Law, justice and the idea of a world society

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International law has traditionally been seen as concerned with the relations among states rather than among people and with order rather than justice. Because of its emphasis on sovereignty, it was, furthermore, regarded as dependent on the consent of states rather than as being capable of being derived from any form of democratic principle, still less from any kind of hierarchical structure of normative authority. Its societal grounding—something that any system of law requires—was, therefore, a presumed society of states: a loose and limited association among sovereign entities whose primary purpose was to enable orderly relations among states without in any way diminishing their sovereign statehood and rights. In the past 30 years this view has been increasingly challenged by interpretations of recent developments in international law that envisage gradual progress towards something that might more properly be called 'world law', since it extends legal personality beyond the state, it derives increasingly from consensus rather than consent and it reflects a growing concern with justice rather than with order. In short, it is a form of law appropriate to a world society of people rather than a society of states. This article first discusses the kinds of reasoning and forms of evidence employed in such an interpretation, then considers the main critiques of it, before, finally, advancing a perspective that differs in certain respects from both the progressivist interpretation and its rebuttal, while drawing some inspiration from each.

The progressivist case

Academic international lawyers, like their IR counterparts, may be grouped into three loosely associated clusters. The first is usually to be found with labels such as 'realist' or 'positivist' (in the juridical rather than the epistemological sense, denoting a belief that international law must be grounded in state consent). The second is variously termed 'liberal–humanist' or 'progressivist'. The third embraces such categories as 'radicals', 'critical theorists', and 'post-modernists', sometimes all classed together under the umbrella term 'Newstream'.

Even the most optimistic idealist would find it hard to maintain that international law has made steady, unbroken progress towards a world society governed by principles of justice. Nonetheless, there is a plausible progressivist story to be told about the evolution of international law. It might begin with the assertion that what Franck calls a 'fairness discourse' has been present in international law from the beginning.[1] Terms like 'equality', 'reciprocity' and 'balance'—all commonplace in eighteenth-century treaties—might be derided by some as doing little more than placing a mask of gentility over what in reality was no more than a relentless struggle for power.[2] But they also delineated an intersubjective social reality in which states shared not only mutually acceptable defining characteristics but also a common language and a normative structure founded on shared assumptions about the rights and duties of states.

Of course, fairness to states in the anarchical European international society of the eighteenth century involved quite different principles and even modes of reasoning from those commonly employed in any other ethical discourse. *Raison d'état* permitted acts of treachery and violence abroad that would be unconscionable at home; the unassailable principle of non-intervention gave governments the freedom to do as they chose with their populaces; states might enjoy an equality in international law but in no material sense; and the 'just balance' they sought in some of their treaties was a balance only of power, not one of any deeper harmony. Yet the fact that their formal communications with each other involved the constant use of a language of diplomacy constructed in terms appropriate to civilized social interaction within a society of sovereign equals meant that the struggle for power was accompanied by the development of a normative and discursive framework that did not simply reflect the naked realities of power.

In the nineteenth century this minimal ethical component became more firmly institutionalized in many international treaties, and also broadened to a limited extent beyond aristocratic courtesy to touch upon issues that related to larger and more communally based questions of justice than those embraced by the esoteric morality of the society of states. As in the previous century, this was partly just a matter of linguistic conventions—the term 'family of nations' became commonplace, for example, but there were also developments that are less easy to dismiss as mere window dressing. From 1815 the Great Powers assumed a privileged status that undermined the formal equality that had prevailed in the previous century and enabled them to set norms and lay down rules for international society as a whole. The sacred principle of sovereignty was further eroded around the edges by treaties and other international instruments according rights to non-state entities such as slaves, Jews, and some

[1] Thomas M. Franck, *Fairness in international law and institutions* (Oxford: Clarendon, 1995), p. 9.

[2] The Peace of Westphalia declared that in the Empire, there should be 'an exact and reciprocal Equality amongst all the Electors, Princes and States of both religions...so that what is just of one side shall be so of the other'. Cited in David Armstrong, *Revolution and world order: the revolutionary state in international society* (Oxford: Clarendon, 1993), p. 34.

minorities. Humanitarian principles were written into the laws of war, international law imposed increasing obligations on states to notify outbreaks of disease and take measures to deal with them, a war crimes tribunal was held in Crete in 1898[3] and the dominant European states insisted that full membership of international society required the ability to demonstrate that internal governance measured up to a 'standard of civilisation'.[4]

