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The Future of International Law Is Domestic (or, The European Way of Law)

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William Burke-White**

International law has traditionally been just that—international. Consisting of a largely separate set of legal rules and institutions,[1] international law has long governed relationships among states. Under the traditional rules of international law, the claims of individuals could reach the international plane only when a state exercised diplomatic protection and espoused the claims of its nationals in an international forum.[2] More recently, international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between governments and their own citizens, particularly through the growing bodies of human rights law and international criminal law.[3] But even in these examples, international law has recognized a clear demarcation between domestic and international politics.

The classic model of international law as separate from the domestic realm reflects the traditional problems the international legal system sought to address, namely the facilitation of state-to-state cooperation and the treatment of one state's nationals by another state. Whether regulating the immunities of diplomats or the rights of ships on the high seas, the traditional purposes of international law have been interstate, not intrastate.

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1. This approach is closely linked to the monist view of international law. Monists argue that international law and domestic law are part of the same system, in which international law is hierarchically prior to domestic law. Dualists, in contrast, claim that international and domestic law are part of two distinct systems and that domestic law is generally prior to international law. *See generally* J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936). While both of these theories provide important linkages between international law and domestic law, for adherents of either approach the functions and institutions of international law remain largely at the international level. *See generally id*.

2. *See* Mavromatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30). Yet the decision of a state to espouse its citizen's claim is one of domestic politics—the state has no obligation to do so. International law does, however, regulate the right of the state to espouse an individual claim, limiting such rights to cases of "close connection," usually in the form of "real and effective nationality" between the state and the citizen. *See, e.g.*, Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

3. *See generally* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

This foundation of international law reflects the principles of Westphalian sovereignty, often seemingly made up of equal parts myth and rhetoric. In this conception, the state is a defined physical territory "within which domestic political authorities are the sole arbiters of legitimate behavior."[4] States can be part of the international legal system to the degree they choose by consenting to particular rules. Likewise, they can choose to remain apart, asserting their own sovereignty and eschewing international involvement. Formally, Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference. But it is also the right to be recognized as an autonomous agent in the international system, capable of interacting with other states and entering into international agreements. With these background understandings of sovereignty, an international legal system, consisting of states and limited by the principle of state consent, emerged.

Today, however, the challenges facing states and the international community alike demand very different responses from and thus new roles for the international legal system. The processes of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives.

To create desirable conditions in the international system, from peace, to health to prosperity, international law must address the capacity and the will of domestic governments to respond to these issues at their sources. In turn, the primary terrain of international law must shift—and is already shifting in many instances—from independent regulation above the national state to direct engagement with domestic institutions. The three principal forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act.

The most striking feature of this conception of international law is a direct emphasis on shaping or influencing political outcomes within sovereign states in accordance with international legal rules. Even in 1945, the drafters of the U.N. Charter still maintained the classical position that international law and institutions shall not "intervene in matters which are essentially within the domestic jurisdiction of any state."[5] Today, however, the objectives of international law and the very stability of the international system itself depend critically on domestic choices previously left to the determination of national political processes—whether to enforce particular rules, establish institutions, or even engage in effective governance. By ensuring that national

4. *See, e.g.*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999).
5. U.N. Charter art. 2, para. 7.

governments actually function in pursuit of collective aims, international law is starting to play a far more active role in shaping these national political choices. Assuming that current political, economic, and technological trends continue, the future effectiveness of international law will turn on its ability to influence and alter domestic politics.

These functions of international law are already well known to the members of the European Union ("EU"). Indeed, in extending membership to ten new countries over the course of the past decade, the EU has relied on EU law as its primary tool of reform and socialization.[6] Even among the original member states, EU institutions continue to perform the types of backstopping, strengthening, and mandating functions described here. Europeans themselves are coming to recognize these uses of law; a new generation of European policy thinkers has openly proclaimed the virtues of the European way of law.[7]

Some may, of course, argue that these new functions of international law have no applicability outside the European context in which they were first embraced.[8] Yet each of the three means through which international law is coming to influence domestic outcomes—strengthening domestic institutions, backstopping national governance, and compelling domestic action—is spreading beyond the Continent.

