Critique, Culture and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse

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In this article, international law is viewed as a social and self-constituting phenomenon. As the product of international society's actualization, it contains many biases and prejudices. Given the inherent subjectivity of any system designed to regulate relations between people — and peoples — it is of utmost importance to subject international law to a searching scrutiny of its tendencies to emphasize certain interests, to exalt particular groups and to order society in preconceived ways. This article uncovers the insidious structural biases of international law, including those just beneath the surface as well as those that are firmly embedded within the consciousness of the discipline's conception. It proceeds to consider the structural discourses of contemporary international law that revolve around the fundamental concepts of sovereignty, jurisdiction and state responsibility. Additionally, the sovereignty discussion distinguishes between three categories of bias: (1) biases remaining as remnants of nineteenth century discourses; (2) biases inhabiting the major metaphors of international law, especially as illuminated by feminism's critique of the state and state power; and (3) biases surrounding major substantive areas of international law, such as protection of the environment and the Kyoto Protocol. The article concludes with an exploration of fairness discourse in an attempt to reign in bias, and thereby to resolve the paradox of universalism and the difficulties it has created for international law and society.

Dans cet article, l'auteur considère le droit international en tant que phénomène social et autoportant. En tant que produit de l'actualisation de la société internationale, il abrite de nombreux biais et préjugés. Étant donné la subjectivité inhérente de tout système conçu pour réglementer les relations entre personnes — et entre peuples — il est extrêmement important que le droit international soit soumis à un examen exhaustif de ses tendances à mettre en évidence certains intérêts, à favoriser des groupes particuliers et à ordonner la société de manière préconçue. L'auteur met en lumière les biais structuraux insidieux du droit international — tant ceux qui affleurent la surface que ceux qui sont enfouis au plus profond de la conscience de la conception de cette discipline. Il se tourne ensuite vers les discours structuraux du droit international contemporain qui tournent autour des concepts fondamentaux de la souveraineté, de la compétence et de la responsabilité des États. En outre, la discussion de la souveraineté définit trois catégories de préjugés: (1) les préjugés qui subsistent du discours du dix-neuvième siècle; (2) ceux qui ont donné naissance aux grandes métaphores du droit international, particulièrement tels qu'ils apparaissent à la lumière de la critique de l'État et du pouvoir de l'État par le féminisme, et (3) les préjugés qui entourent les grands domaines substantifs du droit international, par exemple la protection de l'environnement et le Protocole de Kyoto. L'auteur conclut en examinant le discours sur l'équité dans une tentative de surmonter les préjugés et, par conséquent, de résoudre le paradoxe de l'universalisme et les problèmes qu'il a créés pour le droit international et pour la société.

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Introduction

I. Bias in the Conceptual Discourses about International Law

1. Sovereignty
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II. Examining the Structure of Fairness Discourse and its Presuppositions

Theory is always for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space. The world is seen from a standpoint definable in terms of nation or social class, of dominance or subordination, of rising and declining power, of a sense of immobility or of present crisis, of past experience, and of hopes and expectations for the future. . . . There is, accordingly, no such thing as theory in itself, divorced from a standpoint in time and space. When any theory so represents itself, it is the more important to examine it as ideology, and to lay bare its concealed perspective. ¹

[H]ave we a right to assume the survival of something that was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere. In the animal kingdom we hold to the view that the most highly developed species we have proceeded from the lowest; and yet we find all the simple forms still in existence today.²

Nothing we do can be defended absolutely and finally. But only by reference to something else that is not questioned.³

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International law has undergone profound and radical transformations. The history of international law is replete with paradigm shifts as momentous as those in the history of science, philosophy or the arts. The first great paradigm was forged out of the Treaty of Westphalia in 1648, that point in history commonly given for the genesis of modern international law. Out of the Treaty, certain metaphors for the state and inter-state relations became well entrenched and pervasive. They concerned the equality of sovereign and independent nations and rules of action designed to prevent conflicts and wars. The next great shift involved the move away from natural law to positivism, which gained strength in the late eighteenth century and culminated in the efforts of the great codifiers of the late nineteenth and early twentieth centuries, those who were determined to set down the rules of international law in a coherent and systematic manner. However, this quasi-scientific approach was deemed a failure. Alejandro Alvarez recognized in the 1920s that a new international law was needed to deal with the issues of globalization, to better describe the intertwined nature of law and politics. This realization resulted in a move away from positivism toward postmodernity, from the strict notions of a rules-based system, to a new conception of international law as an ideology, a social system, a great conversation in which all nations, and ultimately all individuals, groups, corporate entities and NGOs potentially can participate and realize a new international society.4

The important point for purposes of this article is that with each of these historical shifts, the prior understandings and conceptual assumptions were not eradicated or wholly replaced. While modified and transmuted by the new innovations, each prior understanding remained intact as part of the structure upon which the succeeding layer was constructed. Contemporary international law, as this article seeks to show, is an amalgam of its history. International law exists in a very special and interesting conceptual space. It is simultaneously both postmodern and antiquated, aspirational and antiquarian, forward-looking and backward-referencing. International legal arguments routinely rely on old precedents

encapsulating bright-line legal rules, such as in *The Lotus Case*,\(^5\) where territoriality trumped nationality. At the same time, they also look forward to customary and so called "soft" law relying on emerging trends in support of a so called "graduated normativity," where there can be various degrees of more binding and less binding norms. As exemplified in *The Nuclear Weapons Case*,\(^6\) the International Court of Justice recognized that the international community is moving toward a prohibition of nuclear weapons, but that a bright-line rule representing an all-out ban under any conditions had not yet been realized. The simultaneous referencing of past legal principles and the importance of emerging trends as having a degree of normative force greatly complicates matters. It makes the discerning of bias more difficult as, arguably, historical distance can never really be achieved.

This article aims to identify, catalogue and explore the biases and blindspots, prejudices and unintended consequences which reside in and around present day international law. Philip Allott has described the new international law as a social phenomenon, as a self-constituting phenomenon, a process whereby the international society is coming to know itself and is actualized.\(^7\) For Allott, international law is a social-psychological phenomenon, and law and society exist out of (as well as in) the minds of its constituents.\(^8\) The basic hypothesis of this article is that because of the inherent subjectivity of any system designed to regulate and mediate relations between people and peoples it is of the utmost importance to subject the new international law to a searching scrutiny and to ask hard questions about its tendencies to emphasize certain interests, to exalt particular groups, and to order society in predetermined or preconceived ways. The outcomes and distributional consequences of the various decisions, models, and discourses the ways of framing, conceptualizing, and talking about international law — must be examined.

The biases of the past are easier to perceive than the biases of the present and the future. One example, the use of the term "civilized states" (which is still in existence in Article 38 of the Statute of the International Court of Justice)\(^9\) and the language employed by the jurists of the nineteenth

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8. *Ibid.* at para. 4
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century readily reveal their prejudices, prejudgments and attitudes. But the prejudices of the contemporary discourses are not so easy to discern. Under normal conditions, we are too close in time and perspective during our everyday legal activities to be able to perceive the new international law’s biases and unintended consequences. It takes a lot of thought and consideration a lot of patient self-criticism and self-appraisal to be able to take a step (or more) back and re-evaluate the process and enterprise of international law making in this new era.

The problem is further complicated by the fact that bias is not a monolithic entity. It does not merely exist in the culture of law. Although culture does play a part in the discussion which follows, it is only one lens through which to view bias in international law. Many biases exist so deeply entrenched in the system of international law as to be part and parcel of its functioning, exhibited in so called background rules and their assumptions. Bias is also found in the major procedural doctrines of international law, in the conceptions of sovereignty, jurisdiction, state responsibility, nationality, statehood, self-determination, and standing. These structural features, which dictate the procedural apparatus of international law, constitute the main subject of this study. Outside the immediate scope of this article, but equally important, are the more well recognized and well documented biases in the context of international law’s substantive regimes, for example, in human rights, the environment, or rules surrounding a particular nation’s labour practices, trade, or immigration policies.

Before moving to specific examples of bias, there must be an exploration of what is meant by the term itself and whether it can be employed in a cogent way. To put the matter succinctly, is there a bias in talking about bias? In some perhaps trivial sense all discourse (all thinking for that matter) is biased in favour of one group, party, person, or identity and usually but not necessarily towards the speaker, the client, or the special interest being represented. But there is a larger concern about bias which may be derived from reading Roland Barthes’ Eiffel Tower essay. Like Barthes’ inhabitant of Paris ascending the Eiffel Tower, international lawyers and academics exist within the structural constraints and presuppositions of the international legal regime. Once the sightseer attains the summit and looks down from the tower’s apex there is a transformation of the city landscape. The city of Paris is seen in a particular way, an idiosyn-

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10. See discussion infra, Part II.
ocratic viewing, mediated by the viewer's position within the tower, its height, location and, most importantly, by the experience of the viewer as a person "inside" the tower's structure.

In much the same way, the international lawyer is conditioned to see the "territory" of international law in predetermined and idiosyncratic ways. As Barthes comments, the viewer upon looking out over the city landscape expects to see certain landmarks, anticipates seeing the historical Paris, populated with various indicators and remembrances of the city's past. When for some reason the landmarks are not present, invisible, obscured, or otherwise not apparent, the mind of the viewer necessarily fills in the gaps created by the lacunae of his or her experience. This is an automatic and subconscious process, by which our experience is made whole by the insertion of our fantasies. Our fantasy of the perceived Paris is made to match the reality of the expected Paris, that is the preexisting Paris residing like a spectre of normalcy beneath the curtain of our conscious minds.

Through the thought experiment of Barthes we can see the manifestation of non-trivial bias. Such bias is usually unseen and unappreciated by the speaker and so causes difficulties, to the point that international legal discourse can become dangerous and counterproductive. Actors within the international community, within the matrix of international law, can confront their prejudices which exist for them outside the tower, but are prevented from confronting those prejudices which exist a priori as part and parcel of the tower's structure. The perception of "outside" bias is sometimes achieved, as mentioned above, when there is temporal distance between the usage of the rule and its formation. When enough time has passed and society has changed, it becomes easier to recognize the biases inherent in, for example, the international legal rules supporting colonialism, slavery or the slave trade. The orthodoxies of preceding generations may become the heresies of their successors. Bias can also be discerned more readily when there is a plurality of voices clamouring for attention. There is, perhaps, a better chance of uncovering biases and blindspots when a variety of alternative narrators are competing to tell the story of international law, as opposed to a narrow range of "official" stories which are received without questioning and perceived as authoritative. In this sense,

13. Of course this process also occurs in the domestic and not just the international realm. Take, for example, all the instances in which the U.S. Supreme Court has decided to reverse prior cases and suspend the doctrine of stare decisis. For example, consider the recent case in the context of state sodomy laws. Lawrence v. Texas, 123 S.Ct. 2472 (2003), reversing Bowers v. Hardwick, 478 U.S. 186 (1986).
the chances of achieving a more unbiased, just and fair conception of international law has arguably been increased in modern times. As international law changes from a monolithic, top-down, rules-based model to a more circular, bottom-up, sociological conception, international law becomes more porous and transparent. Indeed it is more amenable to change as more voices are raised and more perspectives are integrated into the web of inter-connecting relationships.\(^4\)

The modern mode of operation of international law, because of its relative lack of top-down vertical structure and of the lesser emphasis it places on black and white clarity in its rules, is much more dependent for its legitimation upon its own rhetoric than domestic law. What jurists, commentators, academics, and international actors say about the doctrines of international law are more constitutive of international law than what they say about, for example, a particular nation's contract law or property law. Talking as if there is an emerging world state, as if there is a particular international legal rule, is much more important to the formation of the reality of the world state and the rule than talking about the existence of adverse possession in domestic property law, for instance. The strong vertical hierarchy of most domestic legal systems is able to do the work of legitimation and authoritarian reinforcement which international law arguably lacks.

International law makes up for the deficiency of verticality by its heightened reliance on a conversational, horizontal structure, a wait-and-see attitude which is largely foreign to the domestic realm. Precisely because of the inherent importance of international legal discourse one must be especially vigilant about how one talks about international law, international relations, and international legal theory. The discourse of international law is a moral force in and of itself. It propagates stereotypes and creates power relationships. It sneaks up on us because it is so essential to the process of international law creation.

International law is not made in a vacuum. It has a practical, pragmatic, real-world nature. Like domestic law, it is made by a feedback mechanism. International law is, as Allott has written, the world community becoming conscious of itself, waking up and looking around, putting out big and small fires, and generally trying to coordinate and harmonize the multifarious relationships which arise in our current stage of globalization. The nature of the legal rules must be seen in connection with the

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14. It could also be argued, conversely, that a plurality of voices instead creates cacophony and confusion.
real-world state of affairs against the backdrop of the circumstance that force adjudicators and treaty partners to create the rules in the first place. Recently many authors have noted the relevance of international relations to international law and are working to bridge the gap between these two fields. However, this close connection between "the world" and international law is yet another place where bias is especially likely to creep in.

The danger of such real world bias is manifest by the all too easy way facts may seem to be objective, settled, and are all too often taken for granted as true. Despite the seeming concreteness of the reported facts, the so called facts in any particular case are always someone's social construction and most often the social construction of the most powerful players in the world arena. This observation is not the same as asserting the facts are in dispute, which they often are. Rather, the range of possible explanations for events — the facts as conceived by all the players to a dispute — may be imposed by the power elite, whose control often goes unnoticed and unchallenged. Events happen in the world they are not perceived as having happened without linguistic and conceptual tools to explain through discourse what has happened, why it has happened, and what remedies, if any, exist to try to ameliorate the harm caused.