In the first half of the twentieth century the League of Nations saw a further extension of such institutionalized norms. Once again these reflected the influence of a fairness discourse that went significantly beyond the traditional rights of states. In the Covenant itself, the 'well being and development' of the peoples of the former enemy colonies were deemed a 'sacred trust of civilisation', while the signatories also undertook 'to secure just treatment' for their own colonial peoples and 'to secure and maintain fair and humane conditions of labour' wherever they had influence. The territorial settlement also had various guarantees written into it of minority rights, including, in Upper Silesia, the first ever right for individuals to appeal to an international court.[5]

The UN Charter represented a further stage in this evolutionary process. Human rights, justice, social progress and 'better standards of life in larger freedom' were all affirmed as fundamental norms, while strict limitations were placed on the resort to force. The General Assembly was charged with the progressive development of international law and far more extensive commitments were undertaken in respect of all colonial peoples. Non-governmental organizations were given consultative status with the Economic and Social Council. There was, however, only one sop to distributive justice: the richer countries paid a higher proportion of the costs of the UN than the poorer. But it is to the normative explosion after 1945 that progressivists turn in support of their thesis about fundamental change in international law. Three particular progressivist claims about this profusion of legal material are worth considering: that it has significant implications for distributive justice; that it has given rise to one generally accepted new norm—sustainable development—with profound consequences for the issue of justice in international relations; and that the new norms, taken as a whole and viewed in the light of their application by various international legal agencies, may be interpreted as involving a clear shift from an international society to a world society.

Distributive justice is a novel principle in the international context. It was only at the beginning of this century that international law was amended to the effect that states could not use force in pursuit of debts owed by foreign governments. By that measure, today's legal regime in trade and finance looks positively generous, with agreements like the Lomé Convention and other compensatory and stabilizing schemes or the GATT's Generalised System of

[3] R. John Pritchard, *Gunboat diplomacy* (ECPR/ISA Joint Conference, Vienna, 1998).
[4] Gerrit W. Gong, *The standard of 'civilization' in international society* (Oxford: Oxford University Press, 1984).
[5] David Armstrong, *The rise of the international organisation* (Basingstoke: Macmillan, 1982), pp. 37–44.

Preferences.[6] The 'right to development' has been asserted in numerous UN resolutions and declarations, although normally accompanied by disclaimers from the United States to the effect that it does not recognize the principle, and there may have been some marginal shift from the rigorous principle that compensation to foreigners for nationalised assets should be 'prompt, adequate and effective', a standard hard to meet for poor countries and one enshrining an intrinsic unfairness given that foreign property rights were frequently obtained during the colonial period.[7] Mention might also be made of the requirement in several treaties relating to maritime or watercourses disputes for 'economic and social needs' to be taken into account by tribunals.[8]

Complex issues of distributive justice have also been raised in the debates accompanying the emerging environmental regime. Developing countries have advanced several different kinds of justice claims in environmental negotiations: that they have the right to exploit their own resources, that their own sovereignty should not be infringed, that the costs of an environmental regime should fall primarily on the developed world, and that the more environmentally friendly technology should be freely transferred to them, rather than being subject to current rules about intellectual property rights.[9] On the other hand, Western states have expressed concern that unequally applied environmental standards might unfairly damage the interests of their economic enterprises. The precise status and even the meaning of contemporary environmental norms where they touch upon such North–South issues is far from clear, with one important document, the Rio Declaration, managing to incorporate several distinct and partially contradictory principles. The 'right to development' was formally acknowledged for the first time in a consensus agreement, although the United States entered its traditional dissenting statement and, in one commentator's words, 'the nature and extent of that right is left open, as is the question of whether such a right attaches to states, peoples or individuals'.[10] The formula that states had 'common but differentiated responsibilities' for the environment appeared in Principle 7 of the Declaration but Principle 2 gave states 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies'. Principle 6 gave 'special priority' to developing countries but also called for the 'interests and needs of all countries' to be recognized. Principle 11 acknowledged that environmental standards 'applied by some countries may be inappropriate and of unwarranted economic and social cost' to developing countries but Principle 12 insisted that trade measures taken for environmental reasons should not 'constitute a means of

[6] Antonio F. Perez, 'WTO and UN law: institutional comity in national security', *The Yale Journal of International Law* 23, 1998, p. 368.

[7] Malcolm M. Shaw, *International law* (Cambridge: Cambridge University Press, 1991), p. 521.

