absurdity of some of the wealthiest countries in the world invoking CBDR to maintain their status quo. The United States stated clearly in the negotiations that it had no difficulty with the principle per se. But because of how it was being interpreted by many parties, retaining it unchanged in a new agreement was unacceptable. The dichotomy of CBDR reflected the 1990 world economy, the negotiations were taking place a quarter of a century after this, and the new agreement would need to look out towards mid-century. The biggest change factor was the emerging economies, with China in particular overtaking the United States as the world's highest emitter, and the emerging economies as a whole being responsible for most of the growth in global emissions.

Another weakness of the model, in the light of the evolution of the world economy, was the absence of non-state actors. Local government (especially

major cities) and business, two key sectors in the mitigation of greenhouse gases, were involved only on the periphery of the climate regime, and mostly informally. Local government everywhere was having to deal with the challenge of adaptation, which led to them addressing mitigation as well. As for business, aside from their own recognition of climate change, there was convergent evidence through economic analysis that most of the investment to achieve the transition from fossil fuels to clean energy would need to come from the private sector (UNFCCC, 2007, 2008).

These difficulties combined with poor handling of the conference to derail the Copenhagen COP in 2009. But the failure of the formal negotiations was accompanied by a politically conceived pivot towards a different model through the Copenhagen Accord. The accord was silent on the Annex I/non-Annex I dichotomy, instead referring to developed and developing countries. It was neither legally binding nor 'top-down'. Copenhagen indeed stimulated much rethinking about binding versus non-binding agreements, helped by research which demonstrated that the correlation between 'bindingness' (an awkward neologism that emerged from the negotiations) and effectiveness was weak (Bodansky and Diringer, 2010). Some advocates of a legally-binding agreement came to realise that the most important objective was to get a universal agreement which could deliver emissions reductions by all parties.

It was realised that other factors, such as reputation, could also be an incentive for action. The Copenhagen Accord itself, despite being voluntary and a side-agreement negotiated among political leaders of only a small number of parties, attracted more participants with pledges in the months following the conference. The following COP at Cancun brought the gains of the Copenhagen Accord into the UNFCCC, and its legacy is seen in the current 2020 pledges. But it takes time for such evolution in thinking to find its way into the formal negotiations, so anyone listening in on subsequent meetings would not have noticed much new.

Only with the 2011 Durban mandate was the basis for the Paris Agreement laid. Finally there was to be an agreement 'applicable to all', with no prima facie binary division. To achieve this required a continuation of Kyoto's commitment periods until 2020. The last point to be resolved was over legal 'bindingness'. An explicit mandate for a legally binding agreement was needed by the European Union, but was unacceptable to India. In the final moments of the COP, the EU appealed for an agreement where all parties were 'equally legally bound'. The disagreement was resolved by the necessarily ambiguous – and legally imprecise – wording of 'agreed outcome with legal force'.

To some extent the discussion of 'bindingness' was a proxy for something else: how to get other countries to take action commensurate with their responsibilities. At the same time as some parties were pushing for a legally binding agreement under the convention in the LCA track, alternatives to a Kyoto-type compliance mechanism were being explored. Negotiators came up with yet another term, MRV ('measurable, reportable and verifiable'), designed to describe something approaching a compliance mechanism through heightened transparency, and reporting and review rules. This had been formalised as early as the 2007 Bali negotiating mandate and taken somewhat further in the Copenhagen Accord.

An advance in thinking aided by some further research was the idea that the way to reconcile the disagreement over legal form was a 'hybrid' agreement, with the core disciplines split between binding and non-binding. There was no appetite for an agreement that would need continued renegotiation, so it was important to find an outcome that would be future-proof and able to attract universal or near-universal participation. There was much exploration following Durban of which elements of an agreement might be in each category.

Discussions after Durban produced a further refinement on burden-sharing. Whereas CBDR was absent from the Durban mandate (except as implied by its reference to the negotiations being under the convention), it subsequently returned with some additional words, 'in the light of different national circumstances'. This modification of CBDR lessened its de facto inflexibility. It allowed individual parties more confidence that their own circumstances could be recognised. This was consistent with the term 'nationally determined', which was often interpreted as a shift to a 'bottom-up' model. But equally it lessened the scope for countries to shelter behind the dichotomy to avoid making a fair contribution.

The period after Copenhagen was also notable for the efforts by successive COP presidencies to facilitate greater involvement by business. Mexico and France were the most successful. Local government also had a growing presence at COPs. These sectors came together at high level at the mid-point of COP21 (2015) to throw their weight behind an agreement, two further sides of a global leadership triangle whose first side was the 150 heads of state and government at the beginning of the conference. A powerful argument was that both local government and business were taking action on climate change independently of the UNFCCC, but that a new global

> Broadly, [the Paris Agreement's] legally binding provisions are contained in the agreement itself, and the non-legally binding ones in the accompanying COP decisions.

agreement was essential to enable their action to be more effective.

Thus, over the ten years since the start of this phase of climate change negotiations, the limitations of the old model had been well explored, and some new ideas injected, tested and, if promising, socialised. Much of this new thinking came about through research and informal, offline meetings. The contribution of this accumulated work to the success of the Paris Agreement should not be underestimated.

Paris: towards a new model of climate governance

The Paris Agreement is a treaty and in anything but name is a second protocol to the UNFCCC.[4] It can be seen as a 'hybrid' consistently with the way this concept emerged during the negotiations. Broadly, its legally binding provisions are contained in the agreement itself, and the non-legally binding ones in the accompanying COP decisions. The fundamental distinction centres on the nationally determined contributions (NDCs). There is a binding obligation to *have* an NDC in order to ratify the Paris Agreement, but the content of the NDC, principally any target or targets, is not binding. The legal obligation under article 4.2 is to *intend* to achieve the NDC, and to pursue domestic measures towards achieving it. It is also a requirement for successive NDCs to be a progression beyond the previous one, and to reflect a party's highest level of ambition. Taken together, the non-binding and nationally determined aspects go a long way to allaying states' concerns about the risks such as a target that could not be met, or competitive risk if other countries do not take on a commensurate share of the burden. This represents the resolution of the long-standing differences on legal form among parties. Within this broad distinction there is a range of different levels of obligation in both the agreement and the decisions, conveyed by such terms as 'shall', 'should', 'parties aim to', 'should strive to', etc.[5] A sign of the critical importance of the language around obligations was that the final issue to be resolved at Paris required a late change from 'shall' to 'should' to satisfy the United States.

Much better science communication helped to clarify what the fundamental objectives of the global climate regime should be. The aim of limiting global temperature increase to well below 2° in article 2 is supplemented by references in article 4 to peaking and to implied carbon neutrality (a balance between sources and sinks) before the end of the century. These were informed by the contribution of science to understanding the importance of cumulative long-lived gases. Together they give substance and precision to the convention's objective of stabilising greenhouse gases at a safe level (UNFCCC article 2).

Another achievement of Paris is to revise and reintegrate other elements of the international climate change regime that had been built up under the [United Nations Framework Convention on Climate Change].

The agreement overcomes the rigidity of CBDR in another way by retaining the reference to developed and developing countries, and adding an expectation that developing countries will move towards quantified economy-wide targets as they are able to. This nicely complements the reference to different national circumstances in article 2, and gives the flexibility that the Kyoto Protocol lacked. The problematic binary distinction based on two lists of countries would not be consistent with the agreement. Only least developed and small island developing states retain separate recognition.

The Paris Agreement's alternative to a compliance mechanism for NDCs is called an 'enhanced transparency framework'. It stems from the earlier discussion around MRV. It aims to 'facilitate clarity, transparency and understanding' and to 'build mutual trust and confidence and to promote effective implementation'. The rules still to be negotiated will be important to monitor progress, and to encourage countries to continue to pledge their highest possible ambition. They are also expected to demonstrate how their contributions are consistent with the goals of the agreement. The incentive thus becomes a positive one of maintaining reputation rather a negative one of avoiding penalties.

Another achievement of Paris is to revise and reintegrate other elements of the international climate change regime that had been built up under the UNFCCC. In its core article 2, the Paris Agreement gives adaptation and finance equal status with mitigation. Its provisions on adaptation, technology, capacity-building, finance, and loss and damage draw together and update existing mechanisms and bodies in a more coherent framework. It is not quite complete. There remains uncertainty and controversy about carbon markets, which are important to many parties. But there is implied if not explicit recognition of their legitimacy in article 6. How the technology framework established under the agreement will function is also unclear, but its role in 'addressing the transformational changes envisioned in the Paris Agreement' was usefully acknowledged in Marrakech (UNFCCC, 2016).

There is also stronger recognition of the role of non-state actors. This is somewhat limited in the agreement itself, which recognises 'the importance of the engagements of all levels of government and various actors ... in addressing climate change'. But in the final preambular paragraph of the accompanying decisions this is expanded to agreeing 'to promote regional and international cooperation in order to mobilize stronger and more

ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other sub national authorities, local communities and indigenous peoples'. The message here is that tackling global warning requires a cooperative effort across sectors, with governments as but one player. This in itself is a significant shift from earlier legal instruments, and indeed from the beginning of the latest phase of negotiations in 2005, when there was little explicit recognition of this fact.

So is the 'hybrid' Paris Agreement top-down or bottom-up? It is both, and in fact it renders these terms obsolete. The fact that parties determine their own contributions does not make the whole agreement bottom-up. Arguably the most important dimension is the global goals, which are all top-down; they provide an overall framing with which nationally determined contributions must be consistent. And they give an authoritative high-level message to other actors.

Prospects

In the Paris Agreement and its associated decisions, two approaches coexist: what one might call the 'targets and timetables' and 'long-term transition'. The five-yearly NDCs reflect the former. Over the long term it is likely that the latter will dominate, with the targets and timetables still useful to monitor progress. There will still be value in regular assessment of progress towards the global goals through the five-yearly reviews. The global carbon budget that the agreement's goals imply will also be a useful frame of reference, though it remains unrealistic to expect individual shares to be determined from this and allocated through the agreement. In the context of moving towards global carbon neutrality, it is the nature, speed and direction of the transitions that will matter most. This implies a hard look at each economy, sector by sector, and could prove a more powerful organising principle than five- or ten-yearly economy-wide targets and timetables.

The legal instrument at the centre of governance of climate change has thus changed in nature. Previously this was seen as the arrangement among governments needed to effect change. From defining and imposing obligations, it has moved more towards a framework to facilitate, support and encourage action among not only governments but also non-state actors. The context outside the negotiations has seen governments and other actors taking autonomous action. The Paris Agreement has already had an influence that goes far beyond the scope of its legal provisions. As an illustration, while silent on the maritime and aviation sectors, the agreement has supported and stimulated progress in their respective bodies. These two categories were not included in the Kyoto Protocol's legal disciplines, and consensus on how, if at all, they might be brought into the post-2020 UNFCCC arrangements is elusive. But the Paris Agreement provided a context which these sectors could not ignore. Both delivered results between the Paris and Marrakech COPs,[6] as did the Kigali amendment to the Montreal Protocol, on HFCs (hydroflourocarbons), described by UN Environment Programme as 'another global commitment to stop climate change.'[7]

The emerging governance model for climate change is thus an amalgam of traditional intergovernmental provisions and recognition of the role of entities other than governments. It expresses a shared responsibility, where the role of the intergovernmental agreement is to provide the best conditions for the other entities to pay their part. The Paris Agreement is at the centre, by itself not saving a single tonne of CO_2, but providing impetus and guidance, and enabling a network of links to actors and actions that will. Some of these links are binding and non-binding legal ones with governments; the others are informal but still capable of stimulating action and providing a favourable context for it. A perfect illustration of the new model in operation is the 2050 pathways platform launched at COP22.[8] Conversely, the momentum amongst the broader network of actors recognised and facilitated by the agreement can potentially limit the effect of any adverse policy shifts by central governments.

Before the ink was dry on the agreement, expert commentators rushed in to spoil the Paris party by stating the obvious, that the tabled [nationally determined contributions] were collectively far short of the ambition needed to stay within the 2° target, let alone 1.5°.

Conclusion

Will this model of climate change governance prove effective? Before the ink was dry on the agreement, expert commentators rushed in to spoil the Paris party by stating the obvious, that the tabled NDCs were collectively far short of the ambition needed to stay within the 2° target, let alone 1.5°. But this was to miss the point of the achievement, overstating the role of the agreement itself, and underestimating the future contributions from non-state actors. Assuming the remaining details, such as the transparency and accounting rules, can be completed and adopted by 2020, the agreement's first major test will be the 2023 global stocktake. It is very likely that a further round of international political leadership will be needed to stimulate more ambitious mitigation efforts.

The Paris Agreement is not perfect, but it has demonstrably created momentum.

It appears capable of evolution without major renegotiations because, as the early entry into force showed, it got the fundamentals right. This makes the agreement a vehicle for greater ambition. It should also be resilient against temporary defections. Providing all its essential rules are in place and are seen to work, it may become a precedent that the international community can use to meet future global commons challenges.

1 In contrast, the Doha amendment to the Kyoto Protocol, adopted three years before the Paris Agreement, had by the same date received only about half the number of acceptances necessary for its entry into force.

2 The Security Council has addressed climate change on several occasions, including two thematic debates in 2007 and 2011 at the initiative of the UK and Germany respectively. Ban Ki-moon, UN secretary general, described its attention to climate change as 'appropriate and essential'. But the Security Council has not been able to agree that climate change is a threat to peace and security. Many countries wanted to avoid any leakage of negotiations from the UNFCCC, whose CBDR principle (see below) would not apply in the Security Council.

3 For the history of the negotiations from 2005 to the Paris Agreement see Macey (2012, 2016).

4 The term 'protocol' would have made it more difficult for the US administration to classify it as an executive agreement, and hence avoid the need for Senate approval.

5 For a detailed legal analysis of the Paris Agreement see Bodansky (2016).

6 After the Paris Agreement, silent, to the dismay of some, on maritime emissions, a maritime industry official commented: 'the shipping industry remains committed to ambitious CO_2 emission reduction across the entire world merchant fleet, reducing CO_2 per tonne-km by at least 50% before 2050 compared to 2007'. See other, similar comments at http://worldmaritimenews.com/archives/178732/cop21-paris-remains-silent-on-shipping-and-aviation. The International Maritime Organisation's maritime environment protection committee (MEPC), at its October 2016 meeting, agreed on further measures, including a CO_2 monitoring system. At this meeting frequent reference was made to the Paris Agreement, and the need to front up to COP22 with a positive story. Industry associations called for work to determine shipping's '"fair share contribution" towards reducing the world's total CO_2 emissions'. See https://www.bimco.org/News/Press-releases/20161019_Shipping_industry_united_in_seeking_further_progress_on_CO_2_at_critical_IMO_meeting. It was a similar story for aviation. An air transport body, the Air Transport Action Group, would have liked to see aviation included in the Paris Agreement, but nonetheless saw it as providing 'positive momentum' for the sector. ATAG also reiterated the goal of carbon neutral growth from 2020. See http://aviationbenefits.org/newswire/2015/12/aviation-co2-emissions-to-be-dealt-with-next-year-at-icao. This momentum was real: less than a year later, in October 2016, the International Civil Aviation Organization established a new global market-based measure (GMBM) to control CO_2 emissions from international aviation. See http://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-inernational-aviation-emissions.aspx.

7 http://web.unep.org/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate-change.

8 The platform will 'support countries seeking to develop long-term, deep decarbonisation strategies ... It will also build a broader constellation of cities, states, and companies engaged in long-term low-emissions planning of their own, and in support of the national strategies'. See http://newsroom.unfccc.int/media/791675/2050-pathway-announcement-finalclean-3.pdf.

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Duncan Currie

THE OCEANS
the Law of the Sea Convention as a form of global governance

The ocean under threat

Life came from the ocean. Without the ocean, life on Earth is not possible. The ocean produces and regulates much of the planet's oxygen and water, provides substantial amounts of its nutrient and carbon cycling and supports most of its biological diversity. Fish feed over 3 billion humans, supplying 20% of their animal protein intake (FAO, 2016).