Bias also seeps in and surrounds international law by its very attempt to be a postmodern institution and activity. This point is elucidated by Nathaniel Berman in his article, "Modernism, Nationalism, and the Rhetoric of Reconstruction," concerning the relationship between international law and modern art. In this article, Berman draws a parallel between four aspects of modernism, as he sees them, and then maps these aspects onto the contemporary conception of international law. For Berman, modernism, as seen through the lens of modern art, embraces the following characteristics: (1) the critique of representation; (2) an openness to so-called "primitive" sources of cultural energy; (3) innovative experimentation; and (4) the juxtaposition in a single work of elements previously considered irreconcilable. These four characteristics also inform our understanding of the new international law, that is after the two world wars, when international law fashioned itself as a way of appeasing nationalistic energies and harmonizing competing and discordant voices within the world. The new international law has the following four characteristics, reminiscent of modern art: (1) the critique of sovereignty as the

object which defines international law; (2) an openness to previously repressed forces of nationalism; (3) the unprecedented invention of a wide variety of techniques understood as "legal"; and (4) the juxtaposition in international legal discourse, doctrines and institutions of elements incompatible under traditional legal criteria.

This insight of Berman's highlights a further way in which the new international law (and for that matter modernism itself) reinforces bias under the guise of a more reactive, calibrated, and sensitive international legal structure. For example, the notion under the new conception of international law of primitivism, viewed in the new vocabulary as nationalism, is especially pregnant with meaning. This notion sets up an implicit dichotomy between the modern and the primitive and at the same time tries to contain, mediate and deconstruct the primitive to provide an outlet for nationalistic feelings and aggressions. This is bias built into modernity even as it defines itself by reference to the primitive, and the irrational.

As a final consideration in this introduction to the concept of bias in international law, the practical importance of this exploration must be emphasized. As Charles Taylor has noted, groups, like individuals, manufacture their identities and sustain their self-worth and self-conceptions largely on the basis of others' recognition or absence of recognition. Thus uncovering bias is fundamental to allowing groups to fully develop and evolve. Their development is not dependent merely on their own actions and perceptions alone, but, as the traditional jurisprudence of international law teaches, it is also influenced by the perceptions of the international community as a whole, in particular how individual states are viewed by other states, governments and courts. A people's, government's, or social minority's search for recognition may be described as a mirror created and maintained by the international community upon which the group can view their own identity and their own reality. With this insight, it becomes apparent that a people's conception of itself is especially susceptible to bias. As Taylor says, a colonized people's "own self-deprecation ... becomes one of the most potent instruments of their own oppression."

Bias, prejudice, and blindspots have unintended consequences and inflict costs on both the development of international law and human life and well being. They impact the plight of the injured and the oppressed;

18. Ibid.
19. Ibid.
they form hidden impediments which obscure pain, injustice, and oppression. In some cases, they may even directly be the cause of pain, injustice, and oppression. 20 It is the aim of this article to uncover the more insidious structural biases of international law, both those which exist just beneath the surface as well as those which are embedded within the subterranean consciousness of the discipline.

The article proceeds in Part I with a discussion of three major structural discourses of contemporary international law: those revolving around sovereignty, jurisdiction and state responsibility. Within the sovereignty discussion, three categories of bias are distinguished: (1) biases emanating from the concepts which remain as remnants of nineteenth century and earlier discourses; (2) biases surrounding the major metaphors of international law, specifically those illuminated by feminism's critique of the state and state power; and (3) biases involved in the major substantive areas of international law, in particular the environment and the Kyoto Protocol. Part II contains a discussion of "fairness" discourse, in an attempt to define and reign in the concept of bias, and thereby to resolve the paradox of universalism along with the conundrum this paradox has created for international law and society.

1. Bias in the Conceptual Discourses about International Law

1. Sovereignty

The first topic of international legal discourse to be considered is the most basic and fundamental idea of sovereignty, since it serves to ground and delimit the state, the actor traditionally considered at the centre of international legal relations. It is not difficult to see many of the actual and potential biases surrounding the conception of sovereignty. Sovereignty has often functioned to retard or freeze the evolution of international law by protecting states from paying out claims and even from the disapprobation of the international community despite an emerging international legal rule or trend which otherwise would have condemned their behaviour. As will be discussed, it is a concept which has its genesis in mid sixteenth to early seventeenth century Europe and has undergone a peculiar evolution, but is still relied on as an implicit ground rule and utilized as an important — albeit eroding — cloak of state protection.

   Stephane Beaulac has explored the origins of the term sovereignty from

20 Kennedy, supra note 11
its introduction in the sixteenth century in Jean Bodin's *Six Livres de la Republique*.

Beaulac examined the history of the term, pointing out that it was originally employed by Bodin and his contemporaries for purposes of domestic governance. Beaulac's analysis is premised on the important insight (echoing Wittgenstein) that language is not merely a thing, but an activity which communicates "tremendous social power within the shared consciousness of humanity." Beaulac relies upon Philip Allott to help explain the importance of understanding the pivotal words which have shaped international law and society. In Allott's words,

As persons and as societies, we are what we were able to be, and we will be what we are now able to be. So it is with the history of words. We are what we have said; we will be what we are now able to say. *Words contain social history; distilled and crystallized and embodied and preserved, but available also as a social force, a cause of new social effects.*

Bodin, in *Six Livres*, defined sovereignty as follows: "Majesty or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects of a Commonwealth." Beaulac points out that the French text identifies two characteristics of sovereignty: that is "absolute" and "perpetual." But the "absolute" or "unlimited" nature of Bodin's "sovereignty" was tempered by the caveat that the Prince still is subject to "the laws of God, of nature, and of nations." Bodin more specifically outlined three limits on supreme power: (1) to honor contracts; (2) to respect private property; and (3) to consent to taxation. Furthermore, Bodin wrote that there exists other certain "fundamental laws" which the Prince must accept, concerning essentially "rules of succession of the throne and the inalienability of the public domain." Bodin envisioned the power of the Prince as resting upon a pyramidal structure, and the power of

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21. See Sephane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 Melbourne J. Int'l Law 1. Beaulac acknowledges that although Bodin did not invent the term, Bodin is considered the "father" of 'sovereignty' because he provided, "the first systematic discussion of the nature' of this powerful word." *Ibid.* at 6-7 and note 34.


sovereignty as that of the "highest unified power, distinguished from that of the decentralized subordinate power." 30

As Beaulac explains, Bodin's use of the term sovereignty arose out of the specific social and historical context of France and the French monarchy in the late sixteenth century. It was a term designed to support and maintain the monarchy, and especially "to place the ruler at the apex of a pyramid of authority."31 It was only subsequently, by Vattel and later by Wheaton, that the internal sovereignty of which Bodin wrote was distinguished from external sovereignty, i.e., the "independence of one political society, in respect to all other political societies."32 As Beaulac points out, the transformation of the term "sovereignty," from internal to external, shows its malleability and rhetorical force as a term that is continually changing.33

This transmutation of sovereignty from its internal to its external usage allowed states, rulers, and governments to project their power outward as well as inward. It allowed for the propagation and instantiation of idiosyncratic attitudes and prejudices, even in contravention of trends supported by the majority of states within the international community. The biased nature of external sovereignty was especially apparent in the context of slavery and the slave trade. An early example of sovereignty's role in preserving and justifying such trade occurred in The Antelope, a decision by the United States Supreme Court in 1825.34 In that case, the Spanish and Portuguese consuls filed claims concerning "certain Africans as the property of subjects of their nation," after the ship transporting them was brought back to the United States under the command of an American captain, John Smith. Smith also brought a claim for possession of the Africans as slaves captured jure belli.35 In adjudicating the various claims, the Supreme Court went to great pains to emphasize that although public sentiment was against the slave trade, the matter was "unsettled," and the Court must not yield to such feeling.37 After reviewing prior cases the Court concluded that the following rule was to be applied: "that the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives its

30. Ibid at 19 (emphasis in original).
31. Ibid at 22.
32. Ibid at 27, note 195, citing Wheaton
33. Ibid at 26-27
34. The Antelope, 23 U.S. 66, 10 Wheat. 66 (1825).
35. Ibid at 67.
36. Ibid at 68
37. Ibid at 114
sanction to the trade, restitution will be decreed...". 38 This rule was premised on several propositions emanating directly out of the external sovereignty of states: e.g., "No principle of general law is more universally acknowledged, than the perfect equality of nations ... Each legisitates for itself, but its legislation can operate on itself alone." 39 Consent becomes required before a nation can be seen to have relinquished a "right" to engage in the slave-trade, "in which [historically] all have participated." 40 Applying these principles, the Court entered into a calculation based upon testimony and documentary evidence as to the precise number of Africans taken from Spanish ships. Since the number belonging to any Portuguese ships could not be determined, the Court ultimately held that the Africans be divided between Spain and the United States, "to be disposed of according to law." 41

The other paradigmatic use of sovereignty in the nineteenth century was as a tool for state actors to justify expansion of their empires, that is as a means for legitimating the process of colonization. Antony Anghie 42 explained the myriad effects that positivism and notions of sovereignty had in supporting the colonial encounter. Anghie’s main thesis goes further, however, in asserting that "the problem of order among states is a problem that has been peculiar ... to the specificities of European history ... the extension and universalization of the European experience ... [which] has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied." 43 For Anghie, his interest lies "not only in the important point that positivism legitimized conquest and dispossession, but also in the reverse relationship — in identifying how notions of positivism and sovereignty were themselves shaped by the encounter." 44

Features of nineteenth century and earlier thought, including the sharp distinction between civilized and uncivilized states, still reverberate today. 45 Anghie sums up his argument by stating "that central elements of

38. Ibid. at 118.
39. Ibid. at 122.
40. Ibid.
41. Ibid. at 133.
43. Ibid. at 7.
44. Ibid. at 6.
45. Anghie cites Wheaton for standing behind the proposition that what counts as law is the custom “which is practiced only among civilized countries.” 46 Ibid. at 23. In 1866, Wheaton wrote: “Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.” Ibid., quoting Henry Wheaton, Elements of International Law, ed. by George Grafton Wilson (The Carnegie Institute of Washington photo. Reprint 1964) (1866) at 15.
nineteenth-century international law are reproduced in current approaches to international law and relations." 46 This insight is based upon the fact that the "naturalist notion of a mythic state of nature [was] replaced by a positivist notion of a mythic age when European states constituted a self-evident family of nations." 47 Sovereignty became a tool for dividing the European from the non-European world: "since the non-European world was not 'sovereign,' virtually no legal restrictions were imposed on the action of European states with respect to non-European peoples." 48

The concept of sovereignty certainly has evolved since the days of The Antelope and its use in furthering the colonial encounter, but it is still utilized to justify state power and as a means of shielding states from international disapproval and sanction. Before World War II, for example, there was unbounded optimism that the external sovereignty of individual nations could be mediated by the League of Nations. 49 Geoffrey Butler opined in an article published in the British Year Book of International Law (1920-21) that sovereignty can be checked by the League but in a way that preserves fundamental rights. He summed up his point as follows:

[1]n so far as the League of Nations supplies a mechanism for the preservation of these rights and values, the conception of sovereignty, with its necessary implication of moral authority, can for the first time be applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation. 50

For Butler, the League represented a way to ensure peace, so that "subconscious" activities of states, e.g., mining, engineering, locomotion, engineering, and preventative medicine, could be conducted without the interruption of war. 51

Unfortunately, the League failed in its mission to keep the peace and the tragedy of World War II resulted. During and after the second world war, international legal scholars and jurists began to reconceive the notion of sovereignty and the nature of the state itself. This conceptual transformation is evident in Hans Kelsen's 1942 work, Law and Peace in Interna-

46. Ibid. at 8.
47. Ibid. at 68.
48. Ibid. at 69.
50. Ibid. at 41.
51. Ibid. at 43-44.
Kelsen questioned the Austinian assumption that a state is sovereign because “no other order can be conceived to exist above the state or the legal order of the state such that it can obligate the state or the individuals representing it.” For Kelsen, sovereignty (like the state itself) does not exist “in the realm of physical reality,” but rather as a mental construct. “The state is sovereign if we conceive it to be sovereign, if we conceive the order of the state to be highest. It is not sovereign if we proceed from a different assumption.” Kelsen speaks of the “dogma of sovereignty” which functions to support the state, just as “[t]he concept of the state is a typical product of political theology.”

The principles espoused in 1942 by Kelsen in a theoretical sense were later articulated and expanded upon in a practical setting by Judge Alejandro Alvarez in the Corfu Channel Case in 1949. Alvarez had previously written about the importance of the “new” international law embracing a new psychology and ideology, where the artificial division between law and politics was not so clearly defined. Alvarez applied his thinking in practical terms to decide a case between Britain and Albania, which arose out of an incident that occurred in the Corfu Strait. On October 22, 1946, two British destroyers struck mines in Albanian waters, causing damage to the ships and loss of life. In Corfu Channel, Alvarez had this to say regarding the evolving concept of sovereignty:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States... Some jurists have proposed to abolish the notion of sovereignty of States, considering it obsolete. This is an error. This notion has its foundations in national sentiment and in the psychology of peoples, in fact it is deeply rooted... This notion has evolved, and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were bound only by the rules which they had accepted [i.e., as in The Antelope, discussed above]. To-day, owing to social

53. Ibid. at 78-79.
54. Ibid. at 78.
55. Ibid. at 43-44
58. Corfu, supra note 56.
interdependence and the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.\textsuperscript{59}

Alvarez, in his individual opinion, then proceeded to discuss state responsibility, concluding \textit{inter alia} that there is a place under international law for -- what he termed -- the concept of a "misuse" or "abuse" of right.\textsuperscript{60} For Alvarez, states could be held liable even if their actions were undertaken within their sovereign rights.\textsuperscript{61}

Clearly the concept of sovereignty has undergone a radical change from the days of The Antelope, Wheaton, Vattel, and Bodin. Now it is time to determine the biases within modern discourses on sovereignty, and to explore how prior conceptions of sovereignty still permeate the conceptual space of international law and its language games today. Before making this transition, it is worth considering the four propositions regarding discourses on sovereignty noted in \textit{Reading Dissidence: Writing the Discipline: Crisis and the Question of Sovereignty in International Studies}.\textsuperscript{62} These propositions may be rendered in condensed form as follows:

1. "Discourses of sovereignty cannot relate to their object, sovereignty, as other than a problem or question." This statement emanates from the realization that sovereignty enters discourse as a reflection on a lack or loss, something that might have been but is no longer.