[8] Ximena Fuentes, 'The criteria for the equitable utilization of international rivers', *British Yearbook of International Law* (Oxford: Clarendon, 1996), pp. 337–412.

[9] See Shanna I. Halpern, 'The United Nations Conference on Environment and Development: Process and Documentation', *The Academic Council on the United Nations System, Reports and Papers*, 1993, no.2.

[10] Philippe Sands, *Principles of international environmental law*, Vol.1, *Frameworks, standards and implementation* (Manchester: Manchester University Press, 1995), p. 51.

arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. The 1997 Kyoto Protocol on climate change is mainly concerned with setting out several detailed requirements on the emission of greenhouse gases but, in terms of this progressivist narrative, the Protocol (which has much stronger legal status than the Rio Declaration) might be regarded as a small advance for distributive justice. It repeats the 'common but differentiated responsibilities' formula of Rio, but adds relatively stronger requirements for all to implement their commitments 'in such a way as to minimize adverse social, environmental and economic impacts' on developing countries and for new resources, including the transfer of technology to be provided to meet the costs of developing countries.

In 1987 the semi-official Bruntland Report declared that existing international law 'is being rapidly out-distanced by the accelerating pace and expanding scale of impacts on the ecological basis of development',[11] thus aligning itself with those who were beginning to argue that the existing rules and institutions of the society of states were inadequate to cope with the new forces unleashed by globalization. More significantly, it played an important catalytic role in bringing into prominence the term 'sustainable development', which contains the implied principle of 'intergenerational equity', adding another dimension to the fairness discourse, namely that future generations have rights that need to be taken account of in legal instruments. Unlike some new would-be norms, this principle experienced a remarkably rapid progress from declaration to fundamental norm, appearing in numerous subsequent international documents.[12] Of particular interest to international lawyers, the principle was also cited, as if it were already an accepted norm of international law, in the International Court of Justice's (ICJ) decision in the 1997 *Case Concerning the Gabcikovo–Nagymaros Project*, a dispute between Hungary and Slovakia over their proposed navigational regime along the Danube, from which Hungary had withdrawn, citing environmental concerns among other reasons.[13]

The deep seabed mining provisions of the 1982 UN Law of the Sea Convention were widely seen as going much further in the direction of distributive justice than any previous international regime. A fundamental conceptual conflict, arising from Pardo's original 1967 assertion that the seabed was the 'common heritage of mankind', needed to be resolved before any progress could be made in the negotiations. Pardo rejected the concepts of '*laissez-faire* freedom beyond national jurisdiction' and 'the unfettered sovereignty of the State within national jurisdiction'. There was a need, therefore, for 'strong and equitably balanced international institutions with powers to administer ocean space beyond national jurisdiction and to manage its living and non-living

[11] Sands, *Principles of international environmental law*, p. 46.
[12] Guenther Handl, 'The legal mandate of multilateral development banks as agents for change towards sustainable development', *American Journal of International Law* 92: 4, October 1998, pp. 642–65.
[13] 'Report on ICJ decision, 25 September 1997, on Gabcikovo–Nagymaros Project', *American Journal of International Law* 92: 2, April 1998, p. 278.

resources on behalf of the international community'. But so far as 'common heritage' was concerned, the developing countries (in alliance with the 'landlocked and geographically disadvantaged' group of states) wanted this to be interpreted to mean that the relevant resources should be exploited for the benefit of mankind as a whole; the developed countries' first riposte was that the 'common heritage' was available for all on a first come first served basis. In the event, the agreed regime was a compromise, but one that—until the United States reopened the issue as discussed later—on balance reflected developing countries' notions of justice in the following important respects:

- Article 150 called for exploitation of deep seabed minerals to take place in a manner consistent with the interests of developing countries and specifically required existing land based producers of the relevant minerals in the developing world to be compensated for any fall in revenue resulting from exploitation of the seabed.
- The proposed seabed Authority was to control all exploitation of the seabed 'on behalf of mankind as a whole', with its 'parallel access' system designed to ensure that its own mining company, the Enterprise, received the rights to mine half of the available sites. The Authority was also to receive a revenue from its licensing activities, making it the only international organization with a potentially large income not dependent on governments.
- A Review Conference, to be held 15 years after the commencement of commercial exploitation, was to have the capacity to amend the Convention by a three-quarters majority. The Review Conference was specifically charged to ensure that the seabed had been exploited 'for the benefit of all countries, especially the developing states'.[14]
- Companies wishing to conduct mining operations were required to transfer their technological know-how to the Enterprise and to developing country companies that had received mining licences.