The resilience of the ocean is decreasing. The biodiversity of the high seas, which constitute almost half of Earth's surface, remains largely unprotected from multiple threats. These include pollution, overfishing and destructive fishing, noise, and other new and emerging uses. All are compounded by climate change and ocean acidification.

Severe depletion of coastal and shelf fisheries has long been widely acknowledged, but for many years the open ocean was still considered one of the last great wild places on Earth. We now know that the open ocean, too, is under threat. In 2003, Myers and Worm noted that 90% of all of the open-ocean tuna, billfish and shark were gone (Ward and Myers, 2003). In 2005 Ward and Myers showed the potential for trophic cascades and significant declines in mean trophic level as fishing erodes top-down control (Myers and Ward, 2005; Jackson, 2008). In 2006 Worm concluded that marine biodiversity loss is increasingly impairing the ocean's capacity to provide food, maintain water quality and recover from perturbations (Worm et al., 2006).

These changes carry economic costs: in 2009 the World Bank and the Food and Agriculture Organization warned that overfishing, loss of habitat, pollution, rising sea temperatures, acidity, illegal fishing and subsidies were costing the world economy over $50 billion per year (World Bank and FAO, 2009, p.41). Yet the number of overexploited fish stocks continues to increase (FAO, 2016). In 2010, 67% of fish stocks were overfished, and a new UN report notes that since 2010 there has been an overall decline in highly migratory and straddling stocks (Cullis-Suzuki and Pauly, 2010; Secretary-General to

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the Review Conference, 2016, para 16). Fishing has caused trophic cascades, regime shifts, ecosystem-level impacts, and severe declines in sharks, turtles and marine mammals (Ortuño Crespo and Dunn, 2016). Drivers of overfishing include overcapacity, destructive fishing methods, poor governance and weak institutions, loss of spawning and nursery habitat, and the insufficient application of the ecosystem approach and of the precautionary approach (World Bank, 2007). Overfishing has moved to the deep sea, which constitutes the largest source of species and ecosystem diversity on Earth (UN, 2016, ch.36F), with systematic overfishing and few stock assessments.

Two other anthropogenic impacts, climate change and ocean acidification, are multiplying effects on the ocean. It is generally unrecognised that 93% of the planet's anthropogenic heating since the 1970s has been absorbed by the ocean. Yet, ominously, the trend in ocean warming is accelerating (Wijffels et al., 2016). This year the NOAA (National Oceanic and Atmospheric Administration) reported that 2015 was the warmest year within the 136-year reconstructed sea surface temperature records (NOAA National Centers for Environmental Information, 2016). It has been estimated that if the amount of heat that has gone into the upper 2,000 metres of the ocean from 1955 to 2010 had gone into the lower 10 kilometres of the atmosphere, it would have seen a warming of a massive 36°C (Whitmarsh, Zika and Czaja, 2015, p.2). Oceanic algae provide half of the oxygen humans breathe and constitute a major consumer of anthropogenically produced atmospheric CO_2 (Laffoley and Baxter, 2016, p.400).

These trends matter. Sea surface temperature, ocean heat content, sea level rise, melting of glaciers and ice sheets, CO_2 emissions and the atmospheric concentrations are all increasing at an accelerating rate. These have grave consequences for the marine species and ecosystems of the ocean, and for humanity which depends on the ecosystem services. The ocean plays a crucial role in climate regulation (ibid., p.17). Over 90% of global carbon dioxide is eventually stored and cycled through the oceans on long timescales, and the current oceanic uptake is around 30% (Archer, Kheshgi and Maier-Reimer, 1998; Sabine et al., 2004). Climate change may mean the ocean becomes a less effective sink (Sabine et al., 2004). Warming and acidification of the oceans due to climate change comprise an uncontrolled experiment on a global scale. Warming of the ocean surface increases the stratification of the oceans, because warmer and lighter surface waters inhibit upwelling of cooler and denser nutrient-rich waters from below (Schmittner, 2005). Climate change effects on the ocean include coral bleaching, sea level rise, ocean warming, changing currents, melting polar ice and intense weather events (Laffoley and Baxter, 2016).

Ocean acidification, separate from climate change but closely related, is caused by the dissolution of carbon dioxide in the ocean, forming carbonic acid (Feely et al., 2004). Ocean acidification is already 30% over pre-industrial times, and will cause decreased calcification and growth of organisms which are major components of the cycling of carbon and the CO_2 storage capacity of the ocean (Riebesell et al., 2000). Nor are these the only impacts: planetary boundaries represent thresholds beyond which the risk of 'irreversible and abrupt environmental change' to planetary life support systems would make Earth less habitable (Rockström et al., 2009). Nitrogen burdens on the ocean are already estimated to be exceeding the planetary boundary; the ocean acidification boundary and biodiversity are in the high risk zone (Stockholm Resilience Centre, 2016). The cost of damage to the ocean could reach an additional $322 billion per year by 2050 as a result of climate change alone (Noone, Sumaila and Diaz, 2012, p.9).

The contemporary picture of degradation of Earth's oceans is not pretty. In fact, it is somewhat terrifying. What, then, is the 'emerging global community' doing by way of response?

The Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS), negotiated in 1982 and in force since 1994, today has 168 states parties (164 of the 193 UN member states, plus the European Union and two small island territories).[1] The convention contains strong provisions to protect the marine environment:

Ocean acidification, separate from climate change but closely related, is caused by the dissolution of carbon dioxide in the ocean, forming carbonic acid …

- article 192 requires parties to protect and preserve the marine environment, and article 194 requires them to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life;
- articles 123 and 197 contain a duty to cooperate, which the International Tribunal for the Law of the Sea has said is a fundamental principle in the prevention of pollution of the marine environment under part XII of the convention and general international law.[2]

These obligations were highlighted in a recent arbitration between the Philippines and China concerning China's actions in the South China Sea.[3] The tribunal held that article 192 imposes a duty on states parties.[4] This general obligation extends both to protection of the marine environment from future damage and to preservation in the sense of maintaining or improving its present condition. The tribunal

observed that 'Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment'.[5] Since international law requires that states ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control,[6] states have a positive duty to prevent, or at least mitigate, significant harm to the environment when pursuing, in that case, large-scale construction activities.

The tribunal [in a recent arbitration between the Philippines and China] observed that 'Article 192 ... entails the positive obligation to take active measures to protect and preserve the marine environment ...

This duty informs the scope of the general obligation in article 192. Articles 192 and 194, which concerns pollution, found the tribunal, 'set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment'.[7] Being an obligation of due diligence, or of conduct, this requires a 'certain level of vigilance in their enforcement and the exercise of administrative control'.[8] The tribunal also reiterated its finding that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'.[9]

The tribunal then found that China has, through its toleration and protection of, and failure to prevent, Chinese fishing vessels engaging in harmful harvesting activities of endangered species, breached articles 192 and 194(5) of the convention.[10] How, then, to turn these obligations into action?

Global action for ocean protection

One crucial tool of ocean protection is the implementation of marine protected areas, including marine reserves (Lubchenko et al., 2003). In 2010, in Aichi target 11, governments called for a representative network of marine protected areas to be established by 2020.[11] Without an implementing agreement under UNCLOS, it would be difficult to establish marine protected area networks, assess cumulative impacts or develop a benefit-sharing regime for marine genetic resources. An overarching, legally binding mandate and framework setting out goals and purposes could provide for integrated marine protected areas in areas beyond national jurisdiction (ABNJs), providing international support for areas in need of protection, complemented by measures adopted at the regional level (Currie, 2014, 2013).

In 2012, assembled for the Rio+20 conference, the international community developed priorities for the promotion of sustainability. The outcome document, The Future We Want (UNCSD, 2012, paras 113, 158), stressed the crucial role of healthy marine ecosystems, sustainable fisheries and sustainable aquaculture for food security and nutrition, and in providing for the livelihoods of millions of people. It also highlighted the importance of the conservation and sustainable use of the oceans and seas and of their resources for sustainable development and protecting biodiversity and the marine environment and addressing the impacts of climate change. States therefore committed to protecting and restoring the health, productivity and resilience of oceans and marine ecosystems, and to maintaining their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively applying an ecosystem approach and the precautionary approach in the management of activities affecting the marine environment. The conference also agreed on specific measures on fisheries (ibid., para 168), and reaffirmed the importance of area-based conservation measures. These included marine protected areas consistent with international law, based on best available scientific information, as a tool for conservation of biological diversity and the sustainable use of its components.

These are all worthy goals and commitment, and hard fought through long nights of negotiations. But the challenge is, as it always has been: how to implement them? One key paragraph held the seeds of real progress: building on the work of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction – the so-called 'BBNJ' working group – and before the end of the 69th session of the UN General Assembly, states further committed to addressing, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under UNCLOS by September 2015 (ibid., para 162).

That short paragraph was probably the most hard fought of the document, for the ocean at least, and for good reason: it committed the General Assembly to taking a decision in a time-bound way on whether to develop an international instrument. This would be the third implementing agreement under UNCLOS, the first two having addressed seabed mining and fisheries. It would specifically address marine biodiversity, which was all but ignored in the convention, having been negotiated in the 1970s before the importance of biodiversity was really understood.

The Rio agreement followed an agreement in 2011 on a 'package' of elements. Then, states participating in the BBNJ at UN headquarters agreed to work towards the establishment of an intergovernmental negotiating process that would 'address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole': marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; and capacity-building and the transfer of marine technology.[12]

Finally, in January 2015, states negotiating in the BBNJ meeting recommended to the General Assembly that it develop an international, legally binding instrument under the convention on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (UN AHWG, 2015); this was affirmed by the General Assembly in June 2015.[13] That resolution initiated a preparatory committee to report back with substantive recommendations on the elements of a draft text of a binding instrument under UNCLOS. The preparatory committee has since had two sessions (March–April and August–September 2016), with the third scheduled for March–April 2017.[14] The sessions have been well attended and, under able chairmanship from Trinidad and Tobago, have made good progress.

Throughout the process the High Seas Alliance, founded in 2011 and comprising 33 non-governmental organisations in addition to the International Union for the Conservation of Nature (IUCN), has worked through briefing papers, advocacy at UN meetings, through states and through organising and participating in workshops to inspire, inform and engage the public, decision makers and experts.[15]

The BBNJ process has been notable for its transparency and for the engagement of civil society with delegations and the United Nations, and facilitated by the UN's Division for Ocean Affairs and the Law of the Sea.[16] By the end of its 22nd session in 2018, the UN General Assembly will decide on whether, and when, to convene an intergovernmental conference to elaborate the text of an internationally legally binding instrument. Another important process in oceans governance is the adoption of the Sustainable Development Goals. After intensive years of lobbying, a stand-alone ocean goal (goal 14) was agreed, to conserve and sustainably use the oceans, seas and marine resources for sustainable development.[17]

a whole. It needs effective management and development of ocean space resources beyond national jurisdiction for the benefit of all countries and the sharing of those benefits (Pardo, 1993, p.39).

These prescient words from the father of the Law of the Sea Convention may finally become reality through the BBNJ process. The process of effecting change in the oceans is slow, difficult and often frustrating, but it is essential if humankind is to move from the failed international 'freedom of exploitation' model to a global 'benefit-sharing and good governance' model. With transparency and accountability, and the partnership of diplomacy and civil society, the kind of cooperation and consultation promised in UN Convention on the Law of the Sea may finally bear fruit, and global governance for the protection of the oceans take hold.

The past century, … has shown that … freedoms are not to be taken as unlimited, and in particular that the freedom to exploit is exactly what is causing global degradation of the oceans.

Conclusion

The ocean has for centuries been seen as a free-for-all. As recently as the 1980s the principle of complete freedom of navigation, trade and fishing on the high seas, developed by Grotius in Mare Liberum, first published in 1609, was reflected in the negotiations over UNCLOS.

The past century, however, has shown that these freedoms are not to be taken as unlimited, and in particular that the freedom to exploit is exactly what is causing global degradation of the oceans.

In 1990, Greenpeace and other non-governmental organisations convened a conference on 'Freedom for the seas in the 21st century', under the leadership of Professor Jon Van Dyke of the University of Hawaii. Arvid Pardo, whose 1967 speech to the UN General Assembly had stimulated the development of the 'common heritage of mankind' concept and UNCLOS itself, personally presented a paper. Pardo observed that the international community must resolve the dichotomy between the need to use and exploit ocean space and the need to avoid the consequences of such use. This, he argued, leads to a need to establish a new legal order governing ocean space as

1 http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm.
2 *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Case 12, order of 8 October 2013, https://www.itlos.org/en/cases/list-of-cases/case-no-12/#c702, para 92.
3 South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Permanent Court of Arbitration, case 2013-9, award 12 July 2016, http://www.pcacases.com/web/view/7.
4 Ibid., para 941.
5 Ibid.
6 Citing Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p.226, at pp.240-2, para 29.
7 South China Sea arbitration, para 944.
8 Ibid.
9 Ibid., *citing MOX Plant (Ireland v. United Kingdom) Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, para 82.
10 Ibid., para 992.
11 Aichi Biodiversity Targets, 2010, target 11: By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes. https://www.cbd.int/sp/targets/.
12 Letter dated 30 June 2011 from the co-chairs of the Ad Hoc Open-ended Informal Working Group to the president of the General Assembly, document A/66/119, §I.1(a) and

(b), http://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm.
13 UN General Assembly resolution 69/292 (19 June 2015), http://www.un.org/en/ga/69/resolutions.shtml.
14 See http://www.un.org/depts/los/biodiversity/prepcom.htm.
15 http://www.highseasalliance.org/.
16 http://www.un.org/depts/los/doalos_activities/about_doalos.htm.
17 2030 Agenda for Sustainable Development, General Assembly resolution 70/1: *Transforming our World: the 2030 Agenda for Sustainable Development*, 25 September 2015: see http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-14-life-below-water.html

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Klaus Bosselmann

Governing the Global Commons
the 'planetary boundaries' approach

Introduction

This article offers some ideas about a system of governance which reflects the reality of planetary boundaries (Rockström et al., 2009; Steffen et al., 2015). The goal of living safely within the boundaries of our planet cannot be achieved by relying on traditional forms of governance based on the concept of sovereign nation states. States, driven by national interest, have been resistant to accepting responsibility for areas beyond national jurisdiction known as the global commons (Ostrom, 1990). The focus for governing the global commons – the polar regions, oceans, atmosphere, outer space – needs to shift from states to Earth as a whole, evoking what might be called 'Earth governance' (Bosselmann, 2015).

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Hence, consensus-building ultimately resides with citizens, not with governments. It is appropriate, therefore, to perceive of governments as trustees acting for, and on behalf of, citizens as beneficiaries (ibid., pp.155-97). In the Anthropocene, citizenship has ecological and global dimensions (ibid., pp.42-45). This calls for transnational processes of forming the collective will. In this way we can perceive Earth, not states, as the common reference point, enabling us to develop a strong sense of stewardship, or guardianship, for the global commons. This reasoning makes the case that states can, and must, accept fiduciary duties for the global commons.

Reclaiming Earth: the global commons

Currently, the atmosphere is being treated as an open-access resource without any legal status: it is widely regarded as *ius nullius*, a legal nullity. This works for property owners, who fill the vacuum by exercising their property rights. Such rights may not include a right to pollute, but the absence of someone who could

claim violation of their own rights means that actual pollution goes without any sanction. In fact, it is free. This will be qualified only when the law sets rights-limiting emissions standards. To date this has been an uphill battle, which has not been made easier merely by having the Paris Agreement. By asserting that we all own the atmosphere, we begin to use the institutions of law working in our favour. As legal owners we can charge for damage to our common property, provide rewards to those who protect it (e.g. producers and users of renewable energy) and in this way eliminate greenhouse gases.

This could be supported by the public trust doctrine – that natural commons should be held in trust, since assets serve the public good. It is the responsibility of the government, as trustee, to protect these assets from harm and ensure their use for the public and future generations. Nationally, the government would act as an environmental trustee, while internationally states would jointly act as trustees for the global commons, such as the atmosphere. Considering that only about 90 companies are responsible for two thirds of carbons emitted into the atmosphere, a global trusteeship institution could quickly fix the problem of climate change (Costanza, 2015).