2. "The problem of sovereignty is profoundly paradoxical." The paradox is derived from the dual nature of sovereignty, as referring to something that is "a fundamental principle, a supporting structure, a base" but at the same time dependent on activity that proceeds without foundations, "hence a foundation beyond doubt."

3. "It follows that texts or discourses that would produce a semblance of a resolution to the problem of sovereignty must engage in a kind of duplicity."

4. And, finally, that all "'resolutions' to the problem of sovereignty proffered by texts or discourses can only be unstable and tentative."\textsuperscript{63}

\textsuperscript{59} \textit{Corfu}, supra note 56, Separate Opinion of Judge Alvarez at 43.
\textsuperscript{60} \textit{Ibid} at 43-46
\textsuperscript{61} \textit{Ibid} at 47-48
\textsuperscript{63} \textit{Ibid} at 381-83
It is important to bear in mind the ultimate tentativeness of any discourse involving sovereignty. As the authors of *Reading Dissidence* conclude, "the word [sovereignty] can but connote a boundless region of ambiguous activity that a vagabond desire ... would mark off, fill, and claim as a territory of its own." In sovereignty's ambiguity lies its ambition, as well as its effectiveness as a strategic tool for those who use it to preserve the status quo and their power.

The following discussion involves three groupings of bias surrounding the notion of sovereignty in international law. The groups may be labeled as follows: (1) remnants of bias in the still extant concepts of nineteenth century and earlier international law, (2) bias existing in the prevailing metaphors of contemporary international law; and (3) bias in the use of sovereignty in the major substantive areas of international law. The chart below summarizes these three groupings:

<table>
<thead>
<tr>
<th>Concepts</th>
<th>Metaphors</th>
<th>Substance</th>
</tr>
</thead>
<tbody>
<tr>
<td>examples: &quot;civilized nations&quot;; <em>terra nullius</em>; territoriality; consent</td>
<td>examples: gendered notions of the state; the state as a &quot;bounded, unified self&quot;; north-south; east-west; center-periphery; hard-soft</td>
<td>examples: human rights, the environment, trade and labour practices</td>
</tr>
</tbody>
</table>

Focus will be placed on a representative sample of bias from each group. They are: within the "concepts" category, the civilized/uncivilized distinction; within the "metaphors" category, feminism and new conceptions of state sovereignty, and within the "substance" category, the environment, specifically, the Kyoto Protocol.

An important remnant of the nineteenth century concept of sovereignty, which directly shapes and influences contemporary international law discourse, is the civilized/uncivilized dichotomy. A glaring example may

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64. *Ibid.* at 383.  
be found in Article 38 of the Statute of the International Court of Justice (ICJ), used universally today as the main mode of determining appropriate sources of international law. Article 38, subsection 1(c), provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations ..." This use of "civilized" in the most foundational document of modern international law is a clear indication that some nations, i.e., those deemed uncivilized, will be excluded from the discourse of international law.

More than that, the civilized/uncivilized dichotomy, as Anghie has written, represented a technology of control over non-European states. It presented "non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves." Sovereignty for the non-European nations was "a profoundly ambiguous development, as it involved alienation rather than empowerment, and presupposed the submission to alien standards rather than affirmation of authentic identity." Anghie makes the point that this dichotomy and its racial overtones became "something of an embarrassment" for the new international law which has tried in large part to expunge this language from its discourse.

While the language may have been largely expunged — with the explicit exception of Article 38 — the concept still remains with us in insidious and thinly veiled ways. An example is the new liberalism, epitomized by the work of Anne Marie Slaughter. Slaughter utilizes international relations theory and applies it to fashion a new international law based on the distinction between liberal and non-liberal states. In her article, "International Law in a World of Liberal States," she outlines her project, "consistent with an overall commitment to a new generation of interdisciplinary scholarship, is to reimagine international law based on an acceptance [of the distinction between liberal and non-liberal states] and an extrapolation of its potential implications." At the outset, it should be mentioned, Slaughter openly acknowledges the potential "distastefulness"
of this enterprise with the following caveat:

The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19th century distinctions between ‘civilized’ and ‘uncivilized’ States, re-wrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States. Exclusionary norms are unlikely to be effective in regulating that world.\(^75\) (emphasis added).

For Slaughter, the division between states based on “liberality” is a tool which can be “used or abused” depending on the “normative system” that is developed. In a further attempt to distance herself from the ethical implications of her project she self-consciously labels it a “self-professed ‘thought-experiment,’” as opposed to a call to action, a proposal for the future, or some other more ambitious real-world enterprise.

Slaughter’s caveat is ineffective to insulate the project from the “distasteful” bias of the nineteenth century for at least two reasons. First, there is the implicit assumption that the “normative system” developed to govern a world of liberal and non-liberal states will shy away from “exclusionary norms,” allegedly because such norms would be “unlikely to be effective in regulating that world.”\(^76\) However, this assumption is unwarranted. The “exclusionary norms” of the nineteenth century were quite “effective” in creating a normative order for the “civilized” world, and providing a legal context which supported slavery, the slave trade, and colonialism. There is no reason to suppose categorically that exclusionary policies would not be “effective” to order contemporary society just because the term used to describe preferred states has been changed from “civilized” to “liberal.” Such policies and norms are very often effective and can be used to create alliances and trading practices which may have widespread economic advantages while causing deleterious consequences to so-called “non-liberal” states.

A second reason to call Slaughter’s distinction into question concerns the other implicit assumption contained in her caveat: that the “normative order” can be divorced from the distinctions, language games and analytic framework used to build that order, as if the normative order is somehow

\(^75\) Ibid. at 506.

\(^76\) Ibid.
separate and distinct from the conceptual distinctions that it itself uses to carve up reality. In fact, the normative order is created out of, and directly reflects, the language used to represent the state of affairs of contemporary international reality. Slaughter attempts to wash her hands clean of any racist connotations or disadvantageous consequences flowing to non-liberal states by supposing that some "normative order" will appear like a deus ex machina to prevent abuses. Such an assumption is ill-conceived, unrealistic and simplistic. It presupposes a faith in a reified order, which exists somehow outside her "liberal, non-liberal" construct of reality. Such an untethered normative order is a fantasy.

Under Slaughter's model, the very notion of sovereignty is radically redefined. The state is a disaggregated entity. The new sovereignty operates for the purpose of facilitating the acquisition and retention of power for the so-called liberal states. In the newly conceived world of liberal states:

- 'the State' is composed of multiple centres of political authority — legislative, administrative, executive and judicial;
- each of these institutions operates in dual regulatory and representative capacity ... defined in terms of a specific set of functions it performs ...
- the proliferation of transnational economic and social transactions creates links between each of these institutions and individuals and groups in transnational society...
- interactions among counterpart or coordinate institutions from different States ... are shaped by ... an awareness of a common or complementary function transcending a particular national identity...

Under the new system, a "negarchy" is created, that is, in Slaughter's own words, "a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically." As Slaughter observes, "the norm of sovereignty would have to be constructed so as to constitute and protect political institutions of liberal States in carrying out their individual functions and in checking and balancing one another."

It is not contended that Slaughter's entire project should be dismissed outright because of the potential bias inherent in her reconception of the international legal order. To the extent that she points out the many-layered intricacies of power relationships between and among international

77. Ibid. at 534-535.
78. Ibid. at 535, n. 67.
79. Ibid. at 535 (emphasis added).
actors and political institutions, her project adds important and realistic sophistication to the model of international community. But a hard look needs to be taken at Slaughter’s assumptions, especially, the primary empirical and neo-Kantian assertion that liberal states do not make war with each other or that the world as a whole would be better off with the imposition of such a stark distinction between states based on a characterization of their liberal nature. Such an inquiry has already been undertaken by José Alvarez in a critique of Slaughter’s liberal theory, in which he argues that she relies upon questionable assumptions about how liberal or democratic states behave.  

Alvarez first points out that Slaughter’s liberal theory is prescriptive and not merely descriptive; it is not merely a “thought-experiment” as she characterized it. According to Alvarez, “[t]he liberal theory of international relations, or ‘transgovernmentalism,’ is ... presented as a ‘blueprint for the international architecture of the 21st century, offering nothing less than ‘answers to the most important challenges facing advanced industrial countries.’” Slaughter’s liberal theory, for Alvarez, is “millenist, triumphalist, upbeat,” and he underscores the exceedingly positive reception it has received among policymakers, at least in the United States.

In contrast to this good reception, Alvarez notes that there have been several critiques of liberal theory, but most have failed to grapple with the assumptions the theory makes about how states actually behave. For example, Harold Koh has criticized liberal theory for being “essentialist” and for failing to recognize that nations are not permanently liberal or non-liberal. Susan Marks has criticized Slaughter’s liberal theory as part and parcel of “liberal millenarism” [and its] uncritical and superficial view of democracy, noting that liberal millenarists too readily assume that periodic elections ensure a genuine political choice or a real free market of ideas. Harsher critics have emerged from “critical” legal scholars, “new streamers” or scholars of the “sub-altern” or the “post-colonial.” For these critics, liberal theory does more than “shift attention away from the scale, character, and sources of deprivation, oppression and conflict in the contemporary world”: it is the oppressive voice of neo-liberal hegemony.

81. Ibid. at 188.
82. Ibid. at 189-90.
83. Ibid. at 192.
84. Ibid.
Alvarez's critique, however, is more limited and pointed. He asks a central question behind Slaughter's liberal theory: whether liberal states behave better than non-liberal states. An inquiry into this question is crucial because it was just such an unquestioned assumption about the allegedly self-evident moral superiority of so-called civilized states in the nineteenth century that allowed the creation and support for the regimes of slavery and colonialism which we now abhor. In answer to the question “Do Liberal States Behave Better?” he concludes that “we don’t know for sure but... there is plenty of reason to be sceptical.”

Alvarez makes clear that his inquiry “does not take issue with many of Slaughter’s premises,” e.g., the ethical attractiveness of democracy, its importance in fostering civil and political rights as well as economic development, and its benefits in quelling violence, especially in the context of ethnic conflict. Alvarez instead investigates “what little we know” about compliance and “whether liberal theory accurately describes the international law making practices of liberal states, whether in the context of traditional treaties, transnational networks or transjudicial communication.” He also explores inter alia “whether liberal theory and its prescriptions will further peace among nations.” His conclusions, as he describes them, are “a great deal more equivocal than those reached by Slaughter” yet “less damning than those reached by her harshest critics.”

Mention of a couple of Alvarez's arguments may represent his critique. Alvarez points out that the paradigm of a liberal state, the United States, “has plainly not taken the route followed by European states with respect to direct or vertical enforcement of human rights conventions.” Enforcement of international human rights in U.S. courts has been made “notoriously difficult” given the reservations and limitations placed upon human rights agreements by the United States. Alvarez makes the further point that contrary to the predictions of the liberal theorists, “the leading examples of U.S. treaty obligations permitting vertical enforcement by U.S. domestic courts have not been treaties with other liberal nations but bilateral investment treaties (BITs), mostly with non-liberal nations.” The example of BITs (and also FCN treaties, i.e. treaties of Friendship,
Commerce and Navigation) appear to undermine Slaughter’s presuppositions about compliance and liberal and non-liberal states’ treaty-making practices.

Alvarez next addresses liberal theorists’ assumptions regarding the general law-abiding nature of liberal regimes, and challenges Slaughter’s claim regarding “transnational networks,” namely that “liberal states are ... more likely to establish, maintain and adhere to these networks, and the ‘soft’ informal obligations that result from them.”

Alvarez suggests that perhaps Slaughter’s descriptive reliance on such networks as a basis for a prescriptive argument is circular. As he says, “[i]t may be true that the kinds of transgovernmental contacts that Slaughter describes prevail among the West’s industrialized states ... [but] if one defines the relevant governmental contacts to be those that one finds among the West’s quasi-autonomous governmental institutions, it stands to reason we would find more such contacts in the West.”

Later, Alvarez attacks Slaughter’s description of how international law norms are nationalized, arguing that the suggested dichotomy—“traditional law is coercive and top-down while regulatory networks are soft and bottom-up”—does not accurately describe either view of norm making or the complex interplay between the two.

Alvarez also calls into question Slaughter’s assumptions regarding the purported connection between liberal theory and peace. In support of her assumption, “Slaughter says nothing about the many debates about which wars or how many casualties ought to ‘count,’ [or] about arguments that the thesis of a liberal peace may only be viable for the relatively short post-1945 period ....” Alvarez is especially critical of the liberal theorists’ failure to provide a convincing rationale for liberal peace. Slaughter’s explanation of attitudes shared by liberal states “point in all directions at once” and does not provide a basis, according to Alvarez, for prescriptive claims.

As Ido Oren has written, and is cited by Alvarez, liberal peace is “not about democracies per se as much as it is about countries that are perceived to be ‘of our kind.’” If Oren is correct, it leaves room for the possibility that “liberal states may have a tendency, perhaps a greater tendency than non-liberal states, to wage war on those that they perceive

93. Ibid. at 211.
94. Ibid.
95. Ibid. at 213.
96. Ibid. at 234-38.
97. Ibid. at 234-35.
98. Ibid. at 236.
as non-liberal.”¹⁰⁰

The Slaughter-Alvarez dialogue is a healthy one for the future of international law. The kind of critique propounded by Alvarez challenges the somnambulistic tendency of any adherent acting, judging, or speaking within a conceptual structure to fall back into the patterns of the past. There is a real danger, which discourse itself engenders, of allowing thought to be shaped by the processes, distinctions and underlying prejudices of prior discourses. The answer is to be ever vigilant against the subconscious urges which encourage rationalization and justification of the current sphere. The theories of mainstream international law, as quoted at the beginning, are always “for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space.”¹⁰¹

b. Bias in the Metaphors of Contemporary International Law: Feminism and New Conceptions of State Sovereignty

The next modern discourse of sovereignty to be considered is an especially good example of the perspectival nature of theory, of how preconceived notions of “the State” can have far-reaching consequences in terms of state practice and norm creation. Feminist writers have attacked biased notions of the state: specifically they have criticized the ways in which bias arises in the background conceptions held by international lawyers, scholars and other international actors. Karen Knop has pointed out that “international law does not yield easily to feminist legal methods.”¹⁰² This is a polite — a perhaps consciously toned down — understatement of the true state of affairs. A more accurate description of international law is a discipline which has on occasion “looked the other way,” one in which until recently the subjugation of women and other minority groups have either been ignored, permitted, justified, or condoned both in times of war and of peace.