Apart from specific developments such as those cited here, the progressivist case rests on a particular way of interpreting the evolution of the international legal system over the last few decades. The nature of the evolution is neatly encapsulated in statements from two noted cases, the first the 1927 *Lotus Case* in which the judgment of the Permanent Court of International Justice included a strong assertion that since international law derived from the will of states, 'Restrictions upon the independence of States cannot therefore be presumed'.[15] The second is from the ICJ President's Declaration in relation to a controversial ICJ Advisory Opinion in 1996 concerning the *Legality of the Threat or Use of Nuclear Weapons*:

[14] Bradley Larschan, 'The international legal status of the contractual rights of contractors under the Deep Sea-Bed Mining Provisions (Part XI) of the Third United Nations Convention on the Law of the Sea', *Denver Journal of International Law and Policy* 14: 2–3, 1986, pp. 218–21.

[15] Richard A. Falk, *The status of law in international society* (Princeton, NJ: Princeton University Press, 1970), p. 177.

Despite the still modest breakthrough of 'supra-nationalism', the progress made in terms of the institutionalization, not to say integration and 'globalization' of international society is undeniable. As proof of this, one may cite the multiplication of international organizations, the progressive substitution of an international law of cooperation for the classical international law of coexistence, the emergence of the concept of an '*international community*' … The resolutely positivist, voluntarist approach of international law still current at the beginning of the century … has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.[16]

These statements lead into one of the arguments used in support of the case that international law is evolving towards a 'world law', whose subjects are individuals and whose purpose is justice as well as order: the role played by the ICJ itself. Strictly speaking, international law does not have a doctrine of precedent—one case is not binding upon subsequent cases, so there is, theoretically, no possibility for 'judge-made law'. In practice, if only to achieve some consistency, ICJ decisions are generally seen as having a relevance beyond the immediate case to which they relate, if not actually as definitive statements of the state of law at that point. Hence if, as some argue, ICJ judges have taken an increasingly 'progressivist' view of their role and responsibilities, this would have significant legal consequences. Evidence of such an evolution might include (apart from the environmental and nuclear weapons cases already cited) a comparison of the ICJ's 1966 Decision in relation to South Africa's right to continue its possession of South-West Africa (Namibia) under its League of Nations Mandate with its 1971 Advisory Opinion on the same subject. In 1966 the Court had bluntly rejected the Liberian and Ethiopian case against South Africa with the assertion:

Humanitarian considerations were not in themselves sufficient to generate legal rights and duties. A court of law could not take account of moral principles unclothed in legal form.[17]

In 1971, by contrast, the Court took a far more liberal view of its capacities, arguing that it could take account of the evolution in thinking about issues like colonialism since 1919.[18]

If the ICJ is indeed playing a more prominent and proactive role in promoting new, 'progressive' norms, this, it might be argued, is essentially because it is merely reflecting, if not following a long way behind, developments taking

[16] Bruno Simma and Andreas L. Paulus, 'The "international community": facing the challenge of globalization', *European Journal of International Law* 9: 2, 1998, p. 277. See also, Handl, 'The legal mandate of multilateral development banks', p. 662, n. 148.
[17] 'South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)', Second Phase, 18 July 1966, ICJ Reports 1966, 4, *International Law Reports*.
[18] ICJ Reports, 1971, para. 54, *International Law Reports*.

place elsewhere in the international legal order. In 1969, the Vienna Convention on the Law of Treaties invoked the notion of *jus cogens* —a peremptory norm of international law which would render void any treaty that conflicted with it, such norms being defined as ones 'accepted and recognised by the international community of States as a whole'.[19] In this way the Convention laid the foundations for a clear hierarchy of norms, including a category that had the power to negate even such a fundamental positivist principle as the pre-eminence and binding nature of treaties.

Other developments appeared to challenge the exclusive legal personality claimed by the state. Non-governmental organizations had influenced the creation of new legal norms, especially in relation to the environment. The growing body of international economic and environmental law was increasingly obliged to recognize the rights of various non-state entities, including individuals.[20] An even more significant breakthrough came with the war crimes tribunals in the 1990s, together with the creation of an international criminal court. However richly deserved was the fate of the defendants at Nuremburg, the trials were seen as deeply flawed in legal terms, meting out a retroactive justice to individuals in the defeated states only. The more recent developments in establishing the principle of individual accountability for certain kinds of violations of international norms were built upon much firmer juridical foundations.