The idea of global nature trusts has been promoted by environmental lawyers Mary Wood and Peter Sand, as well as economist Peter Barnes (Wood, 2007, 2013; Sand, 2004, 2013, 2014; Barnes, 2001, 2006). Recently, the global petition Claim the Sky was launched by Robert Costanza with support from the Club of Rome.[1] Trusteeship governance is also advocated by the rich literature on the commons (e.g. Bollier, 2014; Bollier and Weston, 2013; Helfrich and Haas, 2009; Ostrom, 1990). The 'reclaiming the commons' movement has certainly found a new momentum in recent times.

International law and the United Nations are not only needed, but practically ready to develop institutions of trusteeship governance. There is, for example, a tradition of UN institutions with a trusteeship mandate, including the (now retired) UN Trusteeship Council, the World Health Organization with respect to public health, and, ironically, also the World Trade Organization with respect to free trade (Bosselmann, 2015, pp.198-232). A number of other UN or UN-related institutions with weaker trusteeship functions exist as well (ibid., p.206). Quite obviously, states have been capable of, expressively or implicitly, creating international trusteeship institutions. These developments – and in particular the existence of supranational organisations such as the European Union – demonstrate that sovereignty of states can be transferred to international levels.

The practice of state governance in recent decades has affected how environmental policies and laws are being conceived.

The underpinning motives are not so much of a particular legal nature, but rather driven more by politics. And politics is driven by morality that presently favours exploitation. But morality can be subject to change. By insisting on the common good, civil society can reclaim lost ground and rebuild democracy. Trusteeship governance should be seen as a joint effort of the UN, states and civil society organisations with an equal say in decision making.

Sovereignty and trusteeship

There is, at present, an alliance between politics ('sovereignty') and private interests ('property') which can undermine the democratic process and public concern for safeguarding the global commons. As Barnes points out, '[n]ot even seated at democracy's table – not organised, not propertied, and not enfranchised – are future generations, ecosystems, and nonhuman species' (Barnes, 2006, p38).

The practice of state governance in recent decades has affected how environmental policies and laws are being conceived. Mary Wood calls this a 'discretionary frame', which means that governments see themselves as perfectly entitled to give priority to short-term resource exploitation over long-term resource conservation (Wood, 2013, p.592). Environmental commons are perceived as 'government-owned', but not with any concern for future generations, nonhuman species, or even the contemporary citizen (Barnes, 2006, p.43). It is clear that governance today is about a quid pro quo, symbiotic relationship between political institutions and corporations (ibid., p.37). The rewards for the latter include property rights, friendly regulators, subsidies, tax breaks, and free or inexpensive use of the commons. This means little is left for the 'common' good.

Fundamentally, the legitimacy of the state rests on its function to act for, and on behalf of, its citizens. This requires consent of the governed.[2] Governmental duties can therefore be understood as fiduciary obligations towards citizens (Fox-Decent, 2012; Frankel, 1983). Such fiduciary obligations are recognised typically in public law.[3] They exist in common law and civil law (although in varying forms and degrees),[4] and are also known in international law (Blumm and Guthrie, 2012; Perritt, 2004; Brown Weiss, 1984). The fiduciary function of the state can also be described as a trusteeship function (Finn, 1995).

Let us, therefore, examine how state sovereignty can be reconciled with trusteeship. *Prima facie* both seem to have different purposes. Yet they are part of the same basic function of the state, which is to serve the citizens on whom it depends and to whom it is accountable.

The environmental crisis and the state of the global commons gives rise to the need for revisiting the relationship between sovereignty and trusteeship (Stec, 2010, pp.361, 378-80, 384-85).

Trusteeship must be pursued at both the international level and the domestic, internal level. As Benvenisti notes, the private, self-contained concept of sovereignty is less compelling than it was in the past because of the 'glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders'. This engenders inefficient, undemocratic and unjust outcomes for under- or unrepresented affected stakeholders (Benvenisti, 2013, pp.295, 301). Non-citizens, future generations and the natural environment all fall into this category.

There are two challenges to advancing the idea of trusteeship, and both boil down to sovereignty. On the one hand, to propose a system of international trusteeship is to directly challenge the principle of non-interference in the domestic affairs of states. To propose that states become trustees themselves, in addition to an international system of trusteeship, is, again, an intrusion into their sovereign right to determine their approach to the environment. However, without the latter we will not achieve the former. Regardless of what one thinks about the legitimacy of sovereignty and the entire make-up of international relations, the reality is that states call the shots. Unless there is a radical reorganisation of global politics, we need to work within the state-centric context.

Trusteeship is an idea which softens the blow of what would otherwise be seen as an unprecedented intrusion into sovereign state affairs. This is a type of intervention that was not envisaged in the UN Charter, but is nonetheless desirable and legitimate (Bantekas, 2009, p.19). As Redgwell explains, 'trust arrangements do not challenge sovereignty directly, for one of the advantages of trusteeship arrangements is the absence of sovereignty in the exercise of trusteeship functions – there is no transfer of sovereignty to the trust authority' (Redgwell, 2005, p.179).

But what if trust arrangements were perceived as a significant intrusion into sovereignty? The many proposals of trusteeship arrangements at the level of the UN have been, more often than not, greeted with hostility. States seem too attached to the principle of non-interference to appreciate cooperation of this kind. Yet the very origins of the concept of state sovereignty are closely linked with humanitarian concerns. The Peace of Westphalia, as the foundation of state sovereignty, was a key instrument for upholding humanitarian precepts relating to freedom of conscience and religion (Stec, 2010, pp.378-80). To the extent that it resolved a crisis of freedom of conscience and equality before the law and many pre-existing institutions had lost their legitimacy and ultimately collapsed, sovereignty has been and can be justified. But it should also be remembered that humanitarian concerns were at the root of the crisis that the new order resolved. Where new crises emerge, can the principle of non-interference really be justified?

Similarly, with regard to the state itself as environmental trustee for those over whom it governs, it could hardly be refuted that a democratically elected government does not owe its citizens a duty to govern their natural wealth and resources in a sustainable way.[5] The first step, then, is reminding ourselves, as citizens and society, that these rights and responsibilities rest with us, despite the state acting as our representative. The second step is convincing the consumer society of what these rights and responsibilities entail. This is no small feat.

The only way to turn things around and move international law from the Westphalian conflict model to a 21st-century cooperation model is to redefine states as trusteeship organisations.

Fiduciary duties of the state

The only way to turn things around and move international law from the Westphalian conflict model to a 21st-century cooperation model is to redefine states as trusteeship organisations. Sovereignty and trusteeship must be seen as complementary, not mutually exclusive. The argument in favour of states as trustees proceeds along the following lines.

The state gains its legitimacy exclusively from the people who created it. While the legality of a state depends on recognition by other states, once in existence a state can only ever legitimise its continued existence through ongoing trust by its people. The core idea of the modern democratic state is that it acts through its people, by its people and for its people. This implies a fiduciary relationship between citizen and state and is arguably the only legitimate basis for political authority (Reisman, 1990). It is echoed in constitutional documents such as the 1776 Pennsylvania Declaration of Rights: '[A]ll power being . . . derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them' (Criddle and Fox-Decent, 2009; Pennsylvania Constitution of 1776, article 1). Locke asserted that legislative power is 'only a fiduciary power to act for certain ends' and that 'there remains still in the people a supreme power to remove or alter the legislature when they find the legislative act to be contrary to the trust reposed in them'.

Kant drew the moral basis of fiduciary obligations from the duty-bound relationship between parents and children (Criddle and Fox-Decent, 2009, p.352). Children have an innate and legal right to their parents' care. State legitimacy is the result of a contract necessarily created between people to form Rousseau's 'general will'. Through this process, Kant claimed, we jointly authorise the state to announce and enforce law.

That state sovereignty is fundamentally a trust relationship cannot be dismissed as a Western ideal. Trusts and the implicit fiduciary relationship are traced back to Middle Eastern origins and Roman and Germanic law, as well as being inherent in religious teachings. The idea is perhaps even more prevalent in non-Western societies because they emphasise collective identity (family, clan, nation, religion) over individual freedom and dignity, imbuing implied fiduciary obligations into the structure of public and private legal institutions (ibid., pp.378-79). The Universal Declaration of Human Rights states that 'the will of the people shall be the basis of the authority of government'.[6]

So, although we may have democracy (and many places do not) in a technical sense, we have lost sight of what duty the state owes to those it governs. At its most simplistic, the state's legitimacy to govern is based on its ability to serve the common interest. Aristotle saw the purpose of the state as for the 'common good'. Locke hinted at such a purpose. But who defines common good and what does it include? According to Locke's definition, the common good was what arose from there being surplus produce that could be sold in the marketplace. The common good is 'a quantifiable one, not a moral one. From this concept of quantity would flow the modern measure of the common good – the Gross Domestic Product – a poor measure of any society's real quality of life' (Collins, 2008, p.455). But because 'common interests' are socially conceived, they are not static and can be contested; we can argue that new functions and responsibilities ought to become a part of the state's mandate to govern.

We have seen that government perceives its role largely as a facilitator of economic growth, seen as analogous to 'prosperity', and thus the protector of private property (ibid.); that is, the belief that allowing individuals to pursue their own interests will result in the best possible social organisation. Few governments could argue that they do not owe a fiduciary duty to their constituents. Indeed, now more than ever governments are scrambling to reduce deficits in order to fulfil their obligation to the public not to overspend. The problem is that states have neglected the ecological aspects of their fiduciary duty. And we, as the voting public, have let them.

Benvenisti conceives of three other normative bases according to which we should ascribe a trusteeship function to states' mandate to govern. The first two grounds lend themselves most easily to the development of rights and obligations under a conception of state trusteeship limited to intra-generational concerns. A normative approach which grounds itself in global resource distribution may be more conducive to the realisation of state trusteeship according to principles of inter-generational equity.[7]

States need to exempt transnational ecological aspects from the concept of exclusive territorial sovereignty, making way for global commons governance.

First, sovereignty should be viewed as a vehicle for the exercise of personal and collective self-determination (Benvenisti, 2013, p.301). Collective self-determination embodies the freedom of a group to pursue its interests to further its political status, and 'freely dispose of [its] natural wealth and resources'.[8] Second, Benvenisti refers to a conception of sovereign states as agents of humanity as a whole (ibid., p.305). He bases this conception largely on the equal moral worth of all human beings[9] and the corresponding foundation of international law in human rights. He argues that it is humanity at large that assigns to certain groups of citizens the power to form national governments. Accordingly, states can and should be viewed as agents of a global system that allocates competences and responsibilities for the promotion of the rights of all human beings and their interest in the sustainable utilisation of global resources (ibid., pp.306, 308).[10] As such, the corollary of state authority to manage public affairs within domestic jurisdictions is an obligation to take account of external interests and balance internal against external interests.[11]

The privilege of territorial sovereignty can, then, be legitimised only in so far as the universal interests of humanity as a whole are not severely affected. This argument is based not only on ecological realities defying national state boundaries, but also on the observation that boundaries of states do not necessarily coincide with boundaries of nationalities, or of those groups whose members share a distinct interest in, and conception of, the common good (Gans, 2003).

For Benvenisti, sovereignty is the power to exclude portions of global resources. Both ownership and sovereignty are claims for the intervention in the state of nature by carving out valuable space for exclusive use (Benvenisti, 2013, p.308). Such a perception of states as power-wielding property owners provides a solid normative foundation for the imposition of a positive obligation on states to take other-regarding considerations into account when managing the resources assigned to them (ibid., pp.309, 310).[12] Property law theory can thus provide us with a framework within which we can translate these moral grounds into legal obligations (Bosselmann, 2011). Thus, we should conceptualise ownership of global resources as originating from a collective regulatory decision at the global level, rather than as an entitlement of sovereign states (Benvenisti, 2013, p.309).

Conclusion

Global commons governance reverses the traditional rule that international law and governance ends where national borders begin. The dichotomy between national law and international law defies ecological reality. States need to exempt transnational ecological aspects from the concept of

exclusive territorial sovereignty, making way for global commons governance. Through environmental trusteeship at the state level, territorial sovereignty is conceptually restricted at the global level, leading to a paradigm shift in international environmental law. Instead of state sovereignty setting limits to environmental protection, environmental protection would set the limits to state sovereignty. Indeed, 'limiting the self-interest of states by taking into account global concerns of humanity has become a fundamental aspect of international law' (Stec, 2010, p.364).

States are as yet unable to resist the global market. Its forces have heavily eroded state sovereignty – the same state sovereignty required to resist its complete dominance. The paradox of surrendering sovereignty to free trade and market forces on the one hand, and on the other hand insisting on sovereignty when expected to protect the commons has been described as the 'sovereignty paradox' (Zaum, 2007, pp.226-31; Kaul, 2013). The way out of the paradox is differentiation: more sovereignty where possible; less sovereignty where necessary. In a globalised world this means protecting citizens and the environment from global economic forces ('more sovereignty') and protecting the global commons through international rules controlling financial and economic markets ('less sovereignty'). The perspective of differentiated sovereignty, also referred to as 'responsible sovereignty', calls for reforming and strengthening global institutions (Kaul, 2013). Nothing is more urgent than matching political institutions to the global challenges we face.

Concern for the global commons is a unifying feature of humanity. If we see ourselves as stewards of Earth, with states acting as trustees of the common good, a crucial step will be taken towards Earth governance – perhaps then, more appropriately, called Earth democracy (Bosselmann, 2010).

1 https://secure.avaaz.org/en/petition/Claim_the_Sky/?pv=58.
2 '[G]overnment is not legitimate unless it is carried on with the consent of the governed': quoted in Ashcraft (1991), p.524.
3 Including constitutional law, administrative law, tax law, criminal law and environmental law.
4 For example, the United States, Canada, Australia and New Zealand recognise them with respect to indigenous peoples, ratepayers and (with the exception of New Zealand) in the form of public trusts, whereas continental European countries more fundamentally rely on public law to assume fiduciary relationships between individuals and governments.
5 See, for example, the Declaration on Permanent Sovereignty over Natural Resources (1962), UN General Assembly resolution 1803 (XVII) [1].
6 Universal Declaration of Human Rights, UN General Assembly resolution 217 A(III) (adopted 10 December 1948), article 21(3).
7 As initially expounded by Brown Weiss (1984).
8 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), article 1.
9 Referring to John Stewart Mill, *Considerations on Representative Government*, 1861.
10 Paraphrasing Huber (1928) in *Island of Palmas (Netherlands v United States)*, RIAA 829, 869.
11 Paraphrasing Huber in *British Claims in the Spanish Zone of Morocco (Spain v United Kingdom)* (1925), 2 RIAA 615, 641.
12 Also when making rival claims on transboundary and public resources.

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Prue Taylor

Governing the Global Commons
an ethical-legal framework

> We stand at a critical moment in Earth's history, a time when humanity must choose its future. As the world becomes increasingly interdependent and fragile, the future at once holds great peril and great promise. To move forward we must recognise in the midst of a magnificent diversity of cultures we are one human family and one Earth community with a common destiny.
>
> – preamble, Earth Charter

Governance of the Earth's global ecological commons creates unprecedented challenges for humanity. Our traditional Westphalian state system was not designed to respond to these global challenges and thus far it has failed to transform. Climate change is the current headline issue; 30 years on and we still swing between hope and despair about our collective ability to radically reduce greenhouse gas emissions. Related issues are beginning to vie for our response: ocean acidification, mass species extinction, land use change and freshwater scarcity (Steffen, 2016, p.23). The emerging field of Earth system science demonstrates that the complex integrated system, upon which all

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humanity and all life depends, is imperilled. The cumulative impact of human activities is the destabilising force (ibid., 2016). Tackling climate change is just the beginning of our endeavours to live within the life-supporting capacity of the Earth system.