Knop begins her analysis by noting the ambivalent notion of sovereignty under international law. She eloquently describes the nature of sovereignty as “at once brute fact of power and central metaphor of normativity, obstacle to the paradisical future worlds and means of their realization, barrier to transparent global relations within individuals and groups and essential sanctuary for them.”¹⁰³ These ambivalent, ambigu-

¹⁰⁰ Ibid at 238
¹⁰¹ Cox, cited in Robert Keohane supra note 1 at 207.
¹⁰³ Ibid at 295.
ous, and contradictory characteristics of sovereignty are at once its power and its poison. Knop's first self-described project is to "increase women's participation in the process of international law."104 Her second project, interconnected with the first, is to examine "the implications of feminist theory for alternative conceptions of sovereignty."105 This article will focus on the second question, specifically Knop's discussion of how the "metaphor of the sovereign State as a bounded, unified self returns us to the problematic equation of State sovereignty with individual autonomy."106

Before discussing the prevailing metaphor of the state as a "bounded, unified self," Knop makes an interesting and effective move in identifying those aspects of sovereignty which can be viewed as at the "centre," and those at the "periphery," of international law. Inasmuch as the center-periphery distinction itself is merely a metaphor for the locus of entrenched power relations, the distinction functions mainly as a mode of instantiating and reproducing the structural bias of the system. Knop turns the center/periphery distinction on its head, however, with her insight into a further dimension to the international civil society beyond "statism," i.e., the notion that states are the central and most important players in the international arena. For Knop, "international civil society is a creature both liberated and enslaved by its marginality. Its existence at the edges of the system of States frees this mix of non-governmental organizations, unofficial groups of experts, and other initiatives from the narrow confines of self-interest ...."107 Knop accepts the center-periphery distinction, but at the same time uses it to catapult herself to a new understanding of power in the international community.

Knop's discussion continues by citing other feminist thinkers who also seek to pass beyond the center-periphery dichotomy. Marie Goetz, for example, "struggles to eliminate the elements of centre, unity and totality that organize structures in hierarchical oppositions" and "allows for the fact that women experience simultaneously many oppressions and must engage in a multitude of struggles that conflict and supplement each other."108 Knop calls this trend which operates outside the mainstream statist system, "dancing in the normative margins."109 She notes, however,

104 Ibid. at 296.
105 Ibid.
106 Ibid. at 297.
107 Ibid. at 316 (emphasis added).
108 Ibid. at 316, n. 90, quoting Anne Marie Goetz, "Feminism and the Claim to Know: Contradictions in Feminist Approaches to Women in Development" in Rebecca Grant & Kathleen Newland, eds., Gender in International Relations (Bloomington: Indiana University Press, 1991) at 133.
109 Ibid. at 316.
that gender conscious groups have to "contend with the fact that these margins are defined by the mainstream fora."\[110\] She also directs attention to further dangers: "the dark side of unregulated international civil society is its tendency to replicate the imbalance of political and economic power that characterizes the system of States, an imbalance apparent in the relations between First World and Third World NGOs [for example]."\[111\]

In addition, Knop points out the limitations of making an analogy between the state, as a "bounded, unified self," and an individual being: "the analogy cannot take into account that States are not like individuals in the significant respect that they are not unified beings, they are not irreducible units of analysis."\[112\] Knop identifies the bias that flows from the individualistic conception of the state when she observes that "the analogy renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic State."\[113\] She further argues that some feminist approaches to international law are coloured by two resulting viewpoints emanating from such analogy: "the territory of the State as the physical body of the individual and the territory of the State as the individual's private property."\[114\] Her salient point is that these metaphors arising out of the bias of statism prevent our progress toward a greater appreciation of the rights of women and peoples within states.

Knop concludes with an examination of two "normative approaches" to sovereignty: "limited sovereignty" and "overlapping sovereignty."\[115\] The concept of limited sovereignty takes into account the question "why the State should have a monopoly on representation in international fora when it may not [be able to] decide the issue at hand domestically," because, for example, "ethnic minorities are claiming greater autonomy within the State."\[116\] In contrast, the concept of "overlapping sovereignty" is at odds with the "monocular view" of sovereignty, instead embracing "the recognition of overlapping legal orders."\[117\] An example is the European Community which coexists with its constituent states, and contains mediating institutions which at the same time allow for the retention of an intact, albeit more porous state sovereignty.

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\[110\] *Ibid*
\[111\] *Ibid* at 317.
\[112\] *Ibid* at 320.
\[113\] *Ibid* at 320.
\[114\] *Ibid* at 320.
\[115\] *Ibid* at 341.
\[116\] *Ibid* at 341.
Knop’s work should be applauded for utilizing the center/periphery distinction to highlight ways women can be empowered “by the [relatively] fluid and unconstricted nature of emerging international civil society” and, even more importantly, for her ability to see the detrimental as well as the beneficial aspects of working at the margins. Knop also deserves credit for examining the various conceptions of state power as being determined by pre-existing metaphors. She takes the existing literature concerning new ways to conceptualize international law, for example, the policy-oriented perspective of McDougal and Lasswell, the transition toward a new world order system of Richard Falk, and the functionalism of Julius Stone and Douglas Johnston, and suggests ways feminist thinkers can harness these ideas to better represent women’s and group interests.

c. Bias in Substantive Areas of International Law: The Kyoto Protocol and the Environment

This section focuses on the Kyoto Protocol because it has become the situs of an acrimonious debate over national sovereignty and the perceived dangers of a new enviro-imperialism, balanced against the asserted necessity for a new international framework to deal with global and transnational problems. Couched within the arguments proffered on both sides of the debate are the remnants of nineteenth century conceptions of sovereignty, as well as new metaphors created to deal with the monumental problems of contemporary society. The Protocol builds on the 1992 United Nations Framework Convention on Climate Change\footnote{United Nations Framework Convention on Climate Change, 9 May 1992, U.N. Doc. A/AC.237/18(Add.1; 31 ILM 849 (1992) (entered into force 21 March 1994).} which was designed to set up a regime to address the problem of global warming by the eventual lowering of greenhouse gas emissions.\footnote{Shalini Prakash, “Enforcement of International Environmental Law: The Kyoto Protocol,” online: Development Alternatives Group <http://devalt.org/newsletter nov03 of_7.htm>.
} In 1997, “more than 160 nations met in Kyoto, Japan to negotiate binding limitations on greenhouse gases for the developed nations.”\footnote{Ibid.} who “agreed to limit their greenhouse gas emissions, relative to the levels emitted in 1990.”\footnote{Ibid.} “The United States agreed to reduce emissions from 1990 levels by 7 percent during the period 2008 to 2012.”\footnote{Ibid.} However, the United States subsequently failed to ratify the Protocol.\footnote{Ibid.}

The core critique of the Protocol made by staunch traditional state sovereignty voices employs familiar rhetoric concerning the inviolability
of state power, especially the necessity that states be permitted to withdraw their consent to treaty conditions. In addition, supporters of traditional sovereignty decry the Protocol's authority to set energy emissions. Here is the rhetoric of one such position:

The Protocol does not limit emissions in the developing countries. China will rapidly surpass America's emissions early in the next century. Greenhouse gas emissions will not be slowed by the Protocol; they will simply be shifted from the northern hemisphere to the southern hemisphere.

So will America's jobs, industry, and wealth. The first-step Protocol is designed to start a series of five-year "budget periods" for which the Conference of the Parties is empowered to adjust the emissions limits on developed countries. By limiting America's emissions, the UN effectively limits our energy use. By embracing this Protocol, America is willingly giving up its authority to set its own energy policy. The Gore/Clinton Administration has embraced the Protocol and has the audacity to claim that it is not a surrender of national sovereignty.

Later in the article, the author creates an alarming picture of the dangers of the Protocol, characterizing it as invading "every facet of American life":

The consequences of the Kyoto Protocol include another giant step toward global governance. The international bureaucracy being constructed by the UN is reaching its tentacles into every facet of American life — hiding behind the scary scenario of planetary impoverishment. Society is being transformed incrementally to conform to the vision of Al Gore's 1992 declaration that societies must be restructured around the central organizing principle of protecting the environment.

The above American view has been echoed by other national voices, including those in other developed countries. Here is an example from an Australian perspective:

Why should the Kyoto Protocol, of itself, presage a new imperialism? What distinguishes the Kyoto Protocol from every other international treaty which Australia has ratified? The difference between Kyoto and every

125. Ibid.
other international treaty is this: If Kyoto is brought into effect, the economic dislocation which must follow its implementation will be unprecedented in modern times. It will be equivalent to the famines of the early nineteenth century in its disruptive power. (except that the famines were followed by good seasons). There are some treaties which Australia has ratified which have caused economic loss to Australians and to people in other countries. The Basel Convention is the best known example. But the extent of the economic loss due to Basel is minuscule, at least in Australia, and understood by very few people. The Kyoto Protocol is a different thing indeed, compared with Basel.126

In contrast to these voices, the other side of the narrative stresses the benefits to both the environment and to developing countries. As stated in a recent World Bank article entitled, “Supporting Poor Communities under the Kyoto Protocol,” “The [Community Development Carbon Fund] will provide financial support to small-scale greenhouse gas reduction projects in the least developed countries and poor communities in developing countries. Poorer communities will get the advantage of development dollars coming their way, and participants in the fund will receive carbon emission reduction credits for reductions in carbon emissions.”127 The pro-Kyoto Protocol side of the debate also minimizes the impact on the infringement to traditional notions of national sovereignty. For example, in the 1998 hearings before the U.S. House of Representative’s International Relations Committee, there was much discussion of the effects of the Protocol on sovereignty and especially its economic impact given the mandated reduction of emissions.128 During the hearings, experts addressed two key concerns, namely that the Protocol would not be applied to the Department of Defense emissions and fears that the Protocol would create a “super U.N. secretariat.” With respect to the first concern, it was reported that “the President determined recently that to ensure defense readiness, he will propose that military operations and training be completely held harmless from any national emissions limits that might be adopted.”129 With respect to the second concern, Mr. Eizenstadt, U.S.

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126. Evans, supra note 123.
129. Ibid. at 31.
Undersecretary of State for economics, business, and agriculture, attempted to allay fears of a world dominating United Nations. He said:

A second misconception is that somehow the protocol will create a super U.N. Secretariat, threatening U.S. sovereignty. That is also fallacious. The review process and the protocol simply codifies already existing practices under the 1992 Rio Convention. The review process is not by some centralized U.N. Secretariat; it is intergovernmental. The review teams are chosen by the government officials and then they can only come into a country with the invitation of that government. They cannot come onto any private property unless the property owner himself or herself permits it. **There will be no black helicopters swooping down on farms.** Also, this intergovernmental team recently visited in April the U.S. Capitol, met with congressional staff and Members of the Congress, and the Capitol still stands. So the notion that somehow people are going to be intruding on our sovereignty is simply and totally untrue. Finally, there are some who suggest the protocol is going to result in a huge government transfer of foreign aid to Russia. That is also not true. U.S. private sector firms may on their own choose to purchase international emissions credits from Russia or any other country that wants to sell them. It will be purely a private decision. The U.S. Government is not transferring taxpayers’ money to anyone. Indeed, this will be one of the crucial ways that the private sector can achieve cost-effective reductions. It will be their decision.\(^{130}\)

The various positions of the two sides, as reflected in the above quotations, make clear that each has internalized a traditional and monolithic conception of sovereignty. No one, it seems (except perhaps law professors and other academics) came out and said that there is no such thing anymore as an impermeable membrane called sovereignty surrounding national territories that must never be relinquished, even in matters of global environmental concern. The territorial conception of sovereignty is apparent in Mr. Eizenstadt’s response, when he states that there is no intrusion of national sovereignty because “[t]here will be no black helicopters swooping down on farms.”\(^{131}\) This over simplistic (and perhaps jocular) expression of this pro-Kyoto position shows that the porous and postmodern notions of sovereignty have not yet infused discourse occurring on the domestic level.

On the international plane, however, there was a different conception of sovereignty being discussed and employed. The new sovereignty

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130. *Ibid* (emphasis added).
became apparent in the interaction between states and environmental nongovernmental organizations (NGOs).\textsuperscript{132} Reportedly, at the sixth Framework Convention Conference of the Parties at The Hague in November 2000, “representatives of NGOs outnumbered representatives of States.”\textsuperscript{133} It should be mentioned that NGOs are frequently excluded from closed door sessions at formal treaty negotiation sessions, and are further disadvantaged because “the institutional setting favours a more moderate approach than is advocated by ENGOs.”\textsuperscript{134} But this institutional bias is counteracted when NGOs are able to exert their force through public opinion and in other less formal ways. Betsill underscores the important role of NGOs:

In the Kyoto Protocol negotiations, ENGOs played important roles behind the scenes and influenced the negotiations in ways that cannot readily be observed in the treaty text. By focusing only on the effects of NGO activity on the outcome of international negotiations, one runs the risk of missing the ways that NGOs shape the process of the negotiations. ENGOs influenced the Kyoto Protocol negotiations by catalyzing and framing debates on emissions trading and sinks, and by increasing pressure on States to reach agreement. Thus, ENGO activities have had indirect effects on the final agreement.\textsuperscript{135}

Betsill further reports that “[d]uring the Kyoto Protocol negotiations, some ENGOs organized demonstrations and protest activities to draw public and media attention to the negotiations and the issue of climate change.”\textsuperscript{136}

In the context of the new international law, according to Betsill, “the notion of sovereignty is being redefined in the post-Cold War era, suggesting that there could be greater opportunity for ENGOs to shape international climate change negotiations.”\textsuperscript{137} The President of the Carnegie Endowment for International Peace, Jessica Mathews, reportedly contends “that power is shifting to new actors: ‘National governments are not


\textsuperscript{133} Ibid. at 49.