At a more general level, some have argued that globalization has had a positive effect in promoting certain values that were seen to be inseperable from its central ideology of trusting markets, deregulating and privatizing.[21] These values included limiting the role of governments, providing equality of opportunity for women and disadvantaged groups in the interests of economic efficiency, and promoting good governance norms including democracy and human rights. All of these norms are explicitly or implicitly in evidence in international economic law and in particular in the interpretation and application of this by agencies such as the World Bank, the IMF and the Development Banks. The combined effect of changes of this kind, some argue, has been to shift international law increasingly from a concern with 'coexistence' to an emphasis on 'cooperation' and its societal base from a limited association to a more fully developed community. Some would even go so far as to suggest that we are witnessing the emergence of a body of law appropriate to a nascent international civil society.[22]

[19] 'The Vienna Convention on the Law of Treaties, 1969', Article 53, Malcolm D. Evans, *Blackstone's International Law Documents* (London: Blackstone, 1994), pp. 168–9.

[20] Dominic McGoldrick, 'Sustainable development and human rights: an integrated conception', *International and Comparative Law Quarterly* 45, October 1996, p. 805.

[21] Philip Alston, 'The myopia of the handmaidens: international lawyers and globalisation', *European Journal of International Law* 8: 3, 1997. See also Thomas M. Franck, 'Is personal freedom a Western value?', *American Journal of International Law* 91: 4, October 1997.

[22] Simma and Paulus, 'The international community', p. 270. See also Jonathan I. Charney, 'Universal international law', *American Journal of International Law* 87: 4, October 1993.

The sceptic's tale

Needless to say, progressivist narratives of the kind sketched above have not gone unchallenged. Traditional realists, who have argued with John Austin for many years that international law is not true law, or with Dean Acheson that it is merely 'a body of ethical distillation', have seen little to cause them to amend their views.[23] This of course is an ancient and mostly inconclusive debate that will not be entered into here, except in so far as the pragmatic approach that concentrates on law's actual role in international affairs rather than the real nature of law as such will be utilized in this article's conclusion.

The more sophisticated positivist case tends not to deny any validity to international law as such but to suggest that progressivists are clutching at straws in their attempt to demonstrate fundamental change rather than a very limited fraying around the edges of traditional doctrine. Positivists would point to the many instances where the ICJ and other courts have not strayed very far from traditionalism. For example, in several continental shelf and water course disputes the ICJ has in practice paid very little attention to social and economic need in its decisions. In the 1982 Tunisia–Libya continental shelf case, the Court explicitly refused to take account of Tunisia's argument that its greater poverty should be a factor in the Court's delimitation. The Court responded that 'a country might be poor today and rich tomorrow as the result of an event such as the discovery of a valuable economic resource', so that a temporary phenomenon such as a state's relative wealth should not be allowed to influence a permanently applicable legal finding.[24] Even this refusal did not satisfy conservative judges who felt that the Court had gone too far in applying equitable principles, as Judge Oda argued:

> … the consideration of socio-economic elements involves questions on global resource policies and world politics which should not be solved by international tribunals because these questions go well beyond equity as a norm of law into the realm of social organization.[25]

In a similar case between Malta and Libya in 1985 the Court also rejected Malta's argument that its status as a developing country without resources should be taken into account:

> … neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries leave room for any considerations of economic development of the States in question.[26]

[23] See G. L. Williams, 'International law and the controversy concerning the word "law"', *British Yearbook of International Law* (Oxford: Clarendon, 1945), pp. 146–63 and Percy E. Corbett, *The growth of world law* (Princeton, NJ: Princeton University Press, 1971), p. 18.
[24] Fuentes, 'The criteria for equitable utilization', p. 343.
[25] Ibid., p. 341.
[26] Ibid., p. 343.