This article considers how humanity might respond to the global ecological challenge from the perspective of ethics and law.[1] The specific focus is the emergence of communitarian values and their articulation in international environmental law. It will be argued that there are tentative signs of communitarian values influencing legal development. These represent small cracks in the edifice of state-centred international law. For the most part we continue to use an international legal system which prioritises and weights rights and obligations 'within a closed compartment of individual state self-interest'.[2] There is much for an emergent global community to do, across spatial and temporal scales of growing complexity.

The Earth Charter itself is a laudable achievement, but it is the process of its creation that is more important and the source of its legitimacy.

A shared ethical vision

The preceding article considered the transformation of states into 'trustees' with fiduciary obligations owed to all human beings. These obligations would be fulfilled both internally and externally for the common (ecological) good. Foundational to such proposals is our ability as humans to develop and share a common set of values that can connect, inspire and guide us. From these basic values, implementing principles can be developed, which can then be articulated in policy and law.

In the context of sustainable development, acknowledgement of the need for a shared ethical vision to guide policy and law, and efforts to achieve it, are not new. For decades the literature on global values has developed alongside that of environmental or ecological ethics. Learning from the horrors of the Second World War, leading thinkers understood that human security resided in understanding the interdependence of ecological protection and social equity. The draft World Constitution of 1948 was created with this concern in mind. It provides that the common good should have priority over private interests in respect of the commons (i.e. the four elements of life). The 1987 World Commission on Environment and Development (WCED) called for states to create a Universal Declaration on Environmental Protection and Sustainable Development in the form of a 'new charter' containing an ethical vision and guiding principles (Rockefeller, 2008). Drawing on the inspiration and history of the United Nations' Universal Declaration of Human Rights, this new charter was to guide the more specific policy and legal outcomes of the 1992 United Nations Conference on Environment and Development. Despite the efforts of many able diplomats, states could not agree to such a document. Valuable conventions and declarations emerged from the conference, but none contained the inclusive ethical vision that many had hoped for in an Earth Charter (ibid.).

Building on the WCED's idea and the groundwork done for the 1992 conference, the Netherlands brought Mikhail Gorbachev and Maurice Strong together to lead a civil society initiative to draft an Earth Charter (ibid.). The initiative put to the test the idea that an emerging global civil society existed and that it could reach consensus on a shared set of values and principles for a sustainable future. Officially launched at the Peace Palace in The Hague in June 2000, the charter articulates the values of care, respect and responsibility for each other and the integrity of planetary systems (part I), and includes a number of supporting principles designed to serve as common standards for guiding and assessing the conduct of individuals, organisations, businesses and governments.

The Earth Charter itself is a laudable achievement, but it is the process of its creation that is more important and the source of its legitimacy. It is the product of a decade-long cross-cultural dialogue on common goals and shared values. The drafting was the result of the most open and participatory consultation process every associated with the writing of an international document. Hundreds of organisations and thousands of individuals participated, ensuring that the charter reflects the influence of many intellectual sources, social movements, religious and philosophical traditions and new world views shaped by many disciplines, including science, cosmology and ecology (Rockefeller, 2008). As a result of this process (or 'ethical dialogue'), the people achieved what states could not. It is for good reason that the preamble begins: 'we, the peoples of the Earth'.

As with many international documents, the launch marks the starting point for the real work to come. In the case of the Earth Charter, the task is to build a stronger global society which includes governments, businesses, organisations, transnational institutions and individuals, acting together and consistently with global interdependence and universal responsibility. The charter can contribute to this task through its content (universal values), scope (cross-cultural acceptance) and support (endorsement and membership of the Earth Charter Initiative).

More significantly, it is a powerful tool for education and further ethical dialogue. It requires us to '[re]-ask and re-explore its fundamental animating questions. What are our deepest responsibilities to Earth and its inhabitants, human and other? And why?' (Donnelly, 2004). In

this sense it is a living document, open for further evolution. It does not deny the immense difficulties of finding and maintaining unity: 'Life often involves tensions between important values. This can mean difficult choices. However, we must find ways to harmonize diversity with unity, the exercise of freedom with the common good, short-term objectives with long-term goals' (Earth Charter Institute, 2000, 'The way forward').

For all its promise and achievements to date, an important critique has emerged. A core member of the drafting team argues that the charter, and the social movement that it has created, have thus far failed to adequately challenge the 'contemporary unjust, unsustainable and violent international order' (Engel, 2014, p.xvi). The charter must do more than offer alternative ethical principles. Related to this critique is the reality that the charter has not, to date, greatly influenced the actions of states or development of international environmental law. It has not yet been the subject of a UN General Assembly resolution, although this has been a goal for many years. On the other hand, it has been officially endorsed by member states (and organisations) through resolutions of UNESCO and the International Union for Conservation of Nature (IUCN).

In a soft-law context, the charter has greatly informed the IUCN draft Covenant on Environment and Development, although this document also requires further endorsement by states. The more recent draft World Declaration on the Environmental Rule of Law, moreover, draws heavily upon the charter, with principle 1 articulating a universal responsibility to care for nature, independent of its instrumental values. The charter has also had a significant influence on the work of many academics (Bosselmann and Engel, 2010), and many of its more developed principles are being applied in national courts. Its 'hard-law' character deserves better acknowledgement (Robinson, 2010).

In the more specific context of climate change, Pope Francis's encyclical *Laudato Si' (On Care for Our Common Home)* called the world to action ahead of the Paris climate change negotiations in 2015. Embracing the Franciscan tradition, it acknowledges the ecological crisis, confronting the common home of humanity and all life, to be a great moral challenge. It calls on every person on the planet to engage in a new and inclusive dialogue of ecological responsibility. The essential message of *Laudato Si'* is reflected in a number of faith and interfaith declarations on climate change.[3] Of equal interest was the Call to Conscience declaration, intended as a reminder to state negotiators (ahead of the Paris negotiations) that policy and law are not value free.[4]

Similarly, the international scientific community has also become engaged in ethical issues. The Intergovernmental Panel on Climate Change (IPCC) fifth assessment report, in its Working Group III report, included two chapters referencing ethical issues (IPCC, 2014, chs 3 and 4). Although more focused on the burden-sharing aspects of climate change, Working Group III noted that there is a basic set of shared ethical premises and precedents that apply to climate change which put limits on plausible interpretations of equity and fairness in the burden-sharing context (ch.4, p.49). The four key dimensions of equity were identified as: responsibility, capacity, equality and the right to sustainable development. The working group also noted that it is morally proper to allocate burdens according to ethical principles and that the eventual effectiveness of a collective action regime may depend on the ability to do so (ch.4, pp.16-17). Climate change policy that is too narrowly focused on traditional utilitarian or cost–benefit analysis neglects critical ethical concerns (ch.4, p.8).

The documents discussed above differ in their scope, focus and source of legitimacy, but they share the aim of articulating communitarian values of universal responsibility for the common good.

Ethics and international environmental law

What do the above expressions of values have to do with the law? There are different views. One view is nothing or very little; international law is and remains the near exclusive domain of states. A sovereign self-interest and competitive rights focus dominates, as does the principle of reciprocity. Co-operation between the international community of states remains 'thin': that is, its central reference point remains the individual and collective interests and goals of states. The law does not yet require states to prioritise and act consistently with the 'greater interests of humanity and planetary welfare' (Brunnée, 2008, p.554).[5]

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An alternative view is that values have everything to do with international law. As a previous article in this issue has noted, different schools of international relations theory draw upon arguments for, and evidence of, common normative positions. Natural law and humanitarian law also draw upon globally identifiable values. In a planetary ecological context we can add the reality that we are undermining the basis of our own existence and that of others. The articulation of shared values, in law, takes the human response beyond that of mere necessity. For this reason, there is a motivation and need to identify a global set of values and interests providing a basis for future law *and* minimum standards for environmental

protection, in the absence of treaty law. This can be characterised as an effort to articulate a form of *ordre de public*, in a similar manner to the Martens Clause which became the basis for international humanitarian law (Shelton, 2009).

This effort to develop law around a conception of 'common interests' different from those of states alone does not deny the relevance of national self-interest. Rather, it recognises that in the long term they can only be protected within the framework of a stable legal regime of close co-operation for the benefit of all. Nor should this effort be dismissed as illusionary utopianism. Prominent international jurists have argued that it is the legitimate role of legal scholars to actively pursue a utopian agenda if an appropriate process is followed (Peters, 2013, p.548). Cassese explores this process and describes it as critical positivism (Cassese, 2011, p.258). It involves an ethical analysis that recognises the importance of values and uses them to both critique existing law *and* argue persuasively about what the law 'ought' to be and how to get there (Peters, 2013). Cassese's critical positivism provides a strategy for weaving humanism into legal reasoning (ibid., p.552). However, for the time being power to resolve the problems of the world community remains in the hands of politicians, diplomats and military leaders. Therefore, scholars may 'suggest ideas and advance solutions, without harbouring too many illusions' (Cassese, 2011, p.271).

> … the status of the concept 'implies that [the global environment] can no longer be considered solely within the domestic jurisdiction of States due to its global importance and consequences for all …'

Values, law and the global ecological commons

What signs are there of communitarian values influencing legal development applicable to the global ecological commons? This section considers some examples from both existing and emerging law.

The 'common heritage of humankind' is considered one of the strongest articulations of international environmental trusteeship (Birnie et al., 2009, p.198). Its ethical foundations are found in African customary law, Asian non-theist traditions and Roman law, as well as Christian theology and Islamic law. At its core is the notion of sustaining the basis or foundations of life, as a precious gift of inheritance (patrimony), for the benefit of all. It expresses concern and responsibility for the 'other' that encompasses both human interactions (between present and future generations) and the human–nature relationship. Ultimately it is about collective human responsibility for the ecological commons (Mann Borgese, 1986, ch.6).

While there is contention about some of its legal elements, two of the least contentious are intra and intergenerational equity and environmental protection (Wolfrum, 2008). A recent opinion of the International Tribunal for the Law of the Sea confirmed (in the deep seabed mining context) that it required states to exercise the highest degree of environmental protection. Further, the ultimate reference point was the interests of present and future generations and not states (ITLOS, 2011). While holding much promise, the 'common heritage' concept proved too controversial for use in treaties on climate change and biological diversity. However, current negotiations on a regime for biodiversity in areas beyond national jurisdiction demonstrate that many states still support the concept as a guiding principle (Long and Rodríguez Chaves, 2015). As with the deep seabed, environmental protection would need to be prioritised over resource use (i.e. marine genetic resources) to ensure that the objectives of a common heritage regime are met. Aside from treaty practice, the concept is closely related to the emergence of the principle of 'common but differentiated responsibility and respective capacities' and environmental human rights (World Declaration on the Environmental Rule of Law, principle 2). It also continues to inspire and guide the efforts of legal academics to find solutions to the current failures of global governance and the ongoing degradation of the global ecological commons (Weston and Bollier, 2013; Magalhães et al., 2016).

In a related treaty context, the 1972 UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage (UNESCO, 1972) provides that features of universal value to mankind should be subject to legal protection for the benefit of present and future generations. It is the duty of the international community as a whole to ensure protection, not just of states that exercise territorial jurisdiction. The treaty qualifies and restricts exercises of sovereignty for the benefit of all humanity. It is currently limited in scope to heritage *within* national jurisdiction. However, there is a novel proposal to apply the universal value of mankind concept to parts of the high seas, an acknowledged international commons, beyond the jurisdiction of any state (Freestone et al., 2016). This may be useful for future efforts to find a co-ordinating concept to guide the development of marine protected areas within the high seas.

Returning to legal concepts, the 'common concern of humankind' is of potential importance. Adopted as an alternative to, but not substitute for, 'common heritage', it is used in the preambles of both the UN Framework Convention on Climate Change (1992) and the UN Convention on Biological Diversity (1992). There is a general view that the specific legal implications of the 'common concern of humankind' should be drawn from the treaty regimes in which it appears (Brunnée, 2008). A narrow interpretation in the

context of climate change suggests that its role does not extend beyond the provisions of common but differentiated responsibilities and respective capacities (Soltau, 2016). Furthermore, the bottom-up approach to setting nationally determined contributions (in the 2015 Paris Agreement) may have weakened much of the concept's potential.

Climate change aside, the potential for the 'common concern' concept is articulated by the IUCN draft Covenant on Environmental and Development (IUCN Environmental Law Programme, 2015). It states that the Earth's biosphere or global environment as a whole should be recognised as a common concern. Article 3 provides that: 'The global environment is a common concern of humanity and under the protection of the principles of international law, the dictates of public conscience and the fundamental values of humanity.' The commentary notes that: '[t]he interdependence of the world's ecological systems and the severity of current environmental problems call for global solutions …, thereby justifying designation ... as a matter of "common concern"' (p.45). Furthermore, the status of the concept 'implies that [the global environment] can no longer be considered solely within the domestic jurisdiction of States due to its global importance and consequences for all. It also expresses a shift in classical treaty-making notions of reciprocity and material advantage [to States], *to action in the long term interests of humanity*' (ibid., emphasis added). As previously noted, the draft covenant does not yet have the endorsement of states as an international framework convention. Nevertheless, it is intended to be a codification of existing international environmental law.

A further area of international environmental law development reflective of communitarian ethics is the emergence of environmental human rights, both in a collective (Westra, 2011) and individual context (Shelton, 2011, pp.385-473). Although not yet the subject of a legally binding international agreement, national developments may clear the way for this to happen in the near future. A survey of national constitutions revealed that some 125 contain environmental norms, 92 of which explicitly recognised a human right to the environment (Boyd, 2012, p.72).[6] No other human right has achieved this level of recognition in such a short timeframe (Law and Versteeg, 2011). The UN Declaration on the Rights of Indigenous Peoples is unequivocal on the matter of indigenous rights and the environment: article 25 acknowledges the importance of spiritual relationships and responsibilities and article 29 provides for the right to protection and conservation of the environment and productive capacities of land and resources.

In a transnational context, domestic legal action on global ecological issues (in the absence of legal standing before international courts) is reflective of emerging communitarian values. Climate change litigation, in the interests of future generations, is beginning to proliferate (see, for example, the Urgenda case in the Netherlands).[7] More specifically, the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters facilitates transnational review of a state's actions through its compliance committee. This innovation is a strong acknowledgement of the importance of national oversight and the interconnection of ecological systems.

The implementation of communitarian values in international law is also closely related to the re-emergent commons movement. Drawing on the work of Nobel Prize winner Elinor Ostrom, and the acknowledged limitations of international law (Tomuschat, 2011; Hafner, 2011), commons scholarship proposes a very different approach to global commons management, with the objective of creating new institutional and legal structures and forms fit for contemporary ecological and social challenges (Bollier, 2014). It places overarching emphasis on providing for collective benefit, as a necessary precondition for providing for the individual prosperity of all humanity (present and future). Commons scholarship reminds us that alternative (and potentially transformative) forms of governance and law are possible, which return authority and responsibility to communities of people and do not swing between the poles of private versus public or result in a slide back to the tragedy of the (open access) commons (Mattei, 2012). Moreover, commons regimes provide for a diverse range of values, often relational in character, beyond dominant economic exchange values. Both the critique and the solutions provided by commons scholarship will be significant for the redesign of governance and law to meet global ecological decline (Weston and Bollier, 2013; Westra, 2011).

A further thread of emergent communitarian values within international environmental law can be found in the growing literature around global environmental constitutionalism.

A further thread of emergent communitarian values within international environmental law can be found in the growing literature around global environmental constitutionalism. In a recent article, Bosselmann considers the evidence for an emerging constituting principle and finds that the argument for sustainability 'as a constitutional principle in national and international law is strong and deserves further investigation' (Bosselmann, 2015, p.182). Ultimately, the purpose of global environmental constitutionalism is to shift environmental concerns from the

periphery to the centre of constitutions, laws and governance.