\textsuperscript{134} Ibid.

\textsuperscript{135} Ibid. at 56-57.

\textsuperscript{136} Ibid. at 55. “For example, during COP 1 in Berlin, three Greenpeace activists suspended themselves from a smoke stack near Cologne, Germany, in an effort to highlight the role of coal-burning power stations as carbon dioxide emitters. At COP 3, Japanese ENGOs covered bushes outside the conference hall with messages, such as ‘Are U going to save us, Al?’, and Greenpeace erected a dinosaur made out of used oil cans and spare car parts.”

\textsuperscript{137} Ibid. at 52.
simply losing autonomy in a globalizing economy. They are sharing powers — including political, social, and security roles at the core of sovereignty — with businesses, with international organizations, and with a multitude of citizens groups ....”\textsuperscript{138} Betsill also cites Professor Karen Litfin as pointing out that “the development of international environmental regimes challenges the authority of States: ‘[Once] States have acceded to non-binding principles or other weak agreements, they usually find it difficult not to agree to increasingly more robust commitments.’”\textsuperscript{139} Betsill concludes that “ENGOs can influence negotiations by holding States accountable to their prior commitments to protect the environment, thereby limiting the ability of States to make autonomous decisions.”\textsuperscript{140}

Stepping back for a moment from the specifics of the Kyoto Protocol, a broader consideration to be addressed is the force independently exerted in recent years in an increasing way against efforts to support environmental protection generally. Richard Falk has identified the process of economic globalization as exerting “a downward pull on the efforts to address various environmental challenges through effective regulatory efforts.”\textsuperscript{141} He argues that “given the time horizons of policy makers, economic globalization and environmental protection stress fundamentally inconsistent policy objectives that could be rendered compatible only by the imposition of effective regulatory authority based on an underlying political equilibrium between competing economistic and environmentalist constituencies.”\textsuperscript{142}

Falk’s insight is important because it suggests another bias which exists simultaneously overlaid onto the puzzle of state-centric sovereignty. As he recounts, the old paradigm which explained the downside of the state-centered system is no longer explanatorily adequate. The old paradigm was characterized by the “essentially inward-looking nature of political authority in the world,” and held that the state as a self-interested party could not therefore protect the global commons.\textsuperscript{143} “This was attributed to a generalized reluctance of states to cooperate externally, and more specifically, to the related inability to solve the free-rider problem ....”\textsuperscript{144} But the new paradigm, defined and shaped by globalization, presents an

\textsuperscript{138} Ibid
\textsuperscript{139} Ibid
\textsuperscript{140} Ibid
\textsuperscript{13} 3.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid at 5.
\textsuperscript{144} Ibid.
even greater difficulty. Under the new paradigm, “all governments are increasingly subject to the discipline of global capital in relation to organizing their activities and setting their priorities with respect to public expenditures and goals.”

Globalization, for Falk, is a tremendous force which exists and functions to a large extent on its own accord or, to use another metaphor, like a run-away train. “[T]he increasingly globalized character of trade, finance, and investment, as reinforced by media, computerization, and advertising, have created strong regulatory imperatives that appear for various reasons to go beyond the capacity and will of states to manage, either directly or on their own, or indirectly through the establishment of international regimes.” Thus conceived, Falk views globalization as a “world-order crisis of a structural and ideological character that has not existed in prior historical periods.” Under this view, the traditional individuated state is sapped of its power not by any concerted conscious effort at global governance or regime change (like the Kyoto Protocol) but instead because of a basic, systemic condition that is changing the landscape of the world, both literally and figuratively.

Falk is careful in his conclusion to temper his remarks about the dangers and pressures created by globalization by the caveat that “globalization is not weighted by its nature against environmentalism.” Rather, “[i]t is globalization as shaped by neo-liberalism in a world of very diverse sovereign states ...” that encounters environmentalism. There are pressures which work to counteract environmental regulation, for example, “the unevenness of material conditions around the world, which makes it difficult for some actors to feel responsible for environmental decay of a global scope and others to feel unfairly expected to bear disproportionate costs in relation to environmental cleansups.” In Falk’s view, the neo-liberal willingness to promote economic growth makes environmentalist concerns “less pressing.” An ensuing “crisis in public goods” has resulted, one which “places a premium on reduced government expenditures of public goods of all varieties ... definitely including environmental protection.”

145 Ibid.
146 Ibid. at 4.
147 Ibid. at 4-5.
148 Ibid. at 24
149 Ibid.
150 Ibid. at 6.
151 Ibid.
152 Ibid. at 6, n. 9.
Globalization may be viewed as another bias which may force state actors into positions of reduced responsibility. It is a new and awe-inspiring characteristic of international life not encompassed by any of the old metaphors of the sovereign state or even by "the society or system of states." Instead, globalization is a metaphor itself for problems like environmental degradation, terrorism, and fluctuations in trade and the world economy that exist beyond the comprehension and solution of any one state or even a minority of individually powerful states.

2. Jurisdiction

The next major international legal discourse to be examined concerns the changing conception of jurisdiction. Like sovereignty, notions of jurisdiction have developed in many ways, influencing how state actors, corporate entities, and individuals conceive the limitations placed upon the exercise of state power. The evolution of the concept of jurisdiction is intimately linked with changes in the conception of sovereignty, discussed above in Part I.1. Jurisdiction, like sovereignty, has become divested from a strictly territorial relationship with the state; it has been expanded to meet the needs of an increasingly interdependent and globalized world. To the extent that the discourse about jurisdiction, like sovereignty, perpetuates antiquated and biased modes of viewing the world, it must be reinterpreted and reformulated to better meet the needs of contemporary international society. To place this discourse in perspective, it is necessary to look at the way jurisdiction was conceived of by United States courts in the nineteenth and early twentieth century.

In *The Schooner Exchange*, decided in 1812, the U.S. Supreme Court was called upon to decide: "whether an American citizen could assert, in an American court, title to [a public] armed [foreign] vessel found within U.S. waters." The Court answered in the negative. The decision hinged on the Court’s understanding of the nature of jurisdiction, territorial sovereignty, and consent. Its jurisdictional discourse was framed as follows:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

154. For Falk, this realization leads to his conclusion that globalization should serve as the basis for the negotiation of "an unprecedented global social contract, an undertaking of immense complexity, and one that will arouse the ideological fury of those who believe in neo-liberal approaches." *Ibid.* at 7.
The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. As this passage shows, jurisdiction was intimately connected with the state's territory and was not to be infringed except by consent.

Because of the mutual exclusivity of sovereign power, the general rule described in *The Schooner Exchange* was that "[the] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." This shows the Court's reluctance to presume any type of extraterritorial application of jurisdiction. A state could however exercise jurisdiction over foreign persons or entities within its borders. Such exercise would be suspended however provided a specific license was given for the activity under consideration or in certain exceptional situations.

In *American Banana Company v. United Fruit Company*, decided in 1909, the Supreme Court again wrestled with the scope of jurisdiction, but this time in the context of activities occurring outside the territory of the United States, "and within that of other states." The plaintiff brought an action to recover three-fold damages under the *Sherman Act* alleging that its operations had been unfairly interfered with by the defendant corporation. The plaintiff claimed *inter alia* that in July [1904], Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plan-

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156. Ibid. at 136 (emphasis added).
157. Ibid.
158. For example, the exemption of the person of a foreign sovereign from arrest or detention, the immunity of foreign ministers, and waiver of jurisdiction over troops of a foreign prince allowed to pass through a territory.
tation and a cargo of supplies and have held them ever since, and stopped
the construction and operation of [plaintiff's] plantation and railway.\footnote{160}

Writing for the Court, Justice Holmes took great pains to base his juris-
dictional narrative on the precept that ""[a]ll legislation is prima facie
territorial.""\footnote{161} Holmes began his analysis by expressing surprise that any
other conception of jurisdiction could be conceived: ""[i]t is obvious that,
however stated, the plaintiff's case depends on several rather startling
propositions. In the first place, the acts causing damage were done ... outside the jurisdiction of the United States ... It is surprising to hear it
argued that they were governed by [an] act of Congress.""\footnote{162} For the Court,
""not only were the acts of the defendant in Panama or Costa Rica not
within the Sherman Act, but they were not torts by the law of the place, and
therefore were not torts at all, however contrary to the ethical and
economic postulates of that statute.""\footnote{163} Although the Court acknowledged
that an American defendant corporation is bound by the laws of the United
States, it found dispositive the fact that the acts of other states — namely
Panama and Costa Rica — were involved: ""a seizure by a state is not a
thing that can be complained of elsewhere in the courts [of a foreign
nation].""\footnote{164}

It is fascinating to juxtapose the judicial discourse within The Schoo-
ner Exchange and American Banana with more recent and sophisticated
conceptions of jurisdiction exemplified in the Restatement (Third) of
Foreign Relations Law and recent cases. Modern views about jurisdiction
have developed beyond reference to the territorial locus of the parties’
actions: they now encompass a broad range of other principles which
focus on the nationalities of parties and national interest and which co-
exist or overlap with the territorial principle. Such views can be found
embedded within Section 402 of the Restatement, which provides:

Subject to § 403, a state has jurisdiction to prescribe law with respect to
(1) (a) conduct that, wholly or in substantial part, takes place within its
territory;
(b) the status of persons, or interests in things, present within its
territory;
(c) conduct outside its territory that has or is intended to have
substantial effect within its territory;

\footnote{160} \textit{Ibid.} at 354-55
\footnote{162} \textit{Ibid.} at 355 (emphasis added).
\footnote{163} \textit{Ibid.}
\footnote{164} \textit{Ibid.} at 357.
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.\textsuperscript{165}

Within Section 402 is the still thriving territorial principle reflected in three parts of subsection (1). Subsection (2) embodies the so-called "nationality principle" and subsection (3), the "protective principle."\textsuperscript{166}

Section 403 of the Restatement, referred to in Section 402, provides the limitations on a state's exercise of jurisdiction to prescribe. The flexibility of 403 is especially apparent in its reliance on the tort concept of "reasonableness." Under Section 403(1), a state may not exercise jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."\textsuperscript{167} Subsection (2) gives further guidance to the legislator, adjudicator, or party by enumerating various factors to be applied in determining "unreasonableness," including:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.\textsuperscript{168}

\textsuperscript{165} Rest. (Third) of Foreign Relations Law of the United States at § 402.
\textsuperscript{166} See Lori F. Damrosch et al., supra note 4 at 1090-1135.
\textsuperscript{167} Supra note 165 at § 403(1).
\textsuperscript{168} Ibid. at § 403(2).
Subsection (3) imposes a hortatory duty of good faith and deference upon two states where a conflict in jurisdiction exists: "a state should defer to the other state if that state's interest is clearly greater."\textsuperscript{169}

The jurisdictional principles set forth within these Restatement sections, as applied by modern United States courts, have resulted in inconsistent and divergent results.\textsuperscript{170} In some instances, the net of extraterritorial jurisdiction has been cast widely, to catch cases involving drug trafficking,\textsuperscript{171} trade, business interests, and alleged Sherman Act violations.\textsuperscript{172} However, in other types of cases involving employment discrimination under Title VII,\textsuperscript{173} the environment,\textsuperscript{174} and constitutional guarantees such as the Fourth Amendment,\textsuperscript{175} the courts have refused to extend jurisdiction extraterritorially. Is there a clear line of demarcation between these two sets of cases? Is there a rationale that helps to explain their divergences and to preserve some jurisdictional discourse which is both coherent and appropriately tailored to modern social, political and cultural conditions? Or, are the courts instead laboring under biased notions of jurisdiction rooted in outmoded and inappropriate conceptions of sovereignty, territory, and national interest?

Take for instance United States v. Alcoa,\textsuperscript{176} where in 1945 the U.S. Second Circuit Court considered whether the Sherman Act applied to activities of a foreign corporation, allegedly in constraint of trade in aluminum ingots, which had taken place outside the United States.\textsuperscript{177} The court was careful to frame the main issue in terms of consequences for the United States. This crucial formulation is apparent in the following passage:

Did either the agreement of 1931 or that of 1936 violate § 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the

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\textsuperscript{169} Ibid. at § 403(3).

\textsuperscript{170} See Robert Malley et al., "Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms" (1990) 103 Harv. L. Rev. 1273.

\textsuperscript{171} See U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997).


\textsuperscript{173} See Bouvrestan v. Aramco, 857 F.2d 1014, 1016 (5th Cir.), reh'g granted, 863 F.2d 8 (5th Cir. 1988); aff'd en banc, 892 F.2d 1271 (5th Cir. 1990).


\textsuperscript{175} U.S v Verduzco-Urquidez, 110 S. Ct. 1056 (1990).

\textsuperscript{176} Supra note 172.

\textsuperscript{177} Ibid. at 421.
conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. 178

This emphasis on "consequences within the United States" is wholly absent from the subsequently overruled American Banana case, which had taken a less sophisticated, more bright-line, on-off approach to jurisdiction.

The Second Circuit Court in Alcoa candidly admitted that it was going beyond precedent by reading the Sherman Act so broadly. Judge Learned Hand, writing for the court, remarked as follows: "It is true that in [prior] cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot." 179 This transition from "animate" to "inanimate" means, while made almost as an aside, represents a major transition. It shows the willingness of the court to begin to apply and formulate a more common-sensical "reasonableness" test, undeterred by technicalities.

Consider also the judicial approach pervading U.S. v. Noriega, decided by the U.S. Eleventh Circuit Court in 1997. Manuel Noriega appealed his convictions in the Southern District of Florida for drug trafficking. 180 Noriega's principal arguments were that the indictments against him should have been dismissed by the district court due to "his status as a head of state and the manner in which the United States brought him to justice." 181 In addressing the "head of state" argument the court relied explicitly on The Schooner Exchange:

The Supreme Court long ago held that "[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily

178. Ibid. at 443.
179. Ibid. at 444.
180. Supra note 171.
181. Ibid. at 1209.
exclusive and absolute. It is susceptible of no limitation not imposed by
itself.” The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116,
136, 3 L.Ed. 287 (1812). The Court, however, ruled that nations, including
the United States, had agreed implicitly to accept certain limitations on
their individual territorial jurisdiction based on the “common interest
impelling [sovereign nations] to mutual intercourse, and an interchange
of good offices with each other....” Id. at 137. Chief among the exceptions
to jurisdiction was “the exemption of the person of the sovereign from
arrest or detention within a foreign territory.”