More generally, the Court has never invoked *jus cogens* in any dispute, nor even used its statutory right to apply *ex aequo et bono* principles of equity in reaching its decisions. Moreover, far from *jus cogens* being the apex of a hierarchical normative structure, with the ICJ heading a similar jurisdictional hierarchy, the reality is that international law is applied in several quite disinct jurisdictional areas, so that, for example, the kind of criteria employed in a trade dispute by a WTO panel would be different from those operating over an environmental issue.[27]

Similar points might be made in respect of the Law of the Sea. Although the seabed mining provisions contain a radical redistributive principle it is one that operates in respect of a resource which may take many decades to become economically viable, if it ever does. In the first phase of negotiations an offer was on the table from the Nixon administration that would have had far greater practical effect: namely that coastal states might share revenues from the much more lucrative area closer to their coasts, which became in the end an Exclusive Economic Zone (EEZ) of 200 miles reserved for the coastal states alone.[28] The Nixon proposal failed essentially because coastal developing states could see more benefit to themselves from an EEZ than from a regime that offered some measure of fairness to all, so were happy to line up with richer coastal states such as Canada.[29] When the Law of the Sea Convention was concluded in 1982, its deep seabed mining provisions were then rejected by the United States and other Western countries. The American case rested on one important constitutional problem—the possibility that a Review Conference might technically be able to bind the United States without the consent of Congress—and a fundamental set of ideological objections arising from the strongly pro-market convictions of the Reagan administration. These generally worked against the redistributive intent of the Convention, for example, by insisting on greater protection for 'pioneer investors' and rejecting the provisions for compulsory transfer of technology, for measures to protect the interests of land-based developing country mineral producers, and for a powerful, independently resourced international organization working mainly in the interests of developing countries. In the event the seabed mining provisions were effectively renegotiated and a new Implementation Agreement devised in 1994 that took much greater account of the market principles that were by then reigning supreme over the regulatory emphasis of the original Convention. The provisions for the Review Conference were in effect abandoned, as were those relating to mandatory transfer of technology.[30] It should be noted, however, that the Implementation Agreement still embraces the principles of redistribution to developing countries

[27] Jonathan I. Charney, 'Third party dispute settlement and international law', *Columbia Journal of Transnational Law* 36, 1997, p. 89.
[28] Bernard H. Oxman, 'Human rights and the United Nations Convention on the Law of the Sea', *Columbia Journal of Transnational Law* 36, 1997, p. 412.
[29] Franck, *Fairness in international law*, p. 397.
[30] Marti Koskenniemi and Marja Lehto, 'The privilege of universality: international law, economic ideology and seabed resources', *Nordic Journal of International Law* 65: 3–4, 1996, p. 550.

as well as compensation for their land-based producers: its main aim is to place these within a free market framework rather than a centrally controlled one.

Realist cold water might also be thrown on other aspects of the progressivist case. For example, a more common evaluation of the GATT/WTO trade regime than the optimistic interpretation presented above is that its 'bias toward trade values ignores other human values that are ordinarily a central part of the political processes of most communities…'.[31]

Even where attempts have been made to inject considerations of distributive justice into trade matters, these have frequently failed to have the desired effect. The International Tin Agreement collapsed in 1985[32] and the UN's Common Fund for Commodities has had little impact.[33] Even the most ambitious scheme to support developing countries' trade, the Lomé Convention's STABEX, has not lived up to expectations with its developing country members' share of EU trade actually declining since the scheme was established.

In the case of sustainable development, this norm might in some respects actually work against the interests of developing countries, however 'progressive' its intentions. The richer developed nations are leading the drive to prevent further environmental and ecological damage and, to that end, are establishing relatively strict domestic regimes in certain areas. But in the numerous trade–environment negotiations that have taken place in recent years, clear differences have begun to emerge between regional regimes dominated by major powers, such as the EU and NAFTA, and those in which there is a stronger developing country presence, such as WTO.[34] This clearly reflects the differing interests between developed and developing blocs, and the fact that the developed countries have not been willing to pick up the bill for a truly global environmental regime. For instance, the richer states have strongly resisted proposals to amend the Agreement on Trade-Related Aspects of Intellectual Property Rights to make environmentally friendly technology more accessible to developing countries.[35] Finally, notwithstanding the excitement in the international legal community following the *Gabcikovo–Nagymaros* case, this was mainly concerned with the law of treaties and the law of state responsibility, with its pronouncements on the environment being essentially marginal and also of only limited general applicability.