This section has considered signs of communitarian values influencing legal development applicable to the global ecological commons. Viewed in isolation, each of these developments can be seen as of limited impact in the realm of realpolitik. Indeed, powerful states have largely resisted many developments in defence of their sovereignty. However, taken together the whole suggests a building trend towards the transformation of law and governance for the global ecological commons. To deliver on this transformation, humanity must also create a global polity capable of working for the global collective benefit. In this regard, climate change is viewed as a significant opportunity for building global citizenship (German Advisory Council on Global Change, 2014) and a much-needed global social movement (Dunlap and Brulle, 2015). Ultimately, this could, at a normative level, contribute to 'recouping the original promise of the environmental movement, that *is the conceptualization and the legal treatment of the natural environment* as a [common good] to be administered in the interest of all and of the generations to come' (Francioni, 2012, p.455, emphasis added).

Conclusion

The Earth Charter text ends with a section entitled 'The way forward'. This resides in deepening and expanding the global ethical dialogue, developing partnerships between government, civil society and business, and nation states renewing their commitment to the United Nations and fulfilling their obligations under existing international agreements. It also resides in the implementation of ethical principles in law.

It is true that states control lawmaking, but academics have a vital role to play in overcoming the positivist tendencies of international law. They can articulate fundamental norms and associated legal principles, consistent with their realisation. In the words of Arvid Pardo, founder of the common heritage concept, it is an 'appropriate function of lawyers to comprehend the reality that surrounds them. Equipped with such an understanding they are entitled to propose legal principles designed to meet to the maximum extent possible – taking into account all the challenges of the ecological age – the needs, wants, interests and values of individuals and of society at large ...' (Pardo and Christol, 1983, p.658)

Ten years later Pardo added: '[i]t will be up to all of us … to open deeper and wider cracks in traditional international law until, in the eternal cycle, a new global order emerges from the ruins of the old, better to serve all humanity' (Pardo, 1993, p.69).

1 Parts of this article are based on previously published work on the common heritage of mankind and the commons: see, for example, Taylor (2016).
2 Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997] I.C.J. Rep. 7, separate opinion of vice president Weeramantry, C(c).
3 From Buddhist and Islamic religious traditions.
4 See also UNESCO (2015); Brown (2013); Gardiner (2011).
5 Referencing Judge Weeramantry's dissenting opinion in Dam case (see note 2).
6 See also the concept of ecological human rights: Taylor (2011).
7 http://www.urgenda.nl/en/climate-case/.

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Graham Hassall and
Marjan van den Belt

Global Sustainability

policy networks for the Sustainable Development Goals

Global policy networks

This article focuses on public policy networks, but more particularly on those that are global in scope and intent.[1] It examines how such networks are being deployed to advance the goals of the Sustainable Development Agenda, and how the New Zealand government and non-government actors might be involved. Networks have become an important tool in policy making at all levels of government. They have been described as

> a set of relatively stable relationships which are of [a] non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests acknowledging that co-operation is the best way to achieve common goals. (Borzel, 1998)

Although networks can exist entirely within an organisation, they are more likely to be a means of expanding well beyond any particular one so as to link up with other actors, whether state, private sector or civil society, to pursue shared objectives, 'a kind of meta structure integrating different forms of interests, intermediation and governance, forming a symbolic relationship between state and civil society' (Katzenstein, 1978, cited in Kenis and Schneider, 1991, p.31)

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Networks may bear a variety of names, including alliance,[2] partnership,[3] forum, initiative, campaign, coalition, etc., or they may be nameless and informally binding together likemindedness. Networks are most commonly established for knowledge sharing, standard setting, issue advocacy, support mobilisation and compliance monitoring (Streck, 2002). While networks are implicitly or explicitly concerned with 'making a difference', they often are not positioned or given a formal mandate for direct implementation, a responsibility which generally falls to individual governments,[4] although Reinicke and Deng point to their role in encouraging compliance of governments with treaties and conventions (Reinicke and Deng, 2000, p.xiv).

This article doesn't focus on policy networks *per se*, but on policy networks that are global in scope or reach.[5] The themes of the 'global policy agenda', which commenced early in the 20th century with the quest for global stability set out in post-World War One agreements, and which were further articulated in the post-World War Two charter of the United Nations through inclusion of human rights, social and economic development, trade and finance, and international cooperation, have since the 1970s strongly included environmental protection and sustainability (Reinicke, 1999). And the term 'sustainability' is increasingly being used as the bedrock for or 'glue' between human rights, social and economic development for the purpose of developing within the carrying capacity of the global ecosystem.

The global policy agenda is advanced by the member countries of the United Nations, not least in the 560 multilateral treaties[6] that are now establishing collective expectations about delivering what Kaul and others have articulated as 'global public goods' (Kaul et al., 2003). Stone refers to the emergence of 'transnational policy communities' to address common problems:

> When a problem is recognized by nations, the policy tools available are international treaties and conventions. Their effectiveness is problematically reliant on compliance and good international citizenship, and founded upon an implicit assumption that states will act 'rationally' and recognise that collective action is to long-term interests. (Stone, 2008, p.27)

Stone points out that networks 'enable actors to operate beyond their domestic context, and networks are the means by which organizations individually and in coalition can project their ideas into policy thinking across states and within global or regional forums' (Stone, 2004, p.560). Global public policy networks have thus emerged to address all manner of global policy problems in a manner that works with, and supplements, the efforts of national governments. Whereas the number of sovereign states rose during the 20th century to 192, the number of international non-governmental organisations grew from approximately 1,000 in 1915 to 37,000 in the year 2000 (Christensen, 2004, p.50).

A considerable number of global policy networks have emerged through global agency patronage.

A considerable number of global policy networks have emerged through global agency patronage. Significant global policy networks that United Nations organs and agencies have initiated include the Intergovernmental Panel on Climate Change, which Weiss has characterised as a powerful recent illustration of 'the role of intellectuals in creating ideas, of technical experts in diffusing them and making them more concrete and scientifically grounded, and of all sorts of people in influencing the positions adopted by a wide range of actors, especially governments', an influence felt because 'the network of world-class volunteer scientists from several disciplines translate scientific findings into the language comprehensible by policymakers' (Weiss, 2010, p.6). In the wake of the success of IPCC, the Intergovernmental Platform on Biodiversity and Ecosystem Services was modelled and is ongoing (2014–18).

Other issue-specific yet global networks include: Safer Cities, Global Water Quality Data and Statistics (GEMStat), the Global Compact (for corporate social responsibility), Academic Impact (for tertiary institutions), Energy for Sustainable Development (GNESD), Coral Reef Monitoring, Promoting Digital Technologies for Sustainable Urbanization, and Monitoring and Evaluation for Disability-inclusive Development. Networks established by the World Health Organization to enlist multi-sector support for global health objectives include the Global Noncommunicable Disease Network, Global Alliance against Chronic Respiratory Diseases,[7] Global Network of Age-friendly Cities and Communities[8] and Global Health Workforce Alliance,[9] amongst many others.

The United Nations Development Programme (UNDP) has initiated global policy centres in the fields of public service excellence, resilient ecosystems and desertification, private sector and development, governance, global development partnerships and sustainable development, to 'provide research support and leverage partnerships to support better use of the organization's funding for emerging priorities and innovation', to use multi-stakeholder approaches such as 'public-private dialogues, government-civil society dialogue, and design of civil society initiatives and platforms' and to 'measure results and the development impact of public-private cooperation, risk assessment and management/due diligence of private sector partners' (UNDP, 2016). The United Nations Environment Programme (UNEP) provides the secretariat for REN21, a global renewable energy policy multi-stakeholder network of governments,

non-governmental organisations, research and academic institutions, international organisations and industry, established to 'facilitate knowledge exchange, policy development and joint action towards a rapid global transition to renewable energy'.[10] Under the auspices of UN-OHRLLS (the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Counties and Small Island Developing States), the third SIDS conference, held in Apia, Samoa, resulted in the establishment of the SIDS Action Platform, which convenes 306 'SIDS partnerships' having sustainable development objectives.[11]

Global Network for Health Equity, which was formed by the convergence of three regional networks.[12] The Global Taskforce of Local and Regional Governments, a coordination mechanism which brings together major international networks of local governments to undertake joint advocacy relating to international policy processes, was established in 2013 through the initiative of the mayor of Istanbul, Kadir Topbaş president of UCLG (United Cities and Local Governments).[13]

Stone notes similar 'transnational policy community' networks of judges, legislators and regulators, among others (Stone, 2008, p.27). The World Economic Forum, a Swiss-based non-governmental

Jurists acknowledge that global public policy networks which establish global norms therefore influence domestic policy, which raises issues of legitimacy and juridification under Westminster notions of national sovereignty.

The World Bank is involved in some 85 global and 35 regional partnership programmes which set international standards, share expertise, promote compliance with codes of conduct or facilitate coordination in other areas of policy:

> Almost half the programs in which the Bank is involved are knowledge, advocacy, and standard setting networks that are generating and disseminating knowledge about development in their sector. Of these, about 40 percent have management units (secretariats) located inside the Bank, about 35 percent in other international or partner organizations, and about 25 percent are freestanding independent legal entities. (Stone, 2017, p.9)

However, not all global public policy networks have their origins in the global agencies. There are those such as the organisation, convenes 'global agenda councils' on 90 pressing global issues, from climate change to global economic imbalances, to research on the human brain.[14] The 38-member OECD has initiated global networks in areas focused on government, economics and law (law enforcement practitioners; privatisation and corporate governance; foundations working for development;[15] and even one for schools of government),[16] although the Global Partnership for Effective Development Co-operation established during the Fourth High Level Forum (HLF-4) in Busan, Korea, in 2011 is better known.[17]

All of these global policy networks provide challenges of governance, such as who takes responsibility for results (whether success or failure) when leadership is 'distributed' and decisions are taken by consensus more than through hierarchy, giving rise to the emerging field of 'collaborative governance'. There are, on the other hand, significant advantages to the use of networks, such as the ability to enlist expertise from well outside one's own organisation, and to mobilise support for attainment of shared goals. Although often distinguished from institutions by their fluid and impermanent existence, networks nonetheless require administrative and financial capacity to operate, and vary greatly in their expectations of members. Although they need not have a permanent secretariat, those that have one tend to operate most effectively. Networks can range from low entry-level commitment (such as the Internet Society), to those requiring subscription, or specified levels of participation and commitment, such as the anti-corruption 'networks' convened by the International Monetary Fund. The Global Health Council established a Global Health Action Network. The Global Water Partnership and the World Water Council collaborated in the integrated water resources management (IWRM) movement (Kramer and Pahl-Wostl, 2014). The Alliance of Small Island States (AOSIS) is a coalition established by 44 small island states in 1990 to assist with their advocacy on global climate change, and is coordinated by a bureau comprising three permanent representatives to the United Nations.

Whereas some networks disestablish when their objectives are met, others evolve in new directions, or even transform into more permanent institutions. The World Health Organization's Global Health Workforce Alliance, for example, created in 2006 with a ten-year mandate to coordinate engagement of multi-sectoral stakeholders to advocate for human resources for health, issued a 'legacy report' at its conclusion in 2016 (Insource, 2016).

Whereas the concerns referred to above are more of an administrative nature, there are others that address constitutional theory. Jurists acknowledge that global public policy networks which establish global norms therefore influence domestic policy, which raises issues of legitimacy and juridification under Westminster notions of national sovereignty. If a national government is not desired by constituents, it can be

deposed through elections. But what democratic oversight of global public policy networks exists? Furthermore, if an action by government creates a harm, this can be redressed in a domestic court of law; under what jurisdiction do harms created by the actions of global public policy networks fall? Advocates of societal constitutionalism suggest that global public policy network activities demonstrate the limits to the Westphalian paradigm of state and law, and are, furthermore, contributing to non-state constitutionalisation of world society (Oerges, Sand and Teubner, 2004).

Policy networks and the Sustainable Development Agenda

Leaving aside constitutional theory for the moment, the fact is that policy networks in support of, in this instance, sustainability have been developing since the Brundtland Report of 1987 and the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. Governments responsible for the generation of public goods at national scale did not prioritise the generation of 'global public goods' over provincial economic interests. The apparent failure of governments and UN bodies (such as the Commission for Social Development) to make genuine progress with policy reforms envisaged by the Rio conference's Agenda 21 was acknowledged at the Rio+10 World Conference on Sustainable Development in Johannesburg in 2002. The weight of having thousands of civil society representatives gather of their own volition on the edges of the intergovernmental meeting and express grave concern about the state of the world's environmental stewardship influenced the establishment of 'type II' partnerships to assist in prosecuting the sustainable development agenda in the following years.

Whereas type I outcomes referred to the conference's conventions and declarations negotiated by states, type II outcomes were 'a series of commitments and action oriented coalitions focused on deliverables made by individual or groups of governments along with other interested parties or "stakeholders"' (Wilson, 2005, p.391).[18] Experience and experimentation with multi-stakeholder partnerships and networks continued through the period of the Millennium Development Goals. Although there is some underlying feeling that the eight goals were once again selected and directed by international agencies without significant input by member countries, civil society or ordinary citizens, who are in fact the intended beneficiaries of the programme (Caliari, 2014), there were innovative new platforms, such as the Leading Group on Innovative Financing for Development, an alliance of 66 states and approximately 25 international organisations, 13 foundations and corporations and 20 non-governmental organisations which collaborated in pursuit of Millennium Development Goal 8, 'global partnership for development'.[19]

It was in this context that the post-2015 development agenda was formulated and framed. A global awareness campaign, The Future We Want, sought out the views of ordinary people in as many countries as possible. The eventual 17-goal agenda resulted from an insistence by some states that it include their priority goals or lose their cooperation.[20] The 2030 Sustainable Development Agenda, launched by the world's leaders at the UN General Assembly in September 2015, is conceptually and operationally different from the Millennium Development Goals in a number of ways. Unlike the Millennium Development Goals, which focused on basic human development goals in the developing world, the Sustainable Development Goals will have universal application, such that the 17 goals with multiple targets and indicators are to be pursued by all countries, not just those of the global south. Secondly, specific targets and mechanisms for each country are to be devised within countries rather than advised by development agencies. Yet another difference is that the Sustainable Development Goals incorporate an expanded approach to stakeholder engagement and include far greater involvement of the private and voluntary sectors. They envisage global cooperation rather than predominantly north–south cooperation, and are driven more by multi-stakeholder 'platforms' than by governments alone, thereby creating fertile ground for the emergence of formal and informal networks consistent with Sustainable Development Goal 17.

> Given the framework for governance set out in the Sustainable Development Goals, being a 'good global citizen abroad' will now require New Zealand to account for its domestic stewardship of sustainable development ...

To enhance knowledge sharing on a global scale, and taking advantage of emerging information technologies, the UN established in 2012 the Sustainable Development Solutions Network, a global knowledge network open to universities, research institutions, foundations, civil society and other organisations with a commitment to Sustainable Development Goal implementation. A regional network for Australia and the Pacific has been established at Monash University in Melbourne.[21]

Increased appreciation of the importance of results monitoring has also led to the creation of statistical partnerships, such as the Global Partnership for Sustainable Development Data.[22] Thinking has now also turned to how multi-stakeholder platforms and partnerships are best led, and how they can maximise the integration of their contributions and minimise duplication (Freeman et al., 2016).

Global policy networks for sustainable development: what role for New Zealand?

Given the framework for governance set out in the Sustainable Development Goals, being a 'good global citizen abroad' will now require New Zealand to account for its domestic stewardship of sustainable development, and this will be viewed in some quarters as quite a challenge. Viewed positively, domestic engagement with the Sustainable Development Goals will confirm New Zealand's reputation as a country which not only coaches others about the path to sustainable development, equity, equality and well-being, but one which also pursues these objectives at home in ways that are inclusive, accountable and transparent. Commitment to progress towards national targets under the Sustainable Development Goals will help advance the view that in the face of global challenges all nations are now 'developing countries'.

Civil society organisations in New Zealand have been watching Sustainable Development Goal dialogue closely, and pressing the national government for information about how it intends to proceed. Non-governmental organisations have agreed that Hui E! will coordinate NGO dialogue on Sustainable Development Goals with government, and on 6 September 2016 Hui E! presented to a meeting with Treasury officials civil society's six priority areas: adequate and affordable housing; vulnerable children; climate change; social and economic inequality; violence against women; and pay equity. Since then, universities have commenced collaboration with Hui E! to facilitate the first New Zealand Summit on the Sustainable Development Goals in 2018 in Wellington, and subsequent summits in Auckland and the South Island, to support the bringing together of all sectors of society in their various configurated networks. It is envisaged that this ongoing dialogue will contribute towards the delivery of Sustainable Development Goals to the best of New Zealand's ability toward 2030.