The Eleventh Circuit Court proceeded to discuss how The Schooner
Exchange doctrine subsequently led to the development of the modern
notion of foreign sovereign immunity and its eventual codification in the
Foreign Sovereign Immunities Act, passed in 1977. Since the Act did not
address “head of state” immunity in the criminal context, the court held
that the only way immunity could attach was through reference to “the
principles and procedures outlined in The Schooner Exchange and its prog-
eny.” Moreover, the court found itself obligated to “look to the Executive
Branch for direction on the propriety of Noriega’s immunity claim.”

By providing that the judicial branch “must look to the Executive
Branch” for guidance, the Court in effect self-consciously abnegated its
role in deciding the case in deference to the recognition bestowed or with-
held by the political branch. The Executive Branch, generally, follows one
of three paths with respect to such recognition: “(1) explicitly suggests
immunity; (2) expressly declines to suggest immunity; or (3) offers no
guidance.” Some courts have held that absent a formal suggestion of
immunity, a putative head of state should receive no immunity.” In
Noriega’s case, the court ultimately denied the defendant’s immunity claim,
noting that the Executive Branch had “not merely refrained from taking a
position...[but pursued] Noriega’s capture and his prosecution...[thus
manifesting] its clear sentiment that Noriega should be denied head-of-
state immunity.” Moreover, the Court further pointed out that “Noriega
never served as the constitutional leader of Panama” and that “Panama has
not sought immunity for Noriega...”

182 Ibid. at 1211
184 Noriega, supra note 171 at 1212.
185 Ibid.
186 Ibid.
187 Ibid. citing In re Doe, 860 F.2d 40 at 45 (2d Cir. 1988).
188 Ibid.
189 Ibid.
Although *Alcoa* was a civil action and *Noriega* involved criminal drug-trafficking, both cases illustrate the judicial techniques to justify and articulate their exercise of extraterritorial jurisdiction over foreign defendants. In *Boureslan v. Aramco*, however, the court rejected the exercise of jurisdiction in an (arguably) more compelling situation involving a United States plaintiff and defendant. In that case, the Fifth Circuit framed the issue as follows: "Does Title VII [of the Civil Rights Act of 1964] regulate the employment practices of businesses which, although incorporated in the United States, employ citizens of the United States in foreign countries?" The plaintiff, a naturalized American citizen of Lebanese descent, alleged he was subjected to discrimination on the basis of his race, religion and national origin while employed in the defendant's offices in Saudi Arabia. The Court rejected the plaintiff's main argument that extraterritorial application of Title VII was mandated by drawing a "negative inference" from the statute's "alien exemption provision." The Court similarly rejected the plaintiff's reliance on the legislative history of Title VII, suggesting extraterritorial application; instead it held that the statute fell "far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application."

What lurks beneath the surface of the court's reasoning in *Boureslan* was its worry about the sovereign rights of other nations, as evidenced by its observation that "[t]he religious and social customs practiced in many countries are wholly at odds with those of this country." Although not addressed directly by the majority, this subconscious preoccupation is apparent. The subtext of the opinion is that by applying Title VII abroad other nations' sovereign rights could be infringed in violation of the territorial principle enshrined in *The Schooner Exchange* and *American Banana*. Both the defendant and the *amicus curiae* had argued that the application of Title VII abroad would be "unreasonable" under the Restatement Section 403. As the dissent made clear, one of the arguments was that "because labor relations are a peculiarly domestic matter, it would be an affront to the sovereignty of other nations to apply Title VII extraterritorially."

190. *Supra* note 173 at 1014.
192. *Supra* note 173 at 1016.
The dissent conducted an exhaustive analysis of the reasonableness of applying Title VII to U.S. citizens abroad and found dispositive that the statute was expressly exempted from application to aliens. "Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provision would be meaningless if Title VII did not apply extraterritorially...." For the dissent, it was not unreasonable to apply the statute abroad because there would be no conflict with other nations' local laws:

The argument that extraterritorial application of Title VII is unreasonable because it would offend the sovereignty of other nations is not persuasive. The fact that another nation may exercise jurisdiction over employment relations on the basis of territory does not render the exercise of U.S. jurisdiction on the basis of nationality unreasonable. The likelihood that concurrent jurisdiction would produce international discord is minimized by the fact that the United States seeks to regulate only the conduct of its own nationals and by the fact that Title VII may be reconciled with foreign law in the event of a conflict.

The fact that there might be "concurrent jurisdiction" does not automatically result in a determination of unreasonableness: "[i]nternational discord does not arise from the existence of concurrent jurisdiction alone as much as it arises from an attempt to regulate the conduct of foreign nationals."  

199. Supra note 173 at 1032.
200. Ibid. at 1031.
201. Ibid. at 1029. In addition to labour law cases, the application of U.S. law extraterritorially has also been denied in the context of environmental regulation. In Natural Resources Defense Council v Nuclear Regulatory Commission, 647 F. 2d 1345 (D.C. Cir. 1981) the Court opined at page 1357: "[w]e do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours. This calls for a thorough understanding of our interests as defined by Congress...we can then reasonably balance the scope of our own regulation alongside the rightful regulatory jurisdiction [of the foreign state]." On several occasions the U.S. courts have either sidestepped or denied the application of the U.S. National Environmental Protection Act, 42 U.S.C. §§ 4321-4374 (1969) [NEPA] extraterritorially when an issue of foreign state sovereignty was involved: see Sierra Club v Coleman, 578 F. 2d 389 (D.C. Cir. 1978); NEPA Coalition of Japan v Aspin, 837 F. Supp. 466 (D.D.C. 1993). Mayaguezanos por la Salud v el Ambiente v U.S., 38 F. Supp. 2d 168 (D. Puerto Rico 1999); Born Free USA v Norton, 278 F. Supp. 2d 5 (D.D.C. 2003). Compare cases applying NEPA extraterritorially to Antarctica and the high seas where no sovereignty extends: see Environmental Defense Fund, Inc. v Markey, 986 F. 2d 528 (D.C. Cir. 1993), Centre for Dialogical Diversity v Nat'l Science Foundation, 2002 WL 31548073 (N.D. Cal. Oct. 30, 2002); Natural Resources Defense Council, Inc. v U.S. Dept. of Navy, 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002).
Commentators on the jurisdictional discourses running through the American cases have noted that the language of "national interest" or "common good" serves to reflect and reinforce "the dominant, hierarchical structures and naturalizes the position of those in power who decide what is best for the 'we'".\textsuperscript{202} The authors of the leading critical article on this subject, Malley, Manas and Nix, point out:

On the domestic level, appeals to "shared values" have been used to justify the subordinated position of, among others, blacks and women. Similarly, in discussions of extraterritoriality, appeals to "shared" beliefs have justified an expansive conception of jurisdiction in such fields as antitrust and securities, but a more constricted version in areas such as the constitutional rights of aliens and anti-discrimination laws. Thus, the securities fraud activities of a foreign defendant against a foreign company in Canada have been prescribed, although the discriminatory practices of Aramco against American workers in Saudi Arabia have gone unchecked.\textsuperscript{203}

The authors make the important point that "the language of jurisdictional argument matters, because language both communicates social meaning and, by circumscribing the ways in which communication takes place, creates meaning."\textsuperscript{204} One solution to the divergences and inconsistencies of the judicial application of jurisdiction in these American cases is to apply an \textit{alternative} discourse, one embracing a new conception of the state and sovereign power. For Malley, Manas and Nix, jurisdictional arguments couched in the univocal language of territory, citizenship, or national interest obscure the complexity of the substantive issues at stake and fail to provide meaningful guidance to decisionmakers. As one commentator has argued, debates about extraterritoriality "protect the discourse from having to assert its own normative theory." [citing David Kennedy, \textit{International Legal Structures} (1986) at 126]. Although perceived and presented as a "preliminary" matter, determination of justiciability actually regiments the outcome of the inquiry.\textsuperscript{205}

\textsuperscript{202} Malley \textit{et al.}, supra note 170 at 1293.
\textsuperscript{203} \textit{Ibid.} at 1293 (citing \textit{Boureslan v. Aramco}, supra note 173, among other cases).
\textsuperscript{205} \textit{Ibid.} at 1303-04.
While these commentators admit that "framing the issue differently might not have led the courts in any of these cases to reach different jurisdictional results...[the point is that] [t]he courts' rhetoric corresponded to a particular geography of the jurisdictional world, one in which self-proclaimed national interests were given precedence over transnational groups' normative claims...."206

While the approach of Malley, Manas and Nix is generally acceptable, it should be noted that alternative discourses are also susceptible to bias, mislabeling and misunderstanding, because what counts as "interests" may vary among cultures and societies, and even among individuals. In particular cases, the interests at stake necessarily will be largely defined by the parties' themselves and other interests will be left out of the discussion, just by the very nature of the litigation process. Moreover, although these authors admit that perhaps jurisdictional results would not change given application by the judges of alternative conceptualizations of state power, it is certainly true that in reality the jurisdictional results in these and future cases will indeed change if different discourses and assumptions are used. Assuming arguendo that such changes in discourse will lead to different outcomes in specific cases, the next question is whether the results will be good or bad.

The answer to this question inevitably introduces the paradox of universalism. On one hand there is the attractiveness of exporting liberal values and the beneficial effects which greater rights and regulation may have on people's lives around the world, either by applying NEP's environmental standards in the Philippines, American anti-discrimination labour laws in Saudi Arabia, or the guarantees of the Fourth Amendment in Mexico. On the other hand, there is the equally serious danger of cultural, ideological and value imperialism. Malley, Manas and Nix attempt to address this objection, in their discussion of the critique they term, "imperialism in disguise." Their answers however do not resolve the conundrum of universalism. First, they argue that "recognition of alternative solidarities does not imply disregard for national ties."207 Their second counter-argument is that "normative orders do not coincide strictly with national entities; rather, they cut through national boundaries. Within the framework suggested here, then, norms are imposed neither by nor on nations, but by certain transnational groups on others. Hence, all jurisdictional resolutions encroach upon the normative order of some transnational group.

206. Ibid. at 1300.
207. Ibid. at 1301.
This is as true of assertions of jurisdiction as it is of denials of jurisdiction."

With respect to the first argument, it is true that in some situations using an alternative discourse would not necessarily mean disregarding national ties. But the use of an alternative discourse in other cases may mean that one set of laws is being privileged over another, namely in situations of concurrent jurisdiction where a conflict exists. In such cases, Section 403 mandates the application of a "reasonableness" test involving a balance of certain factors in order to ensure that the outcome is fair to all parties. But the problem with this approach is that the required balance is determined by a judge who is replete with personal assumptions, biases, cultural presuppositions, values and indoctrinated societal goals. These goals and values may be at odds with the laws and practices of people in another nation.

As to the second argument that "normative orders do not coincide strictly with national entities," while true in some cases, it does not assist in answering the paradox of universalism. As the authors correctly observe, "within the framework suggested here ... norms are imposed neither by nor on nations, but by certain transnational groups on others." Yet the conundrum with respect to the dangers of imperialism on the one hand and universal values on the other is not resolved by re-labeling those who impose their norms as a "transnational group" as opposed to a "nation" within the context of specific cases. The salient and important point made by Malley, Manas and Nix is that over-reliance on notions of sovereignty and self-determination can "take on an ironic, even hollow quality" in specific cases in light of cultural values that dictate a different outcome.

While this may be true, what is hollow to one person may not be to others, especially to those on the other side of the case arguing for the preservation of their transnational groups' values and interests — or what the first party may consider their biases and prejudices.

3. State Responsibility

This section examines the international legal discourses about state responsibility and the built-in biases and prejudices surrounding this term.

208. Ibid.
209. Ibid.
210. Malley et al. use Martin v. Republic of South Africa, 836 F.2d 91 (2d Cir. 1987) as an example of a case where "sovereignty" and "self-determination" rang "hollow" due to the fact that the discriminatory conduct in that case — leaving a black man at the scene of an accident — was violative of a fundamental norm.
As the name itself suggests, there is great emphasis placed upon the state, along with certain assumptions in the discourse about state power, attribution, and how liability does or does not attach to individuals within the state structure. The efforts of the International Law Commission (ILC) in recent years to articulate the rules of state responsibility through Draft Articles will be discussed. Especially important to this inquiry is the impact and effect of these Articles on the future of international law. As some scholars have concluded, the Articles may do more harm than good because they may represent a counter-productive and even dangerous path which does a disservice to the deeper and more long lasting goals of international society.\textsuperscript{211}

One of the first discussions of state responsibility in modern times is found in the judgment of the International Court of Justice (ICJ) in the Corfu Channel Case.\textsuperscript{212} The first of two issues articulated by the Court related to state responsibility and was as follows:

Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?\textsuperscript{213}

The second issue concerned whether the United Kingdom had breached Albanian sovereignty by the actions of the Royal Navy.\textsuperscript{214} In the Court's opinion, "from all the facts and observations [set forth previously in the opinion], the Court draws the conclusion that the laying of the minefield which caused the explosions ... could not have been accomplished without the knowledge of the Albanian government."\textsuperscript{215} What is interesting is that, as the Court reported, the "obligations resulting for Albania from this knowledge [were] not disputed between the parties."\textsuperscript{216} Thus, even in this early discourse on the state responsibility, there remained a general consensus amongst states about certain principles of responsibility based on their knowledge of a particular state of affairs. But the opinion did not address, and so leaves unclear, what it would mean for a state to "know" something — i.e., what level and

\textsuperscript{212} Supra note 56.
\textsuperscript{213} Ibid. at 6.
\textsuperscript{214} See ibid.
\textsuperscript{215} Ibid. at 22.
\textsuperscript{216} Ibid.
number of individuals within the state's structure would satisfy this knowledge requirement. Assuming, as the Court found, this knowledge existed, then the Albanian "state" had a duty to notify shipping in the area about the minefield. This duty arose not from the Hague Convention of 1907, "which is applicable in time of war, but on certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."217

The other important outcome for the state in Corfu Channel is that it may be held liable not only for its acts but also for its failures to act. In the words of the Court: "[i]n fact nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania."218 On the second issue regarding Albanian sovereignty the Court determined that "the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction."219 Interestingly, the sovereignty issue was overshadowed by the importance of the state responsibility issue. This is apparent from the Court's award of money damages to the United Kingdom for the explosions and loss of life but only a declaration for Albania for its loss of sovereignty.220

The explanation for this imbalance in remedies available to each side of the dispute is illuminated by Judge Alvarez's separate concurring opinion, which provided a more sophisticated and nuanced view of state responsibility. For Judge Alvarez, state responsibility for different acts or omissions varies in character and severity. He cited three general categories: "international delinquencies, prejudicial acts, and unlawful acts."221 One example of an international delinquency is the very inaction complained of in the instant case, i.e., "acts contrary to the sentiments of humanity committed by a state in its territory, even with the object of defending its security and its vital interests; for instance, the laying of submarine mines without notifying the countries concerned."222 For Alvarez, a "prejudicial act" is "one which causes prejudice to a State or to its nationals, but which does so by means of acts not constituting an inter-

217. Ibid.
218. Ibid. at 23.
219. Ibid. at 36.
220. Ibid.
221. Ibid. at 45.
222. Ibid. (emphasis added).
national delinquency, e.g., as a consequence of an insurrection, civil war, etc."