Newstream international lawyers will typically reject both positivist and progressivist approaches (each of which they will, in any case, tend to see as parts of the same spectrum and subject to the same fundamental criticism that they sustain a discourse and its associated practices that are, at root, oppressive and need radical rethinking). Without going into detail about Newstream

[31] Perez, 'WTO and UN law', p. 376.
[32] Franck, *Fairness in international law*, p. 422, n. 65.
[33] Ibid., pp. 423–4.
[34] Richard H. Steinberg, 'Trade–environment negotiations in the EU, NAFTA and WTO: regional trajectories of rule development', *American Journal of International Law* 91: 2, April 1997.
[35] Ibid., p. 243.

perspectives,[36] the following central points may be briefly noted, since they will play a part in the concluding argument.[37] First, international law has played a central part in determining who is included and who excluded or marginalized in international society. Terms such as 'civilization', commonly used up to the time of the League Covenant, are far from being value-neutral and could easily help to underpin an unjust international order, excluding colonies, indigenous peoples and others from any legal entitlements. Second, where more conventional perspectives see international law as arising from state practice, Newstream theorists see it as being constituted by language, and hence as a system of 'linguistic manoeuvres' rather than rules. Law as 'discursive practice' contributes to global social exclusion, for example through its central term 'sovereignty', which defines legal personality in such a way as to prevent the emergence of a global legal order in which non-state entities might have rights. Third, both positivist and progressivist writers subscribe to a flawed Enlightenment view of history in which international law helped to constrain the worst excesses of an anarchical state system, or, in the progressivist view, assisted in a steady evolution towards a more just world community. This conceals the extent to which international law consistently reflected the interests and preoccupations of the most powerful states: from legitimizing territorial conquest in the past to institutionalizing an unjust international economic order today. War crimes tribunals, for example, are merely the latest instrument to uphold Great Power dominance. In either version of the sceptical narrative we remain a considerable distance from anything resembling a world society.

The socialization of states

It is my contention in this concluding section that neither the progressivist thesis nor the positivist or Newstream critiques quite capture the nature of contemporary international society or the role of international law in it. For, while a world society is clearly not taking shape on the back of developments of the kind described by the progressivists, neither is the society of states unchanged from its nineteenth-century form. Globalization and other forces may well have created a structure of economic, social, political and cultural interactions that cannot fully be understood within a framework defined solely by the state and the relations among states, but they have not replaced that framework. Rather, they have altered the way in which it operates primarily by redefining our understanding of what it means to be a state at the end of the millennium. That redefinition and reformulation, in turn, have influenced the social interaction

[36] See the excellent discussion of these approaches in Deborah Z. Cass, 'Navigating the Newstream: recent critical scholarship in international law', *Nordic Journal of International Law* 65: 3–4, 1996, pp. 341–83. See also David Kennedy, 'A New Stream of international law scholarship', in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt, *International rules: approaches from international law and international relations* (Oxford: Oxford University Press, 1996), pp. 230–52.

[37] This summary is derived from Cass, 'Navigating the Newstream'.

among states, including the processes by which international society arrives at its rules, and the nature of the rules themselves. Such changes have, in turn, fed into the fairness discourse in international relations.

It is, perhaps, time to call a halt to one of the more pointless (if most popular) games in academic IR: pronouncing the end of sovereignty. Sovereignty has a legal meaning, and only a legal meaning. It denotes constitutional or jurisdictional independence and has nothing to do with a state's actual power to perform specific functions or the ways in which its freedom to act may be constrained by non-legal forces outside its control.[38] As such it is a term with only limited worth, but it is not valueless: in particular it is of central importance in comprehending the nature and role of formal rules in international society. A sovereign state cannot formally be subject to any external jurisdiction except by its own consent. One implication of this is that the sole source of legitimate authority inside or outside the state is the state itself. However profound the changes in international relations in the past 50 years have been, they have not altered this central fact. This does not mean that the ICJ or WTO or other such agencies may not sometimes be able to play a quasi-independent role in world affairs, merely that the ultimate source of such capacity they possess is the state, and they function within the limits of state tolerance of their freedom.

International law, therefore, remains the law of states associated in a society of states, not of people who are members of some larger community. As such it inevitably reflects the interests of the more powerful members of international society, much as the Newstream critics maintain. But where both the Newstreamers and realists show a curious blindness is in refusing to take much account of changes in the nature of those powerful states since the last century. Less than one hundred years ago all major states were in a posture of permanent readiness for war with each other and, more importantly, were able to carry their societies with them into two world wars. They dominated the rest of the world and, again, had few problems in mobilizing their societies to uphold their domination by force. International legal texts reflected this reality, being as much concerned with legal issues arising from war as those governing peace. Indeed, international law may be said to have evolved through three stages rather than two, with a law of competition preceding a Cold War law of coexistence and what may be today's law of cooperation. But today both war among the major powers and straightforward colonial domination by them of other states look less and less plausible. There are many reasons for this, but two of particular importance are the increasing interdependence and multi-level interaction among the major powers, and the fact that all of them are subject to far greater degrees of popular scrutiny and accountability. The first has given them an ever longer list of common interests and problems requiring settled rules and norms to bring some predictability and stability to the international