Global policy networks can be recognised and are ever evolving in both formal and informal ways. This article highlights the development of global policy networks culminating in the recent adoption of the United Nations Sustainable Development Goals, which seek to inspire a discourse across developed and developing countries and engage sectors beyond governments. Civil society, business and academia are engaging to create or recreate informal networks in order to understand the Sustainable Development Goals, and to develop concerted action and measurement capacity to develop an accountability at societal level. Hence, formal global policy networks are both influencing and being influenced by emerging informal networks at multiple levels of scale. New Zealand's challenge is to cultivate cross-sector networks that give practical effect to each of these aspirations.

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1 Thanks to Robin Chandler for helpful comments.
2 http://www.who.int/alliance-hpsr/en/.
3 http://www.globalpartnership.org/; http://www.ngowgsc.org/.
4 Or else it lies with governance networks: see Huppé, Creech and Knoblauch (2012).
5 Some networks that include the term global in their title do not have global scope or reach; they may have global aspirations, or they may merely be using an en vogue term which draws attention.
6 https://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml.
7 http://www.who.int/gard/en/.
8 http://www.agefriendlyworld.org/.
9 http://www.who.int/workforcealliance/en/.
10 http://www.ren21.net/about-ren21/about-us/.
11 http://www.sids2014.org/partnerships/.
12 http://funsalud.org.mx/gnhe/.
13 http://www.gtf2016.org/about-us
14 https://www.weforum.org/communities/global-agenda-councils.
15 In addition to 'global networks', OECD convenes many others, including Economic Regulators, Fiscal Federalism, Parliamentary Budget Officials, etc.
16 http://www.oecd.org/gov/global-network-schools-of-government.htm.
17 http://www.oecd.org/development/effectiveness/globalpartnership.htm; see also http://effectivecooperation.org.
18 Some of these type II links are still viewable online at http://www.earthsummit2002.org/ic/process/type2.html. See also the OCED's type II partnership commitments at http://www.oecd.org/greengrowth/oecdwssdpartnershipinitiatives.htm.
19 http://www.leadinggroup.org/rubrique173.html.
20 http://www.copenhagenconsensus.com/post-2015-consensus.
21 http://unsdsn.org/; http://ap-unsdsn.org/about/secretariat/.
22 http://www.data4sdgs.org/.

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Kevin P. Clements

Global Security confronting challenges to universal peace

The challenge of peace is complex and intractable. Much depends on the meaning of the concept and the definition of the term. And in that respect much depends on whether a diplomatic-legal or a sociopolitical approach is adopted.

The diplomatic-legal approach is enshrined in the United Nations Charter of 1945. The primary goal of the United Nations is to protect future generations from the scourge of war. The charter bestows on the Security Council the primary responsibility for maintaining, or restoring, international peace and security. The means by which this is to be attained rests, by convention, on the doctrine of collective security. Article 39 empowers the council to determine whether there has been an act of aggression or a breach of the peace, and in such cases the council may authorise the use of armed force, by one member state or collectively by a group, to restore international peace and security.

The same article also empowers the council to determine whether a 'threat to international peace and security' has arisen, and respond according to its best judgement. It is this concept, a 'threat to peace', that has provided the means for considerable self-empowerment by the council over the past quarter century.

The concept of global security has become an established term to use in the 21st century. In one sense it is an update on the mid-20th century concept of 'international security', because it acknowledges that, while military capacity remains essentially with the nation state, the sources of conflict and the key to peace and security in the contemporary age draw from insights pertinent to the emerging global community. Yet this insight was, in fact, also enshrined in the UN Charter in a concept that is scarcely recognised. Article 1.2 requires member states to take 'appropriate measures to strengthen universal peace'. The concept of universal peace is entirely different from that of 'international peace and security' in chapter 7. Universal peace does not encompass military force; it evokes work of a sociopolitical nature.

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So, what might be the challenges to strengthening universal peace? In today's world they are numerous. And they seem to be increasing. In this article I intend to address the contemporary sociopolitical challenges to the attainment of universal peace for humankind.

Measuring peace

Every year the Global Peace Index ranks the world's nations in terms of their levels of peacefulness (see Institute for Economics and Peace, 2016). The top five most peaceful countries in 2016 were Iceland, Denmark, Austria, New Zealand and Portugal. We do not cook the books (I chair the international advisory board), but New Zealand has ranked second or fourth for the last ten years. The five least peaceful countries are Syria, South Sudan, Iraq, Afghanistan and Somalia.

Over the course of the past five years there has been a movement away from the previous quinquennial (2005–10), when it looked as though the numbers of violent conflicts around the world were diminishing. Since then there has been a steady expansion of armed conflict from 2008 (19,601 battle deaths) to 2015 (101,406 battle deaths). These figures, moreover, underestimate the numbers of deaths and displacements occurring in the world right now, yet they indicate that increasing numbers of people are being killed in war. The other consequence of this is that there are now 49 million internally displaced people and refugees as a consequence of war, an enormous increase compared to the early 2000s (15–18 million).

So, despite claims that things are getting better (Pinker, 2011), there is evidence that violent ideologies and violent behaviour (both organised and spontaneous) are actually getting worse. It is difficult to recall a moment in history when there have been so many negative dynamics intersecting. There seem to be some fundamentally pathological things happening at a political level that are beginning to pose a major challenge to the emerging global community.

Because of this the world is at a critical juncture, as political leaders seek to make sense of some challenging global dynamics from the national level alone. Most of these big issues (climate change, war, refugees and inequality) cannot be resolved nationally. They are global challenges which require global solutions. The main problem in our response to these global challenges is that nation states are defining threats to their security and well-being more narrowly.

Since 9/11, for example, Western powers have focused on terrorist threat and harnessed huge financial resources to prevent, manage and defeat it. This expenditure has, by and large, been misplaced. Terrorism-related deaths, for example, increased by 286% between 2008 and 2014. But in a broader context the total number of deaths is infinitesimal. The Global Terrorism Index, for example, noted that deaths from terrorist incidents were 32,715 in 2015 compared to 8,466 in 2008 (Institute for Economics and Peace, 2015). This pales into relative insignificance when compared to the 1.25 million people worldwide who were killed in traffic accidents, or the 33,366 people killed in the United States from gun deaths in 2013. Most of the world's terrorist fatalities (79%) are accounted for by five nations: Iraq, Syria, Nigeria, Libya and Pakistan. Even with the addition of fatalities from terrorist incidents in France and Belgium in 2015, Western societies need not really worry about the 'terrorist threat'; it is a problem for countries already deeply embroiled in violent conflict.

Let us turn to the economic cost of conflict. The Institute for Economics and Peace has been calculating the actual cost of direct conflict, assaults and violence on the streets and the costs of trying to insure against such contingencies. It estimates the economic costs of conflict in 2015 to be US$742 billion. Total overseas development assistance for the whole world in 2015 was 22% of the cost of conflict (i.e. US$167 billion). The peacekeeping budgets globally were US$8.27 billion and the total amount spent on UN peace building was US$6.8 billion – a tiny fraction compared to the amount spent on violence.

So this is the extraordinary reality we are grappling with. There is something deeply malign about the way we are organising and distributing global wealth. When so many parts of the world are in dire need of basic necessities it is shocking that so much wealth is directed towards the prevention/management of organised or spontaneous violence. In the Asia Pacific region, for example, military expenditure is on a rapid increase while many of the other indicators of national, regional and global well-being are moving in the opposite direction. The correlates of peace – well-functioning government, equitable distribution of resources, free flow of information, good relations with neighbours, high levels of human capital, low levels of corruption – are all moving in a negative direction. Instead of governments enhancing their capacity, effectiveness and legitimacy there is growing evidence globally that they are becoming more incapable of sound governance, and generating high levels of political alienation and scepticism.

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Many governments are also proving to be constitutionally incapable of redistributing wealth to ensure that the marginalised and the excluded from elite democratic politics have sufficient to ensure the basic necessities of life. One of the biggest challenges to peace globally is the inequitable distribution of resources. Oxfam's latest inequality report (January 2016) finds that 1% of the world's

population owns 48% of the world's wealth, and by 2020 this is expected to reach 51%. This scale of inequality is completely unsustainable at global and national levels over the short, medium and long term.

One of the consequences of this global inequality is a generalised and widespread rejection of globalisation. We can talk all we like about global citizenship and building a global civic culture, but the reality is that many of our compatriots in Western countries are moving away from globalisation (both negative and positive) and reverting to atavistic nationalism. As real wages for most people in advanced industrialised countries remain static or negative, and when large numbers of people understand, through social media, the hugely inequitable distribution of wealth, why should they commit to high levels of either regional integration or global integration?

The most fundamental challenge to global peace lies in the global retreat from tolerant cosmopolitanism to intolerant atavistic nationalism, growing racial prejudice, anti-immigrant and refugee sentiment, Euroscepticism, homophobia and Islamophobia. These are the correlates of radical global movements and they are closely correlated with racism, sexism, Islamophobia and intolerance.

Elections have been won recently by transgressing most norms of civilised political discourse and by emotional rather than rational appeals, and by dwelling in what is now known as the world of post-truth politics. 'Post-truth' political systems place a low value on integrity and truthfulness and high value on emotional and charismatic appeal. All of them have activated what we might call latent authoritarian tendencies, or more importantly a fundamental quest for order by any means, but particularly by active authoritarian leadership. This is posing fundamental challenges to the whole notion of global citizenship and global institutions capable of managing the global economy in a sustainable and equitable manner. This regression towards nationalism is accompanied by a growing tolerance for coercive and violent solutions to problems even when these have proven ineffective.

Jonathan Sacks suggests that we are outsourcing not just our economies and politics but morality. There is a sense in which individual conscience is taking third place to the imperatives of the market and the polity. Economic crises and failures, for example, are being addressed by different political systems but most are proving to be woefully inadequate in ensuring that responses to such failure do not bear heavily on those who already lack capacity and political efficacy. Upon receiving the 2016 Templeton Prize, Sacks had this to say:

> Civilizations begin to die when they lose the moral passion that brought them into being in the first place. It happened to Greece and Rome, and it can happen to the West. The sure signs are these: a falling birthrate, moral decay, growing inequalities, a loss of trust in social institutions, self-indulgence on the part of the rich, hopelessness on the part of the poor, unintegrated minorities, a failure to make sacrifices in the present for the sake of the future, a loss of faith in old beliefs and no new vision to take their place. These are the danger signals and they are flashing now. (Sacks, 2016)

These danger signals are flashing in ways inimical to the whole idea of a global civic culture and effective global institutions. Global political and economic dynamics are generating a series of challenging pathologies.

These dynamics are producing deep political pathology. I am completing a book on the politics of compassion which identifies a number of political pathologies inimical to peace, justice and sustainable development. They can be summarised as the politics of domination, inequality and greed, fear and interventionism, the politics of deficient leadership and the politics of a paralysing present. This is what humanity is confronting today as it contemplates how to build a global civic culture and create global citizens out of national citizens. The 'retribalisation of culture' that seems to be in the ascendancy is deeply subversive of global order. It is more subversive than the 'terrorist threat' or the fear of foreign invasion.

Political leaders interested in the protection of cosmopolitan space and the advancement of positive transnationalism and globalism will need to generate a paradigm shift away from 'power over' to 'power with', from coercive to integrative.

Conclusion

Political leaders interested in the protection of cosmopolitan space and the advancement of positive transnationalism and globalism will need to generate a paradigm shift away from 'power over' to 'power with', from coercive to integrative power. We have to develop normative systems capable of sustaining relatively non-coercive, non-dominant social systems and the politics that go with this. This is a fundamental problem. The 21st century can no longer sustain notions of hierarchical power, with some people giving the orders and the rest following. It does not work in terms of the integrated challenges we are facing in the world at the moment. So how do we develop a whole new concept of politics which is based on integration and shared leadership and shared accountability, with some moral vision and passion to go with it?

Rogers argues that there are two big dynamics that have to be grappled with (Rogers, 2016). The first is the increasing marginalisation of the majority of the world's people caused by the workings of the contemporary international economic system, which concentrates most of the fruits of economic growth in the hands of a trans-global elite of some 1.5 billion people. The second is climate change. Both of these global problems demand global solutions. So this is the moment to transcend national sovereignties with effective, capable and legitimate global institutions. But it is a moment we are rapidly losing as we retreat from some of the achievements of the past back to narrow concepts of nationalism. So how do we reactivate the notion of an inclusive cosmopolitan global civic culture?

Even these words will confront those whose wages haven't lifted for the last five years or those who are living in the rust belt or those who have just been displaced from their farms. Why should they listen? There are some fundamental challenges here which we really have to grapple with. They are at the heart of building a peaceful world; at the heart of doing justice at the level of nationality.

How do we mobilise people across national boundaries with a new vision of an interdependent, just and harmonious world, and how do we ensure that this vision will appeal to those who are in the business of reactivating atavistic tribalism?

Lévinas asserts that we ensure our security by unconditional responsibility to and for the welfare of the other, except when the other is causing suffering, in which case we have a primary responsibility to stop the suffering. Sacks said something similar in his Templeton Lecture:

> This means recovering the moral dimension that links our welfare to the welfare of others, making us collectively responsible for the common good. It means recovering the spiritual dimension, or at least an ethical dimension, that helps us tell the difference between the value of things and their price. We are more than consumers and voters; our dignity transcends what we earn and own. It means remembering that what's important is not just satisfying our desires but also knowing which desires to satisfy. It means restraining ourselves in the present so that our children may have a viable future. It means reclaiming collective memory and identity so that society becomes less of a hotel and more of a home. In short, it means learning that there are some things we cannot or should not outsource, some responsibilities we cannot or should not delegate away. (Sacks, 2016)

The whole point about developing global citizenship, building a global civil culture and revitalising the global project relies on each one of us rediscovering our own moral capacities, some sense of what it is that we value and cherish, and then doing our best to resist the forces that are aimed at dismantling all that has been achieved with progressive enlightenment projects over the past century.

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Chris Gallavin and Kennedy Graham

Building Criminal Accountability at the Global Level: the ICC and its discontents

With the negotiation of the 1998 Rome Statute of the International Criminal Court (ICC), we all believed we had entered a new age: an age of unheralded peace and security, of justice, of an end to impunity; an age of accountability. At the time we believed the statute to be the biggest advance for peace and security through the rule of law since the United Nations Charter of 1945.

The Rome Statute promised the missing function to the long-promised form of individual criminal accountability. Not merely augmenting state responsibility, the statute left state responsibility for dead. Thumbing its nose at the political bodies of the UN system, the statute established an entirely independent line of judicial authority. It promised beacon-like authority for taming power through law, blending politics with justice. It spoke to all of us as individuals over or beyond our nationality; it spoke to us as global citizens, albeit through serious sanction and not liberation.

Yet just 14 years into its existence, the International Criminal Court faces a crisis of confidence. Several states have announced an intention to withdraw, and a regional organisation is considering setting up a counterpart. What has happened to the institution? What has developed in the relationship between power and law? This article seeks to provide an answer within the context of a vision of 'global law for the global community'.

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Introduction

When the Rome Statute was completed in 1998, bringing the ICC into existence four years later, it represented the culmination of work, spanning a century, towards strengthening the rule of international law, by introducing individual accountability for certain criminal actions of international significance. That effort marked a number of seminal historical moments of the 20th century.