Finally, an unlawful act — e.g., the one committed by the United Kingdom in violating Albanian sovereignty — is "one which disregards or violates the rights of a State, or which is contrary to international law.... The responsibility of the State which committed it varies according to the nature of the act."

This sliding scale of responsibility with respect to unlawful acts explains why the acts of the United Kingdom, although unlawful, did not rise to the level of condemnation and seriousness triggered by Albania's omissions.

In addition, it becomes clear that each side in the Corfu Channel Case was acting, in accordance with its own view of the situation, under the impression that it was exercising a legitimate right: for Albania, it was the right to self-protection and territorial integrity; for the United Kingdom, it was the right of free passage through an international strait in time of peace. For both sides, however, their actions represented a "misuse of right." This limitation on the exercise of rights, as articulated by Judge Alvarez, provides another lens through which to view the case and prevents states from gaining immunity just because they believed they acted within their rights. The resulting problem, once again, is how to determine the legal line between, in this case, the legitimate exercise of a right and the misuse or abuse of it.

The decision in the Corfu Channel Case may be compared with another more recent one involving a finding of state responsibility, namely the Case Concerning United States Diplomatic and Consular Staff in Tehran (hereinafter "U.S. Hostages Case"). In that case the ICJ characterized the initial facts leading up to the hostage taking as follows:

At approximately 10:30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy’s premises.

223. Ibid.

224. Ibid. (emphasis added).

225. Ibid. at 47-48. See Alvarez’s opinion, arguing that “in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law.” Ibid. at 48


227. Ibid. at para. 17.
The facts thus immediately set up a situation, analogous to the *Corfu Channel* Case, where at least a state may be liable not just for its positive acts — mine laying or hostage-taking — but also for its omissions or failure to act — failure to notify interested countries of the danger from the mines or failure to protect the safety of foreign diplomatic personnel.

It is significant that Iran did not appear before the Court in order to fully present its case and proffer arguments in support of its position. However, the ICJ did examine the initial question of the admissibility of the United States’ claim and Iran’s objections thereto contained in its letter to the Court of 9 December 1979. In the manner of Albania’s assertions, the Iranian position centered on its own somewhat loosely conceived notions of sovereignty:

The Iranian Government in its letter ... drew attention to what it referred to as the ‘deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters’. The examination of the ‘numerous repercussions’ of the revolution, it added, is ‘a matter essentially and directly within the national sovereignty of Iran’.

In the letter, Iran further argued that the ICJ could not exercise jurisdiction over the matter because “[the U.S. hostages] question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.” According to Iran, therefore, “the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.” The Court rejected Iran’s claim that the case was inadmissible and found that the general reliance on such historical circumstances without further explanation was not sufficient to divest the Court of jurisdiction.

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233. *Ibid.* at para. 37. The court additionally addressed Iran’s argument based on “more than 25 years of continual interference by the United States in the internal affairs of Iran” by again emphasizing that “it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States’ claims. The Iranian Government, however, did not appear before the Court.” *Ibid.* at 81.
As to the merits of the case, the Court directly addressed the responsibility of Iran for the attacks on the embassies and subsequent hostage taking: "[t]he first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection." However, this fact did not absolve Iran of responsibility. Even though the attacks were not directly imputable to the actions of the state, this "does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations." As in the Corfu Channel Case, the state was found liable for its omissions, i.e., the government’s failure to act to protect the embassies and the diplomatic personnel in contravention of the Vienna Conventions of 1961 and 1963.

Another important part of the discourse on the state responsibility in the U.S. Hostages Case concerned the legitimacy and appropriateness of counter measures taken by the U.S. subsequent to the hostage taking. The ICJ noted that the United States had acted unilaterally after instituting its action before the Court and after provisional measures had been ordered. The United States imposed economic sanctions, froze assets of Iranian nationals and conducted an abortive military rescue which included invading Iranian territory. The Court did not condone these acts of "self-help," but instead “expressed its concern” in the following manner:

Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units .... No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran’s long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court’s own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States’ incursion into Iran. When, as previously recalled, this case

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234. Ibid. at para. 61 (emphasis added).
235. Ibid. at para. 61.
236. Ibid.
had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations: and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.237

The dissenting opinion of Judge Morozov was even more condemnatory of the U.S. counter measures and would have denied United States any reparations: “taking into account the extraordinary circumstances which occurred during the period of judicial deliberation on the case, when the Applicant itself committed many actions which caused enormous damage to the Islamic Republic of Iran, the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation.”238

The doctrine of state responsibility as expressed in these two cases is interestingly devoid of bright lines clearly indicating where the right stops and abuse of the right begins. The majority of the Court in the U.S. Hostages case condemned the American counter measures but stopped short of holding that such actions would preclude reparations for Iranian breaches. The Court made its condemnation of the United States in the softest voice possible — by expressing its “concern” and recalling that it had formerly ordered the parties not to “aggravate the tension.” Judge Morozov attacked the majority’s characterization of these counter measures as well as the depiction of the facts themselves by the majority:

Some parts of the reasoning of the Judgment described the circumstances of the case in what I find to be an incorrect or one-sided way .... I was unable to accept paragraphs 32, 93 and 94. The language used by the

Court in those paragraphs does not give a full and correct description of the actions of the United States which took place on the territory of the Islamic Republic of Iran on 24-25 April 1980. Some of the wording used by the Court for its description of the events follows uncritically the terminology used in the statement made by the President of the United States on 25 April 1980, in which various attempts were made to justify, from the point of view of international law, the so-called rescue operation. But even when the President's statement is quoted, some parts thereof, which are important for a correct assessment of those events, are omitted.

This alternative interpretation of the facts and the different ramifications of the United States' alleged violations of international law shows that there were no clear a priori legal (although good political) reasons for the majority to treat the American counter measures as frowned upon yet tolerable.

This inherent lack of bright line rules in the state responsibility discourse brings up the quest for substance and codification pursued by the ILC in its Draft Articles. These Articles have become highly influential in spite of the fact that they are provisional only and have not been agreed by states in a formal treaty. The ICJ has considered "certain aspects of the Draft Articles as reflecting the customary international law of state responsibility." Other tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, "have likewise considered various parts of the Draft Articles and ILC's commentary as authoritative expressions of customary law."

The Draft Articles begin with the statement that "[e]very internationally wrongful act of a State entails the international responsibility of the State." Phillip Allott has written that the notion of "state responsibility" is a "dangerous fiction" which in effect creates more harm than good. His first point is that "it consecrates the idea that wrongdoing is the behaviour of a general category known as 'states' and is not the behaviour of morally responsible persons."

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239. Ibid at 53, para. 5 (Dissenting op. of Judge Morozov).
243. Supra note 240, Art. 1.
244. Supra note 211 at 13.
245. Ibid at 13-14.
cceptability exists as a legal category, it must be given legal substance ... general conditions of responsibility have to be created which are then applicable to all rights and duties. The net result is that the deterrent effect of imposition of responsibility is seriously compromised ... by leaving room for argument in every conceivable case..." At a basic level, Allott is concerned with the "nefarious effects" of interposing the concept of responsibility between wrongdoing and liability.

The first critique is reminiscent of the point made in the context of the sovereignty and jurisdictional discourses concerning the idiosyncratic and outmoded conception of the state and its state powers. As discussed, the reification of the state can result in certain viewpoints being privileged over others, namely those with nationalistic ties and those allied with narrowly defined national interests. Alternative discourses get discounted or left out, especially those based on the interests of transnational groups. A similar phenomenon occurs in the context of state responsibility. The result in this context, as Allott makes clear, "is that those human beings who implement law's rights and duties are able to perceive themselves, on the one hand, as entitled to implement the state's rights and duties and, on the other hand, as bringing about responsibility in the state if they implement them unlawfully." For Allott, "it is not surprising that states behave badly" under such circumstances. In effect, the state acts as a shield (and sword) for individuals to hide (or fight) behind: "The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally from the duties the law imposes and from the responsibility which it entails."

With respect to the second critique, Allott focuses on the Articles concerning "Circumstances Precluding Wrongfulness," which by defining the limits of responsibility also thereby provide copious arguments to states and their lawyers to justify otherwise unlawful behaviour. These Articles define six circumstances precluding wrongfulness: "consent, countermeasures in respect to an internationally wrongful act, force majeure and fortuitous event, distress, state of necessity, and self-defense." Allott identifies the self-defense exception and its close relation — counter measures — as akin to "self-help". He takes a hard stance with respect to self-help, commenting that it is "indistinguishable

246. Ibid. at 14.
247. Ibid.
248. Ibid.
249. Ibid.
250. Ibid. at 17.
from anarchy in practice if it is regarded by the subjects of the law as the normal sanction of the law."

Allott's view of the concept of state responsibility concept sees through it to something hidden, and even pernicious, beneath its surface. His evaluation of state responsibility is important because it forces one to question the perceived wisdom and structure of the doctrine. Out of the three discourses explored in the present article, state responsibility superficially appears to be the most helpful in protecting the state and preserving international society. However, that a doctrine which professes to "impose responsibility" on rogue nations could also simultaneously, and perhaps in a greater number of instances, function to do the opposite — that is to allow states to escape responsibility — is an apparent paradox and an utter chimera for international law and the international lawyer. Allott's perspective also recognizes the dangers surrounding the bureaucratization of international law and society, which, in a Weberian sense, "involves not only the dominance of a certain social group but also the dominance of a certain mentality."

From a sociological perspective, bureaucratization "is no longer precisely the spirit of autocracy and oppression characteristic of old regimes." Rather, it is an attitude which "seeks to get the job done with the minimum of spiritual commitment and the maximum of personal security." For Allott, this spirit is especially sympathetic to the state because it sustains the state structure, and is particularly detrimental to — what for Allott is the proper focus and concern of international law — the people who exist within the state. Allott has a particular perspective (and some may say bias) that envisions the role of the international lawyer as serving not just governments but "international society" as a whole: for him, "as lawyers they are servants not of power but of justice."

This utopian view is one which imbues law with special, almost supernatural, powers as the overseer and restrainer of state power. Law functions ideally for Allott as a great mediator, allowing the relationship between the people and the state to be one of growth, prosperity and stewardship, not subjugation. At the same time, law's articulations, especially as manifested in the work of the ILC, its codifiers and bureaucrats, tend to devalue and erode the very legitimacy of law itself. The view of

251. Ibid at 21.
252. Ibid at 9.
253. Ibid. at 10.
254. Ibid.
255. Ibid. at 24.
law as a great social phenomenon, with its promise for humankind's well
being and happiness, is life affirming and positive. As Allott points out,
though, this is a view which is yet to be realized, because international law
is trapped to varying degrees, as argued in this article, in the pre-revoluti-
onary and antiquated discourses of previous centuries.  

II. Examining The Structure Of Fairness Discourse And Its Presuppositions

The central concern of Part I of the article was the influence of bias in the
discourses of contemporary international law, specifically those about
sovereignty, jurisdiction and state responsibility. These discourses were
singled out, both for their representative capacity to highlight certain trends
running like threads through the fabric of international law and for their
interconnectedness and interdependence. Now in Part II it is time to
examine the discourse surrounding fairness. The concept of fairness has
become a vehicle that, for its proponents at least, enables the transplanta-
tion of western, liberal values to other parts of the world. It also does so,
according to its adherents, in a way that allows those values to be legiti-
mated, i.e., it avoids the imperialism critique, it conquers charges of ethno-
and culture-centrism, and, most importantly for present purposes, it
defeats the challenge of bias launched by those who reject the universalist
stance.

Thomas Franck has analyzed the notion of fairness and finds it the
most important basis for the creation of modern international legal norms.  
For Franck, international law has reached a new level of maturity and
complexity. It is now in its post-ontological stage, meaning that the
question "whether international law is law" no longer needs to be asked,
proved, defended, or fought over; rather, the issue of importance is the
content of the new international law. Thus new questions must be asked,
such as "Is international law effective? Is it enforceable? Is it understood?
and, most importantly, Is international law fair?" Fairness, therefore,
has become the meta-discourse, which rises above and preserves the other
internal discourses, providing legitimacy, acceptance, and stability to the
system of international law.