To the extent that what we describe as the "European way of law" is already evident both within the EU and now in a growing number of other contexts, this Article describes an important reorganization of the means and mechanisms through which international law operates. Our argument goes further, however, by suggesting that these new mechanisms of international law have the power to make the system as a whole far more effective. We therefore move beyond description and prediction to prescription, suggesting ways that the European way of law should become the future of international law writ large.

We also recognize, however, the potential dangers in current trends. As we emphasize in the conclusion, our vision of the principal future functions of international law assumes an intensive interaction between international law and domestic politics. But domestic politicians can manipulate international legal institutions and mandates to serve their own purposes, such as jailing political dissidents as part of complying with a Security Council resolution requiring domestic action against terrorism. More broadly, the basic

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6. *See generally* MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY 43–46 (2005).

7. *See, e.g.*, *id.*; Gráinne de Búrca, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, 27 FORDHAM INT'L L.J. 679, 680 (2004) (arguing that a similar role of law is generating a "more general and comprehensive human rights policy" within the EU).

8. *See, e.g.*, Eric Posner & John Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 966 (2005) ("There is no reason to think that a court that works for Europe, where political and legal institutions in most countries are of high quality, would work for a world political community that lacks the same level of cohesion and integration. Whatever one thinks about the EU, it is nothing like the international community.").

positivist foundations of international law, requiring states to freely accept such interference in domestic politics, raise the possibility of manipulation and even imposition of such "acceptance" as a result of power disparities.

Part I of this Article identifies a new set of global threats and actual and potential responses, including the EU's uses of law to transform new members "from the inside out." Part II argues that the future relevance, power, and potential of international law lie in its ability to backstop, strengthen, and compel domestic law and institutions. Part III examines the potential pitfalls and dangers of these new functions of international law. Finally, Part IV contrasts our analysis with other recent efforts to blur the boundaries between the international and domestic spheres, noting that what is distinctive about our claim is not the intermingling of two kinds of law, but rather the impact of international law on domestic politics and vice versa.

I. New Threats, New Responses

Rules can reflect and embody aspirations for a better world. Alternatively, and equally likely, rules respond to concrete problems. The changing nature of international legal rules today responds to a new generation of worldwide problems. The most striking feature of these problems is that they arise from within states rather than from state actors themselves.

Examples abound: the terrorist attacks of September 11, 2001, were launched by a group of nonstate actors operating from within the territory of Afghanistan;[9] the massive ethnic crimes in Rwanda, Congo, and Sudan are, in large part, the product of rebel forces within states;[10] the most dangerous examples of nuclear proliferation can often be attributed to nonstate criminal networks such as those of A. Q. Kahn.[11] The 2004 Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change identifies problems of intrastate origin such as "poverty, infectious disease and environmental degradation . . . civil war, genocide and other large scale atrocities . . . nuclear, radiological, chemical and biological weapons, terrorism, [and] transnational organized crime" as among the core threats facing the international community today.[12]

More often than not, the origins of these threats can be addressed directly only by domestic governments that have the jurisdictional entitlements, police power, and institutional capability to act directly against them. Arresting

9. *See generally* Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report (2004).

10. *See, e.g.*, Josias Semujanga, Origins of the Rwandan Genocide (2003); Robert B. Edgerton, The Troubled Heart of Africa: A History of the Congo (2002); Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Jan. 25, 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

11. *See* William J. Broad & David E. Sanger, *Pakistani's Nuclear Black Market Seen as Offering Deepest Secrets of Building Bomb*, N.Y. Times, Mar. 21, 2005, at A7.

12. Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* 2, U.N. Doc. A/59/565 (Dec. 2, 2004).

criminals or terrorists, securing nuclear materials, and preventing pollution are within the traditional province of domestic law. The result is that the external security of many states depends on the ability of national governments to maintain internal security sufficient to establish and enforce national law.