- At the end of the First World War, the Treaty of Versailles envisaged a tribunal to try the German kaiser for 'a supreme offence against international morality and the sanctity of treaties'. No such crime existed and, largely as a result, no agreement was reached and no trial undertaken.
- In the late 1940s, however, the Nuremburg and Tokyo tribunals ensured that Axis leaders were individually tried, with many convicted, for war crimes, crimes against humanity and crimes against peace. Again, no such crimes existed in positivist law during the war, although it can be argued that they were part of customary law, and the constitutional documents of the tribunals were based on that opinion.
- The young United Nations intended for the transition of the world from one-off tribunals to a permanent international criminal court. A draft statute existed by the early 1950s, but the onset of the Cold War halted progress.
- With the Cold War terminating in the late 1980s, the subject of a permanent court was reinstated on the agenda of the UN General Assembly at the initiative of Trinidad and Tobago. With support from Canada and the European Union, negotiations for a treaty establishing such a court succeeded within a short space of time (1995–98). With the requisite number of 60 ratifications, the Rome Statute came into force, and the ICC into existence, on 1 July 2002. The development signified, potentially, a new era in international relations.

Membership

The court's membership has grown rapidly, with 124 states parties to the Rome Statute in 2016. It has coexisted with other, ad hoc tribunals (in the former Yugoslavia, Rwanda) and hybrid arrangements between the UN and nation states (Cambodia, Sierra Leone), and regional organisations (such as a Senegal-African Union body for the trial of a former leader of Chad). Unlike these others, the ICC is a permanent institution with potentially global reach.

The current membership of the court, while satisfying in many ways, masks two shortcomings: the power factor and a regional skew. The power factor, while unsurprising, is vividly portrayed in the case of the ICC. Whether they are states or individuals, it is the larger or more powerful that resist the strengthening of the law, and the weaker or smaller that promote it. It is no accident that most of the major powers (the United States, Russia, China, India) are not parties. Russia signed the statute in 2000 but has not ratified the agreement and in November 2016 notified the secretary general of the Federation's intention to no longer be a party to the Rome Statute. China and India have not signed. France and the United Kingdom, however, have ratified and are thus parties.

Whether they are states or individuals, it is the larger or more powerful that resist the strengthening of the law, and the weaker or smaller that promote it.

The United States has vacillated over the court, having signed the statute in 2000 and then voided its signature in 2002. For some years it maintained bilateral agreements with many countries in which the latter agreed not to hand over US nationals to the court. For a few years it persuaded the UN Security Council to pass resolutions to similar effect, and its congress maintained sanctions against states that refused bilateral agreements. After some years, however, this policy has softened, in so far as the US sees the court as a potentially useful instrument, or at least awkward to avoid or deny in some circumstances, such as Sudan.

The refusal of three of the permanent members of the Security Council to become parties to the Rome Statute stands in stark relief to the exercise of their power to have the council refer nationals, including heads of state, of those states which are parties to the statute. From the standpoint of many states parties, this is the height of hypocrisy.

A skew in regional membership of the court is also noticeable. Of the 124 parties, the majority come from Europe, Africa, Latin America and the Pacific. Only eight parties are from Asia (including Japan, South Korea, Philippines, Bangladesh and Afghanistan); major countries, such as India and Pakistan, North Korea and Indonesia, remain aloof. Only one party is from the Middle East (Jordan), while four states (Egypt, Oman, Syria and Yemen) have signed but not ratified. Iran and Israel have not ratified, despite having signed on the same day in December 2000.

The fact that major powers are the last to adhere to the rule of international law is well known. The regional skew is less explicable. To some extent it is correlated with crisis areas (such as Kashmir, the Middle East and North Africa). But this is not total: South Korea joined the court despite the tensions on the peninsula. There is, moreover, the argument that ratification, at least as part of a truce arrangement, would strengthen the rule of law and help prevent the recurrence of tension.

Jurisdiction

The court's jurisdiction is clearly defined in the statute, which lays down the principle of complementarity, specifies the origin of advancing complaints and the opening of investigations, and identifies the crimes within its jurisdiction.

Complementarity

The ICC stands as a court of last instance, the presumption being that a state party's domestic criminal jurisdiction is sufficiently robust to handle its own cases. But, under the principle

of complementarity, the ICC accepts jurisdiction if a state party is unable or unwilling to ensure that criminal justice will apply through its own domestic jurisdiction in a specific case.

Exercise of jurisdiction

Under the statute there are four possibilities for enabling the court to exercise jurisdiction:

- self-referral: a state party can request the court to open an investigation over alleged crimes within its own territory, on the grounds that it lacks the capacity to do so within its own domestic jurisdiction;
- other state referral: a state party may request the court to open an investigation over alleged crimes by another state (not necessarily a party) if its own nationals have been victims of the alleged crimes;
- UN Security Council referral: the Security Council may refer a situation to the court if it judges this to be in the interests of international peace and security;
- *proprio motu:* the prosecutor is empowered to open an investigation, either on his or her own initiative or in response to allegations advanced by private groups.

The crimes

The statute accords jurisdiction to the court over 'the most serious crimes of concern to the international community as a whole'. It confines that jurisdiction to four crimes: genocide, war crimes, crimes against humanity, and aggression.

The first three crimes differ from the fourth: with respect to these the law governs crimes committed in the course of conflict (*ius in bello*). In contrast, aggression is a crime that commits a state or individuals to conflict itself (*ius ad bellum*). The court has exercised jurisdiction over the first three since July 2000 but, for reasons explained below, aggression is not yet justiciable.

The crime of aggression is also different in another important sense. While the other crimes might be committed against a leader, in most cases they are committed by local military commanders, usually of rebel forces. In the case of aggression, the crime belongs to the most senior leader: political leaders in the form of heads of state or government (including cabinet ministers, such as the minister of defence), or the military leader of a country (the commander of the armed forces). Partly because of the sensitivities, the crime of aggression did not become justiciable in July 2002 with the other three. The decision was taken in 1998 to include aggression as a leadership crime, but to defer justiciability until two conditions were met: reaching a legal definition of the crime, and setting out the conditions under which the court would exercise jurisdiction.[1]

In the case of aggression, the crime belongs to the most senior leader: political leaders in the form of heads of state or government ... or the military leader of a country ....

Defining the crime of aggression has been a challenging exercise. As early as 1933 the USSR took an initiative with the Convention for the Definition of Aggression. But the convulsions of the 1930s and '40s, and a divided world, blocked any constructive progress. In 1974, however, the UN General Assembly adopted a seminal resolution defining aggression, which served as the basis for political, and to some extent legal, work.[2] But for the purposes of criminal law, a precise and exhaustive definition was required. In the early 2000s a working group on the definition of aggression produced a draft legal definition of aggression.

In 2010 the review conference of the Assembly of the States Parties to the ICC achieved a remarkable diplomatic breakthrough in which both conditions, a definition and the conditions of jurisdictional competence, were agreed. The Kampala amendment, now ratified by 32 states parties, requires a final decision by the states parties, meeting as an assembly after January 2017, to proceed. If and when that occurs, the crime of aggression becomes subject to the court's jurisdiction, effective one year after the assembly's decision, for those parties ratifying the amendment.

The introduction of aggression as an individual leadership crime in international law will have a revolutionary effect on international relations. A president or prime minister of a state party, a defence minister, or a commander of a nation's armed forces will be individually liable under international criminal law, if their country's armed forces commit aggression as defined in the Kampala amendment. This is where power meets law, perhaps more vividly than in any other example. The relationship between the political responsibility of the UN Security Council to determine whether aggression has been committed under article 39 of the UN Charter, and the judicial responsibility of the ICC to determine whether aggression has been committed under an amended Rome Statute, is highly sensitive. The compromise solution at Kampala accords the Security Council some discretion vis-à-vis the court. It can require the court to defer any investigation for a 12-month period, though such deferral is not indefinite. But the court's independence on substance is largely retained: a decision by the prosecutor whether to proceed is not conditional on any prior political decision by the Security Council.

Record of the court, 2002–16

The record of the court's dealings to date is shown in Table 1.

It is clear that the court has a full load, at least for its limited capacity. In short:

- Nine trials have run their course: four defendants have been found guilty (with one appealing and three under consideration for victim reparations); one has been acquitted; one case has been withdrawn; one has been vacated; and two charges were not confirmed.
- Five trials are currently under way.
- Ten cases are under investigation (including the only one involving alleged genocide).
- Ten more cases are under preliminary examination.

Table 1: Summary of ICC cases, by stage*

Stage	Genocide	War Crimes	Crimes Against Humanity	Total
Preliminary	0	4	4	10
Under investigation	1	7	9	10
Pre-trial	0	0	0	0
Trial	0	3	3	5
Appeals	0	1	1	1
Reparations	0	3	1	3
Closed	0	3	4	5
Total	1	21	22	34

* Note: The totals are not necessarily equivalent to the sum of the subsets, since more than one crime may be involved in a case, and because at the preliminary investigation the crime may not be publicly announced.

Table 2: Source of authority for ICC investigations

Self-referral	Other state referral	UN Security Council referral	Proprio motu
Situations under investigation			
Uganda		Sudan	Côte d'Ivoire
Democratic Republic of the Congo		Libya	Kenya
Mali			Georgia
Central African Republic I			
Central African Republic II			
Preliminary examinations			
Gabon	Comoros (Israel)		Afghanistan
Palestine			Burundi
Ukraine			Colombia
			Guinea
			UK (Iraq)
			Nigeria

African tensions

The ICC has come under increasing criticism from some African states. A number of states parties have recently commenced the process of withdrawal:

- on 12 October 2016 the Burundi Parliament decided to withdraw, notifying the UN secretary general on the 26th;
- on 19 October South Africa submitted its instrument of withdrawal, which takes effect one year later;
- on 25 October Gambia announced an intention to withdraw;
- Namibia has stated an intention to withdraw, its cabinet having made such a decision.

African criticism of the court

The African criticism focuses on alleged bias in selection of investigations and prosecutions, a sensitivity heightened when sitting heads of state or government are involved. The president of Sudan has been issued with an arrest warrant, and the president and prime minister of Kenya have been under investigation. The opposition to the court has taken the form of non-cooperation over the Sudan case and a recent movement to withdraw from the court, spearheaded by Kenya.

In the case of Sudan, the investigation derived from a referral by the UN Security Council in 2005.[3] An arrest warrant was issued within months against the president and other officials. The council's resolution, adopted under chapter VII of the UN charter, called on all UN member states to fully cooperate with the ICC. Despite this, the African Union responded with a resolution calling on states parties not to cooperate. The president has visited many African countries, including states parties, without being arrested. Under the UN Charter (article 103), decisions made by the United Nations take precedence over those by regional organisations. The African Union decisions are, in fact, invalid and in violation of the charter and the binding Security Council resolution.

The case of Kenya involved an investigation of two political leaders for alleged crimes committed in the wake of the 2007 election. The prosecutor opened the investigation with the support of the then president and prime minister. The two leaders under investigation were installed subsequently as president and prime minister, with resulting opposition to the investigation from the new government and serious witness intimidation. The cases against the leaders were dropped, although charges against other individuals are retained.

Reflections on the criticism

Much of the criticism derives from concerns over who has the power to advance allegations and initiate investigation. Table 2 shows the source of the cases under investigation or preliminary examination.

As is shown, only two cases have been referred by the Security Council. Eight cases have been self-referred, and nine have been opened by the prosecutor, of which five are in Africa and four elsewhere. The evidence suggests that there is, in fact, no bias against Africa.

If the self-referrals are removed, the geographic spread appears different. And of the nine cases initiated by the prosecutor, five are from Africa, two are from Europe, one from Asia and one from Latin America.

The political fact remains, however, that there is a heavy concentration on Africa in the court's dealings:

- all five trials currently under way involve African conflicts;
- of the ten cases under investigation, eight are African, one is Arab and one is European;
- of the ten cases under preliminary examination, four are African, three are European (of which one involves a permanent Security Council member, the UK), two involve the Middle East (Palestine, and a complaint against Israel) and one is Asian.

The withdrawing countries oppose in particular the arraignment of sitting heads of state. States parties not cooperating in the arrest of the Sudan president justify this on the grounds that he enjoys immunity through office. This is, however, not a valid understanding of contemporary law. It is inconsistent with the Nuremburg Charter of 1945, which states that: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'[4] In the first session of the UN General Assembly in 1946, all UN member states became party to the London agreement containing the Nuremburg Charter. In the same resolution the assembly declared the London agreement and the jurisprudence of the Nuremburg trial to be reflective of customary international law. In 1950 the General Assembly adopted a set of principles of international law which asserted that 'the fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law'.[5] The same principle was incorporated more recently in the draft Code of Crimes against the Peace and Security of Mankind.[6]

African defence of the court

Notwithstanding these criticisms, there is a robust defence of the court, including from African states. At the African Union's 27th summit in July 2016, influential countries (Senegal, Nigeria, Côte d'Ivoire, Tunisia and Botswana) opposed a proposal for 'mass withdrawal'.

So long as military power remains caged in national jurisdictional capability, the strengthening of the rule of law will prove difficult.

Relevance of other conflicts

The 'African crisis' raises the question of whether the court has failed to explore potential crimes sufficiently in other regions. Where there is intense and continuing conflict, there will usually be war crimes committed. In Asia, Sri Lanka is not a party to the statute, but if a party's nationals have been victims, the way is open for a complaint. The Philippines is a party, and the question has to be asked why there has been no exploration by the court, whether of war crimes in the south of the country or of crimes against humanity under the current 'war on drugs' policy of the new government. In the Pacific there may be reason for complaints of crimes against humanity by Australia (on Manus Island) and by Fiji (repression of political leaders, citizens and the media).

Other countries where potential crimes could be alleged but which are not parties to the statute include Sri Lanka, the United States, Russia, China, Iran and Saudi Arabia.

Challenges facing the court

Apart from the African crisis, two challenges confront the court: one logistical, one political. The logistical problem concerns the limited enforcement power of the court. The political challenge is the trade-off between 'peace' and 'justice' in any post-conflict situation.

Enforcement

Perhaps the biggest weakness of the Rome Statute is the lack of enforcement power. The statute does not allow trial *in absentia*, and so a suspect must be physically present for any trial to proceed. The prosecutor's office has no intelligence capacity, nor any physical capacity to apprehend, arrest and transfer. This leads to lengthy delays in bringing those charged before the court and can diminish the court's standing. At present, 11 suspects remain at large. Some way must be found of rectifying this.

The trade-off between peace and justice

This raises the difficult relationship between peace and justice. While it is a natural instinct for all involved, not least but not only the victims of atrocity crimes, to see justice dispensed, the process can have a chilling effect on the cementing of a peace arrangement. Suspects still clinging to power or to marginalised territory, or under malign protection, will only agree to a peace arrangement if it accords them a passage to impunity. The most prominent example of this dilemma is the case of former Liberian leader Charles Taylor. The apprehending of Taylor for alleged crimes during the conflict in Liberia and Sierra Leone was delayed for a period lest it impede the peace and reconciliation process. Ultimately, however, Taylor was arrested, and tried, convicted and sentenced in the special court for Sierra Leone.

Conclusions: the future

The International Criminal Court is a symbol not of the global community but of one that is emergent. Its rationale and its principles are predicated on the peace and the human rights provisions

of the United Nations Charter, a 'statist' constitutional document coined in the mid-20th century. Yet by bringing the individual within the reach of criminal law, it extends those provisions, bringing accountability from the level of the state to that of the individual. As described in the preamble to the statute, the states parties are conscious that 'all peoples are united by common bonds, their cultures pieced together in a shared heritage'. And the parties harbour a concern that 'this delicate mosaic' might be shattered at any time; hence the need for a permanent court, one that makes no distinction among the 7.3 billion humans on the planet today, including those holding the highest positions of power.

It has not been, is not and will not be an easy path. So long as military power remains caged in national jurisdictional capability, the strengthening of the rule of law will prove difficult. Those who preside over the committal of the gravest crimes will disclaim personal liability through general political oversight, shrug off the notion of individual legal accountability, and take refuge in their military capacity to remain unreachable. It took years for Radovan Karadžiş to be apprehended. Oman Al Bashir may never be brought before the court, at least during his leadership tenure. Leaders of the US and China will remain unreachable for decades.