256. Ibid. at 25.
257. See Thomas M. Franck, Fairness in International Law and Institutions (New York: Oxford
University Press, 1995).
258. Ibid. at 4-6.
259. Ibid. at 3-9.
260. Ibid. at 9.
The importance of fairness to international law's self-conscious justification cannot be overstated. If it is fair to impose our cultural values universally throughout the world, then what basis do recipient societies have to object? Fairness may seem like a way out of the paradox of universalism, but it is necessary first to determine on what it is based. At bottom, if the fairness discourse fails to provide justifications for the transplantation of legal values, or if the presuppositions of fairness are unsatisfactory, then better ways must be sought to resolve the critique of cultural imperialism.

Franck identifies two presuppositions of modern fairness discourse: moderate scarcity and community.261 The condition of moderate scarcity, as Franck says, citing Rawls, presents an optimal opportunity for fairness discourse to be productive: "it is most likely to be productive when the allocation of rights and duties occurs in circumstances which make allocation both necessary and possible."262 The implication is that productive discourse must convince others (i.e., the less fortunate) of the distributinal justness of their assigned allocations. Compare the state responsibility discourse which was most likely to be productive, effective or efficient in situations where the most powerful had been wronged and needed a remedy against a less powerful adversary, even in spite of the technical wrongs committed by the more powerful, as the Corfu Channel and U.S. Hostages cases exemplify. In other words, fairness discourse would not be productive if it failed to pacify and assuage the discontent felt by those less well off.

With respect to the second precondition of fairness, Franck supposes a community "based, first, on a common, conscious system of reciprocity between its constituents..."263 The community, Franck emphasizes, is not just about shared rights and rules, but also about "shared moral imperatives and values."264 This point echoes Slaughter's distinction raised in Part I between liberal and non-liberal states, where the so called "liberal" states constitute the community. When one considers who defines liberal and who defines the community, it becomes painfully obvious how tautological and circular is the use of these terms. We define who is able to join the community and who gets excluded, so it is no wonder that "fairness" can thrive in this limited context.

Concern over the exclusivity and bias in this reference to the commu-
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nity of states may be countered, as Franck does, by stressing the global nature of contemporary relations. For example, he says:

As we enter the third millennium, there is much evidence of a global community, emerging out of a growing awareness of irrefutable interdependence, its imperatives and exigencies. It may be tempting to speak of emerging 'global communities': of trade, of environmental concerns, of security, of health measures, etcetera. It would, however, be inaccurate because the regimes are linked. A state's conformity with environmental policy will have an effect on its credit-worthiness in borrowing from the World Bank; most favored nation trade benefits may be linked to a state's human rights record, and so forth. These multiple linkages, making different regimes interdependent, are evidence of community.265

The trend of globalization certainly points toward increasing interaction between states and a larger and larger encompassing community. But the process is not complete yet. There are many states and people living within states which do not share a sense that they belong in any real sense to a global community.

But what does it matter if a few rogue nations do not (or do not choose) to participate in a larger community of states? May not they be left alone or forced to comply if they do not feel the voluntary obligations of the "liberal" states? Indeed, some sort of disagreement is an inevitable part of the fairness discourse. As Franck acknowledges:

Even if 'everyone' were to agree, at least in theory, that fairness is a necessary condition of allocational rules, this unfortunately would not assure that everyone shared the same sense of fairness or agreed on a fixed meaning. Fairness is not 'out there' waiting to be discovered, it is a product of social context and history.... What is considered allocationally fair has varied across time, and still varies across cultures.

What this tells us, however, can be easily misrepresented. It does not tell us that the search for allocational fairness is the pursuit of a chimera. What the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective ... a human, contingent quality which merely captures in one word a process, reasoning, and a negotiation leading, if successful, on an agreed formula. . . .266

265. Ibid. at 12.
267. Franck, supra note 257.
What this quotation also shows is that Franck is well aware of the subjective and viewpoint laden nature of the fairness discourse. Any one conception of fairness may (paradoxically) be biased from someone else's perspective. To be fair likely seems unfair to someone, some of the time. One person's freedom fighter may be another's terrorist. One person's liberation is to another subjugation. One person's sacred values are another's outlawed taboos.

Given the admittedly subjective nature of fairness, the question still remains, what to do with rogue or non-compliant nations? One way the fairness discourse deals with this question is by subdividing fairness, so that it can function on different levels for different parties simultaneously. This subdivision is encapsulated in what Franck calls his "caveat" to the fairness discourse. It distinguishes between "legitimacy as process fairness" and "distributive justice as moral fairness." The important point here is that these conceptions can, and do, conflict, although there is much overlap between legitimacy and justice. Just as sovereignty concerns state sovereignty and people's sovereignty, so fairness may express legitimacy and justice. Both are viable options in the discourse. As Franck says:

The notion of fairness encompasses two different and potentially adversary components: legitimacy and distributive justice. These components are indicators of law's, and especially fair law's, primary objective: to achieve a negotiated balance between the need for order and the need for change. ... What matters is how this tension is managed discursively through what Koskenniemi calls 'the social conception' of the legal system. This 'social conception' manifests itself in the discursive pursuit of fairness.

Thus, for example, there were fairness arguments made on both sides of the United States's intervention in 1990 against Iraq after it had invaded Kuwait. Supporters of the United States asserted legitimacy-as-fairness in arguing that concepts such as uti possidetis and territorial integrity gave legitimacy to Kuwait's claim of sovereignty, free from invasion. The

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268. "May" is more exact than "is" because it is logically possible to have a universally fair rule, i.e., in theory, there is a possible state of affairs where a rule could be devised which everyone would be convinced produced a fair result. For example, if our entire community consisted of a small group of people, or perhaps a large group with homogenous interests, and no other people in the universe were in existence, then a rule could be devised that everyone would consider fair.

269. Ibid., supra note 257.

270. Ibid.

271. Ibid. at 23.

272. Ibid.
other side urged justice-as-fairness in maintaining there was a grossly unjust resource allocation between the peoples of Kuwait and Iraq, who had been artificially divided by colonial intervention.\textsuperscript{273}

This nuanced approach captures some of the depth and flexibility of the fairness discourse and goes a long way to meeting the claim that "fairness" does not take into account alternative views and cultures. But the charge of ethnocentrism is still not answered, because one can imagine a situation where both "legitimacy-as-fairness" and "justice-as-fairness" operated in tandem and synchronously within one community, but not between different communities. An example might be specific family law or divorce rules operating in different cultures. In one culture they may be viewed as completely legitimate and distributionally just, but considered in another as sexist, unfair, and degrading to women.

John Tasioulas has written a paper directly critiquing Franck's discussion of fairness.\textsuperscript{274} Tasioulas criticizes Franck for, among other things, his failure to deal adequately with the problem of ethnocentrism.\textsuperscript{275} Tasioulas acknowledges that Franck does not accept the objectivist basis of fairness, but instead, as we have seen, embraces an inter-subjective and flexible conception.\textsuperscript{276} In order to highlight the importance of culture and the imperialist dilemma that is not rectified merely because of one community's inter-subjective conception of fairness, Tasioulas relies on the work of Italian political philosopher Daniel Zolo.\textsuperscript{277} Zolo attacks the liberal enterprise of universalism by first asserting "the incompatibility of the values expressed in human rights norms with 'the dominant ethos in countries like ... China, Pakistan, Saudi Arabia, the Sudan or Nigeria.' Second, he insists that the lack of objective foundations for such norms renders their invocation 'a perfect continuation of the missionary, colonizing tradition of the Western powers.'"\textsuperscript{278}

Tasioulas suggests that "nothing in [Fairness in International Law and Institutions] ... really dispels the threat of ethnocentrism."\textsuperscript{279} He does, however, acknowledge that elsewhere Franck argues that "personal freedom is not a parochial, specifically Western value and hence not an ethno-

\textsuperscript{273} Ibid.
\textsuperscript{275} Ibid. at 995, et seq.
\textsuperscript{276} Ibid. at 997-998.
\textsuperscript{277} See e.g., ibid. at 996, quoting Danito Zolo, Cosmopolis: Prospects for World Government (Cambridge, Mass.: Polity Press, 1997) at 118-119.
\textsuperscript{278} Ibid.
\textsuperscript{279} Ibid. at 1000.
centric imposition on non-Western cultures." As Franck says in that other context:

There is no reason to believe that these underlying emancipatory forces [e.g., developments in industrialization, urbanization, scientific and technological discoveries, transportation, communication, information processing and education] ... are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy.

In addition, Franck does have another argument which speaks to the non-parochial character of liberal values and ideas. This occurs in his discussion of democracy, as Tasioulas notes:

This almost complete triumph of ... notions of democracy (in Latin America, Africa, Eastern Europe, and to a lesser extent Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which future development of global society will turn. It is the unanswerable response to claims that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of Western industrial states.

For Tasioulas, these arguments are a "valuable corrective to the tendency to refuse cultures and ascribe to them an historically invariant essence."

Despite the attractiveness of the "independent variable" argument and the "empirical democracy" claim, this still does not adequately answer why certain states are left out of the community of states, or why some cultures are privileged over others, nor does it provide a normative explanation for the universal nature of liberal values. As Tasioulas notes, "it is unlikely that such empirical considerations, pertaining to modernity ... can blunt the real force of the ethnocentric challenge."

Indeed, while it provides a sociological or descriptive explanation for the fact of the permeation of liberal values throughout the world, it does little to explain

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280 Ibid.
282 Ibid. at 1001, citing Franck, supra note 257 at 88.
283 Ibid
284 Ibid. at 1002.
why these values should predominate.

Tasioulas is surely right to be skeptical of Franck's utopian vision of the fairness discourse as really having all the justificatory and explanatory power which it is advertised to have. But, at the same time, Franck is correct in pointing out that there is no objective standard of fairness with which to assuage the rumblings of "the natives" and the malcontents. Fairness discourse suffers from the kind of blind adherence which Wittgenstein discussed in *On Certainty*, from which Tasioulas aptly quotes: "[m]en have judged that a king can make rain; we say this contradicts all experience. Today they judge that aeroplanes and the radio etc. are means for the closer contact of peoples and the spread of culture." 285 This statement is made in connection with Wittgenstein's general discussion of how we come to know or believe things about the world, which is helpful in making an assessment of the fairness discourse.

One of Wittgenstein's main points in *On Certainty* is that it is a fallacy to think that incremental experience in individual cases teaches us how to judge the world. For Wittgenstein, "experience is not the ground for our game of judging. Nor is it its outstanding success." 286 This should not be confused with an objectivist stance. Wittgenstein is not saying, like Kant, that judging is dependent on a priori structures common to all mankind through Reason. Instead, Wittgenstein has in mind an inter-subjectivist idea, that is an organically arising structure of propositions which are mutually dependent and reinforcing. This idea is elucidated by Wittgenstein's further two insights that "[w]hen we first begin to believe anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.)" 287 and that "[w]e do not learn the practice of making empirical judgments by learning rules: we are taught judgments and their connexion with other judgments. A totality of judgments is made plausible to us." 288 For Wittgenstein, "[i]t is not single axioms that strike me as obvious, it is a system in which consequences and premises give one another mutual support." 289

These insights help to understand both the limitations and the power of fairness discourse. Fairness is a language game which we all play in the Western liberal world. It has been learned and has come to be seen as the

primary mode upon which we judge other propositions, arrangements and institutions, as well as the extraterritorial application and transplantation of our laws on other nations and peoples. But Wittgenstein reminds us that fairness, like any other judgment, is only one element in a web of interconnecting ideas which hang together in a certain conceptual structure. The strength of the fairness discourse derives not from its individual rightness or wrongness but rather from its co-existence and interdependence with other concepts in the Western liberal vocabulary, for example, legitimacy, equity, freedom, and justice. Each of these terms gains credibility and is partially defined by reference to fairness, and vice-a-versa.

In Culture and Value, another posthumously published collection of writings of Wittgenstein, he remarks that "[n]othing we do can be defended absolutely and finally. But only by reference to something else that is not questioned. I.e. no reason could be given why you should act (or should have acted) like this, except that by doing so you bring about such and such a situation, which again has to be an aim which you accept." This thought is another way of making the point that eventually justification and explanation must stop because, at the last, there is no further reason for our actions which can be articulated, given the confines of our language and our way of seeing the world. The Iraq/Kuwait crisis of 1990 comes to mind again. As Franck commented there was no absolute and final justification for American intervention just as there was no absolute and final justification for Iraq’s invasion of Kuwait. In the end, each side acted on principles that were ultimately justified, not by further concepts, but by the achievement of a new situation, the legitimacy of which the majority of the rest of the world by consensus would either accept or reject.

In one sense, Wittgenstein’s insight regarding certainty does not resolve the charge of ethnocentrism raised against fairness discourse. In fact, it actually strengthens this charge by acknowledging that concepts derive their meaning from the socially accepted complex of interconnecting principles which are learned as part of one’s language, culture, upbringing and development as a member of a particular society. But, in another wider and surely more important sense, Wittgenstein’s philosophy provides a solution to the charge by acknowledging that the notion of certainty is a function of an inter-subjective commitment reached by persons operating as part of a functioning community. Because each

290 Supra note 3 at 16e.
291 Supra note 257 at 23-24.
system or each culture operates within its own conceptual structures and language, it is true that no one system has any a priori claim of primacy. But it is also true that in the real world a state of affairs already exists, and continues to grow, from which is emerging a new community whose values will gain priority because of globalization and the sheer number of its participants.

Indeed, the problems and blessings of globalization impel us to operate as a mixed society of states, transnational groups, peoples, individuals and other entities. We have no choice if we are to survive as a species on this planet. It is hard not to agree with Phillip Allott's view that "law forms part of the self-constituting of a society" and that "law is a universalizing system, reconceiving the infinite particularity of human willing and acting, in the light of the common interest of society."292 From the abstract heights of Allott's almost Hegelian project of law realizing itself comes the recognition that there may not be any ethical justification for cultural imperialism which can be articulated outside our own idiosyncratic cultural context. However, that fact, although it may be hard to accept, does not require abandonment of the project of international society and international law. Instead, it requires that we accept a commitment to take a hard look at our biases and assumptions.

292. Allott, supra note 7 at 69, paras. 3.1 and 3.4.