[38] Alan James, *Sovereign statehood* (London: Allen and Unwin, 1986), p. 25.

system. The second has meant that popular demands for greater welfare and continuing economic growth, combined with a greater distaste for the amoral ways of the old politics, have both determined to a great extent the domestic political agenda for most leaders and constrained to some degree their international options. These developments are of course interrelated: popular demands for prosperity are increasingly dependent upon what happens in the international economic order. Today's liberal democracies are kinder, gentler things than they used to be, organised at least as much to provide justice as order or security.

A further effect of globalization is that the major powers constantly watch each other, not, as in the past, out of fear of military threat but because they face the same kinds of economic, social and political problems and are interested in observing how others deal with them. International society is not just a juridical association but a framework within which multifaceted social interaction among states takes place—most intensively among the major liberal democracies. In the course of such interaction, states are subject to a constant process of socialization in which they internalize each others' policies and practices across a wide spectrum, including economic, financial, educational and social policies. One consequence of this continuing process has been a redefinition in the West of collective understandings of what being a legitimate state entails. Where once legitimacy in international society required primarily the ability to demonstrate control over a specified territorial area and to perform certain limited international obligations, international legitimacy today is coming increasingly to involve considerations that were once deemed to be entirely matters of domestic concern for states, considerations that may be summed up by the term 'good governance': a set of norms embracing democracy, human rights, the rule of law and deregulated economies. With the end of the Cold War Western states have been less constrained by the perceived need to prop up regimes that fell far short of good governance standards and consequently far readier to press other states to move towards such objectives through attaching political conditions to loans and so forth. They have also perceived it to be in their self-interest to do so. If their own publics impose increasingly high standards on Western governments in areas like the environment or welfare provisions, they risk pricing themselves out of the international market place unless they can ensure that such norms spread. Furthermore, there is increasing recognition that capital finds its most secure and profitable homes in states that are reasonably well governed, with well educated work forces. Hence, while the most thoroughgoing processes of international socialization operate among the major Western powers, any state participating or aspiring to participate in the international politico/economic order encounters pressures to internalize the norms, institutions and practices that are now believed to characterize the fully legitimate state.

International society, therefore, remains a society of states, but one dominated by states that bear little resemblance to their imperial predecessors.

They have also become increasingly confident that their own liberal democratic capitalist societies constitute the norm towards which other states should gravitate and international law has essentially reflected that conviction. Newstreamers would have no problems in interpreting this development as simply the latest stage in a long history of Western imperial domination. Where once the 'standard of civilization' provided the respectable cloak behind which the West oppressed weaker countries, now the standard of governance plays the same part. But not all Newstream propositions lead to negative interpretations. For example, the argument that language constitutes reality is invariably used to show how a certain terminology sustains oppressive and unjust structures. But it has never been entirely clear why language need necessarily function in such a negative fashion: as good governance terminology permeates the international discourse, and becomes institutionalized in legal documents, is it not possible that it might help to constitute a more just reality?

A similar argument about the importance of language may be used to answer the realists' claims that international law does not matter much, if indeed we can accept that it is a form of law in the first place. Constant reiteration of good governance doctrines in legal documents gives them a taken-for-granted quality that leads eventually to their institutionalization as basic norms of international society. Even so, can they affect state behaviour in the absence of powerful sanctions to enforce them, such as those that operate within states? This brings us perilously close once again to the debate about the essential legality or otherwise of international law, and indeed the nature of law as such. It will suffice here to employ the pragmatic case: that most states, most of the time act as if they perceive themselves to be operating within a framework of legal norms and react strongly when states are seen to be violating basic rules. To repeat, this is far from claiming that we live in a world society where justice is a fundamental objective. Globalization, like any process of rapid change, has produced winners and losers and the institutions of international society can have only the most limited impact on this state of affairs while they remain based on the doctrine of state sovereignty. But international society has always played a crucial role in determining the criteria for full membership, or for legitimate statehood. Its current criteria include requirements that, if adopted, will inevitably push states towards a greater responsiveness to justice claims from their own peoples. Insofar as progress may be made in ameliorating some of the unfairnesses arising from globalization, it will be made within each individual state rather than the international community, but the latter, by institutionalizing good governance norms in international law, can have a significant effect upon the fairness discourse inside states.