Until some form of enforcement capacity is bestowed on the court, or created in support of the court, through, perhaps, a separate enforcement agency (Interpol is a voluntary organisation), this will not change. Such a development will not occur in the immediately foreseeable future, but the same rationality and foresight that produced the court in the first place will, at some stage, result in an enforcement capacity that equates with the court's jurisdictional competence, a freedom and protection from political bias or interference, and an objective application of due process and dispensing of justice that results in the existence of global law which attracts the genuine support of the world's citizenry.

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.
>
> —Judge Robert Jackson, Nuremburg Tribunal hearing, 1948

1 Rome Statute, article 5(2)
2 UN General Assembly resolution, Doc Res/28/3314.
3 Security Council resolution 1593 (2005).
4 Charter of Nuremburg, article 7.
5 'Principles of International Law Recognised in the Charter of the Nuremburg Tribunal and in the Judgement of the Tribunal', principle III.
6 International Law Commission, draft Code of Crimes against the Peace and Security of Mankind, International Law Commission, 48th session, May–July 1996, UN General Assembly official records, 51st session, supp. no.10, UN Doc A/51/10.

Neil Boister

GLOBAL LAW
confronting the transnational criminal

Philosophers of liberalism from Rousseau to Rawls have placed the good citizen at the centre of the liberal political arrangements they advocate. These good citizens bear their obligations and exercise their rights within the law of nation states. They enjoy status in their communities, communities to which they owe allegiance. Conceptions of the nature of this citizenship vary widely. Some have a trace of the totalitarian. Rousseau famously argued that humans living in a society must reconcile their own sense of subjective freedom with the objective need to act correctly (Rousseau, 1762, chs 5-8). In a state of nature they live only for themselves; as citizens they cease to be individual units and become parts of the new unit, the community. Independence is exchanged for dependence. Other philosophers emphasise the capacity of citizens living in a community for rational choice. Rawls argues that citizens have the capacity to pursue their own conception of what is good and share a conception of primary goods such as the basic liberties within a society defined by fairness (Rawls, 2001, part 1). Macedo argues that public justification of the community's action is critical, making all participants 'a community of interpreters, a citizenry of self-critical reason givers' (Macedo, 1991, p.78).

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Global citizenship

Whether notional equivalents to this national citizenship exist at a global level – global citizens, living in a global community, who must reconcile their subjective freedom with the needs of the global community, who may do so because they share a global conception of the good, and to which the community must justify its actions – has been a subject of debate for some time (Archibugi, 2008; Dunoff and Trachtman, 2009). One of the principal motivations for this concern has been the necessity for some form of effective global citizenship to make for continued human viability in the face of environmental catastrophe (Falk, 1993, pp.39, 41). Falk describes the rationalist-elitist embodiment of this notion:

> [T]he global citizen as a type of global reformer: an individual who intellectually perceives a better way of organizing the political life of the planet, and favors a utopian scheme that is presented as a practical mechanism. Typically such a global citizen has been the advocate of world government or of a world state or a stronger United Nations – accepting some kind of political centralization as indispensable to overcome today's political fragmentation and economic disparities. (ibid., p.42)

Embodying commitment to a kind of idealistic imperialism, this approach to global citizenship contrasts with the parochial reality of the transnational global citizen doing business (whether it be commercial, governmental, moral or whatever) in different places, connected, networked. There are other such conceptions, yet all embrace a completely de-territorialised concept of citizenship which presents unique problems of the definition of the criteria for and quality of membership of this global political community. To put it crudely, what status does the global citizen enjoy, how do they qualify to enjoy it, and in what do they enjoy it? The state appears always to be in the way, to obscure the relationship of individuals with a global society of individuals.

Global criminals

This is particularly so in regard to the position of those who do not only not meet their social obligations, who do not share a sense of the good, but who deliberately flout the law, who share a sense of the bad and how they can profit from it. At a national level they are considered criminals, and when convicted they may lose some of their freedoms, such as physical liberty, and rights of citizenship, such as voting.[1] However, when these individuals cross borders, or the effects of their actions cross borders, they become transnational criminals. Pirates, slavers, drug traffickers, bribers, human traffickers, people smugglers, terrorists, organised criminals, money launderers, cybercriminals, environmental criminals, weapons traffickers, illicit traffickers in cultural property, organ traffickers, fraudsters, counterfeiters, identity thieves, damagers of undersea pipelines, or some other type of criminal, all engage the interests of other states, potentially many other states. They engage with and become subject to the substantive criminal jurisdiction of states, a jurisdiction which, relying upon an increasingly tenuous link between the interests of the state and that individual's actions, has steadily enlarged beyond state territory. In many cases states take jurisdiction over individuals who are not their nationals and who do not enjoy any of the rights or privileges of citizenship within those states.

The 'bad man' view of global citizenship

When criminals network with other criminals across borders, they engage, as Falk terms it, in a kind of globalisation 'from below' (Falk, 1993, p.39). This position also dictates their view of the law. Justice Oliver Wendell Holmes famously said that 'if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict' (Holmes, 1897). What does the bad man who traffics across borders want to know about what the global community expects of them? They probably think only of the laws in the states in which they operate, from the perspective of how to avoid being caught and punished for breaking those laws (if there is any practical likelihood of that occurring). They consider these laws only to try to avoid them by secrecy, or through corruption or coercion. Should this dictate the global response – should they fall outside the law because they undertake criminal activity and do not enjoy the protection of citizenship?

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> According to the ancient English concept of outlawry: 'he who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man", he is a wolf.' (Harvard Law Review, 1989, p.1301, n.6)

Are these transnational criminals (or modern global outlaws) rightly considered fair game by all comers? One thinks, for example, of Somali pirates captured and apparently executed by Russian naval forces to global clamour (Hussein, 2010). Or are they just bad global citizens, whose community is, because of their activities, the globe; who can be punished because of the harm

they cause but who should be able to seek some minimum levels of protection from that community? The answer to this question dictates the quality of the global criminal justice response to transnational crime. Will it respect fundamental values of legality and due process, or will it permit states by omission to ignore human rights obligations to foreign criminals?

The response: transnational criminal law

The legal response of the international community has been to adopt 'rules and legal instruments … specifically created to deal with transnational criminal matters' (Gless and Veryaele, 2013, p.3). Bad citizens are subject to globalisation 'from above'. They are the objects of the collaboration of states which use different kinds of international instruments to suppress transnational crime. States rely on crime suppression conventions such as the United Nations Convention against Transnational Organised Crime,[2] adopted with the goal of standardising crimes at the national level and making possible international cooperation in the investigation, extradition and prosecution of criminals who commit serious crimes transnationally. Authoritative decisions of intergovernmental organisations, such as Security Council resolution 2178[3] on foreign fighters, go even further and institute extensive preventive measures against potential transnational criminals prior to any action on their part. Soft law such as the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation[4] provide for a much tougher sanctions-backed implementation regime than more formal treaty obligations. States are constantly urged to join new multilateral systems to suppress crimes. In recent years we have seen a proliferation of new regimes to combat activities such as counterfeiting of medicine[5] and the smuggling of tobacco,[6] and moves towards suppression of piracy of intellectual property on the internet (see Urbas, 2012).

These systems foster criminalisation and the processing of alleged criminals. But whatever form this intervention takes, this is not a direct ordering by the international community of the lives of individuals. The state intrudes as the mediator of these rules because of the maintenance of the right to take coercive action against individuals as a prerogative of sovereignty. There is, thus, no single point of origin for these transnational criminal laws; there are rather multiple points of origin. These points of origin may be the unilateral domestic actions of states, or agreements based on treaties or other more informal relations between states, or perhaps even arise out of the actions of transnational actors such as intergovernmental organisations, or even companies, such as the banks engaged in self-regulation for anti-money laundering purposes (which accords more with the private law notion of transnational legal activity). The system is plural – the order dispersed in nature.

> There is … no basic transnational standard for a 'fair trial' beyond a state's domestic criminal jurisdiction, something which effects the investigation and extradition of transnational criminals …

The single nexus all of these rules have, however, is a focus on cross-border crime. There are two interesting things about this response. First, if these instruments designed by the international community to suppress transnational crime can be said to express the notion of global citizenship at all, it is from the point of view that they do so only through expressing the belief that only an increase in the exercise of power and authority of states on a global scale can serve the interests of all. To put it another way, the one group of individuals that globalisation really pays attention to is global criminals, if only to suppress their activities. Second, these instruments pay little attention to the rights of these criminals; in their silence they reinforce an implicit conception of transnational criminals as global outlaws.

Systemic human rights risks for global criminals

The human rights regulation of national criminal justice systems is generally weak (see Currie, 2015). But the systems also entrench systemic abuse because the international agreements to suppress transnational crime call for severe action based on ambiguous principles. One result, for example, is that developing states which struggle to comply engage in symbolic commitments to severe practices through the use of, for example, heavy punishments to make up for their poor enforcement of these treaty-derived laws. There is, in addition, no basic transnational standard for a 'fair trial' beyond a state's domestic criminal jurisdiction, something which effects the investigation and extradition of transnational criminals (Gless and Vervaele, 2013, p.6). Gless makes the point that when international instruments for the suppression of crime are developed, state participants seem primarily concerned with the establishment and enforcement of their own *ius puniendi* and the limitation of the *ius puniendi* of other states, rather than with the plight of the individuals subject to the system (Gless, 2015, p.119ff). She notes that from the defendant's point of view transnational criminal law does not look coherent at all, but rather like a patchwork of laws made of overlapping national criminal jurisdictions (p.127). In a system where states retain their independent authority to enforce their jurisdiction, yet are urged to cooperate, defendants may find themselves subject to multiplications of penal power. Hence she argues for the urgent necessity to adopt an approach that places the individual defendant at the centre of transnational criminal relations, not as

an object but as a rights holder.

Gless supports adoption of a global rule against double jeopardy that does not only prevent double prosecution for the same actions, which is currently not prevented, but also prevents parallel prosecution, and deals with situations where some states criminalise particular activity while other states do not. For example, states that seek cooperation from other states against transnational criminals through extradition must provide a functional equivalent to the constitutional protections they afford their own citizens who are exposed to prosecution (ibid., pp.130-4). Gless's argument echoes Benvenisti's general view that states owe obligations to foreign individuals caught in their web of authority because the state, as a trustee of humanity, must express the basic moral obligation that every individual exercise their own self-determination in a way that takes account of others' interests (Benvenisti, 2013, p.300ff).

Full global citizenship for bad global citizens

The same argument can be made in regard to the global polity. The suppression conventions create a negative global citizenship in the sense that they are bearers of obligations not to commit certain crimes against the interests of large hegemonic states. At a practical level Benvenisti accepts that the state must be, at least for the moment, the instrument of the global polity for the protection of transnational criminals from that global polity. The globalisation of rights and protections more explicitly to bad global citizens from the laws created to suppress their activities is a necessary step to granting these bad citizens the quality of protection any citizen deserves. Transnational criminal law needs principles of criminalisation, as well as principles of establishment and enforcement jurisdiction. Gless makes the point that these global principles cannot be set at a high level of abstraction; they have to be principles that can shape and direct the application of national rules in these situations. These principles can be deduced from the normative aims of transnational criminal law or through empirical analysis of existing rules within the system (Gless, 2015, p.136).

There does appear to be a growing consciousness, if only at a rhetorical level, of the need to protect the rights of transnational criminals. The disasters of the global war on drugs are a case in point. It has been accused of allowing law enforcement to make war on minority communities such as black Americans (Davis, 2003). Severe treatment of alleged offenders and severe punishment of offenders largely acts as a surrogate for effective action to control the global drugs market. Human rights NGOs point out that Iran's interdiction programmes, for example, supported by Western and other donors and through the UN Office of Drugs and Crime, have enabled the execution of significant numbers of convicted drug traffickers in spite of donor state and official UN positions that condemn the use of the death penalty (Reprieve, 2015). Of more immediate relevance to New Zealand, Anthony DeMalmanche, a New Zealand national, was convicted in Indonesia for drug trafficking offences despite raising evidence that he had been duped into trafficking the drugs, and was sentenced to 15 years' imprisonment (Dunleavey and Cowlishaw, 2015). At the 2016 special session of the UN General Assembly on the world drug problem the General Assembly adopted resolution S-30/1, which makes the following operational recommendation on proportionate and effective policies and responses, as well as legal guarantees and safeguards in criminal justice. States agreed to

> (o) Promote and implement effective criminal justice responses to drug-related crimes to bring perpetrators to justice that ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings, including practical measures to uphold the prohibition of arbitrary arrest and detention and of torture and other cruel, inhuman or degrading treatment or punishment and to eliminate impunity, in accordance with relevant and applicable international law and taking into account United Nations standards and norms on crime prevention and criminal justice, and ensure timely access to legal aid and the right to a fair trial.[7]

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However, this is just one area of action in a particular silo in transnational criminal law. Full realisation of human rights protection of global bad citizens requires a conscious rebalancing of the interests of effective crime control.

Conclusion: principles for the suppression of global crime

A rough framework for policymaking in this field should ask the following principle-based questions about any proposed new international instrument for the suppression of crime.

General

- What evidence supports the identification of specific threats as harmful and does it justify either the use of criminal sanction or the use of the specific procedural mechanisms recommended?
- Are the principles in the proposed treaty/international instrument etc. acceptable to all potential parties

and not bound to any single legal tradition? (Bock, 2013, p.184)
- Does the proposed instrument adhere to the principle of legality by vesting the jurisdiction to prescribe certain crimes and to adjudicate and enforce those crimes in a competent lawmaker? (Luchtman, 2013, pp.13, 14)
- Does the proposed instrument adhere to lex certa: i.e. will what is to be criminal be readily known and available, certain and clear? (Ireland-Piper, 2013, p.87)

Principles for substantive criminalisation and punishment
- Does the proposed instrument embrace the principle of personal guilt as a prerequisite to criminal liability by making clear provision for conduct and fault in the definitions of proposed criminal offences? (Bock, 2013, p.184)
- Does the proposed instrument embrace the principle of certainty of punishment by making clear provision for the type and measure of punishment to be meted out?

Principles for the establishment of criminal jurisdiction
- Does the proposed instrument adopt clear and recognised principles of jurisdiction, both territorial and extra-territorial, which establish a sufficiently close connection between the state concerned and the alleged crime in question to justify that state establishing jurisdiction?
- Does the proposed instrument spell out clearly a theory of precedence in cases of concurrent jurisdiction?

Principles for the enforcement of criminal jurisdiction through procedural cooperation
- Does the proposed instrument prohibit double jeopardy (*ne bis in idem*) so as to avoid the prospect of repeat prosecution for essentially the same offending?
- Does the proposed instrument guarantee respect for human rights, such as privacy in exchange and storage of information, whether pre-investigation, for the purposes of investigation or for the purposes of trial?
- Does the proposed instrument guarantee respect for human rights and fair treatment at all stages of proceedings, from investigation through to punishment, including enjoyment of all rights and guarantees provided by the domestic law of the party in the territory in which that person is present?
- Does the proposed instrument provide that all criminal charges be brought before a tribunal established by law, or, in the case of administrative action, include the right of the judiciary to exercise oversight?

Luchtman questions the theoretical basis for holding that these bad citizens are bearers of rights under transnational criminal law (Luchtman, 2013, p.11). Is it because we are all Kantian global cosmopolitans, or just because we are human? However we construe our relationship with the global polity, we can all potentially be bad citizens. Ironically, the need to provide these bad citizens with protection is likely to become more pressing as global problems begin to bite, and individuals take advantage of the commercial opportunities these problems present. The market potential is enormous, for example, for the trafficking in the victims of global warming and the smuggling of people attempting to escape drowning and burning lands. How will we respond as global citizens when we catch these traffickers? Badly?

1 Although to what extent is a matter of debate: see, for example, Schall, 2006.
2 The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.
3 Resolution 2178, 24 September 2014.
4 FATF (2012, updated 2016), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: recommendations, available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.
5 See the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (or MEDICRIME convention), 28 October 2011, CETS no.211.
6 See Conference of the Parties to the WHO Framework Convention on Tobacco Control, Protocol to Eliminate Illicit Trade in Tobacco Products, 12 November 2012, FCTC COP/5/6, 11 May 2012.
7 General Assembly resolution S-30/1, 4 May 2016.

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