Where states are strong enough to combat these internal threats directly, international law can and must play a critical coordinating role to ensure that governments cooperate in addressing threats *before* they span borders. Far too frequently, however, domestic governments lack the will or the capacity to adequately respond to these challenges. Since the early 1990s, the number of states unable to effectively govern their territories has increased.[13] As Francis Fukuyama affirms, "[s]ince the end of the Cold War, weak or failing states have arguably become the single most important problem for the international order . . . . Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration, and attack their neighbors."[14]

Where national governments are unable or unwilling to address the origins of these threats themselves, international law may step in to help build their capacity or stiffen their will. This use of international law moves well beyond both its classical definition, as "the rights subsisting between nations,"[15] and its more modern conception, as, in part, regulating the conduct of states toward their own citizens.[16] Where human rights law identifies a set of clear prohibitions on government behavior, coupled with a set of positive aspirations toward economic, social, and cultural rights, these new international legal rules seek actively to shape not only domestic law but also the domestic political environment to enable and enhance domestic government action. The result is far more invasive, but also potentially transformative. For many countries, ranging from the United States to Russia, from the countries of the Middle East to those of Africa, this new use of international law is also far more frightening.

This new model springs from a conception of international law spreading outward from Europe. The Treaty of Westphalia, ending the bloody Thirty Years War with the principle of *cuius regio, eius religio*,[17] has given way to the Treaty of Rome, ending a century of bloody intra-European wars with a con-

13. *See* JEREMY W. WEINSTEIN ET AL., ON THE BRINK, WEAK STATES AND US NATIONAL SECURITY: A REPORT OF THE COMMISSION FOR WEAK STATES AND US NATIONAL SECURITY 9–12 (2004) (describing recent incidences of state failure); *see also* Stuart E. Eizenstat & John Edward Porter, *Weak States Are a US Security Threat*, CHRISTIAN SCI. MONITOR, June 29, 2004, at 9 ("In those states [Iraq and Haiti] and others like them—Afghanistan, Somalia, Liberia, and possibly Pakistan—where poor states lose control, it's often Americans who pay the price.").

14. FRANCIS FUKUYAMA, STATE BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 92–93 (2004).

15. Emmerich de Vattel described international law in the 1750s as "the rights subsisting between nations or states, and the obligations correspondent to those rights." EMMERICH DE VATTEL, THE LAW OF NATIONS Preliminaries § 3 (Joseph Chitty et al. trans. & ed. 1883) (1758).

16. *See generally* Slaughter & Burke-White, *supra* note 3.

17. "Whose territory, his religion."

cept of pooled sovereignty that has steadily expanded and deepened in the contemporary EU. As the EU's legal system has evolved, the prime purpose of the European Court of Justice and even of the Commission has been less to create and impose EU law as international law than to spur national courts and regulatory agencies to embrace and enforce EU law as national law.

Moreover, as Mark Leonard writes in his provocative new book *Why Europe Will Run the 21st Century*, "Europe's weapon is the law."[18] He describes Europe's power in the world as "a transformative power,"[19] rooted in a strategy of democratization that is based on requiring candidate countries to "swallow all 80,000 pages of European laws and adapt their own legislation to accommodate them," as well as then accepting continual monitoring by EU officials to ensure that they are in fact living up to their new commitments.[20] The result has been a "rebuilding [of] these countries from the bottom up."[21] Indeed, "[t]he European model is the political equivalent of the strategy of the Jesuits: if you change the country at the beginning, you have it for life."[22]

Note the precise way that European law works in this equation. For all the 80,000 pages of regulations, the EU Council of Ministers and the EU Commission issue directives that specify ends rather than means. It is up to national legislatures and courts to decide precisely how the member state in question will fulfill a particular directive. Once those laws are passed, EU institutions—the Court and the Commission—look over national shoulders to ensure that they actually do what they commit to do. This European way of law is precisely the role that we postulate for international law generally around the world.[23]

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18. LEONARD, *supra* note 6, at 35.

19. *Id.* at 5 (quoting Richard Youngs, *Engagement: Sharpening European Influence*, *in* GLOBAL EUROPE REPORT 2: NEW TERMS OF ENGAGEMENT 1, 5 (Richard Youngs ed., 2004)).

20. LEONARD, *supra* note 6, at 45.

21. *Id.* Others have suggested that these changes are, at times, imposed instead from the top down, and may be indicative of a democratic deficit in the EU. *See, e.g.*, Giandomenico Majone, *Europe's Democratic Deficit: A Question of Standards*, 4 EUR. L.J. 5 (1998) (observing that the "democratic deficit . . . refers to the legitimacy problems of non-majoritarian institutions, i.e., institutions which by design are not directly accountable to the voters or to their elected representatives"); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273, 273 (2000) (arguing that the EU is based on a "systematic program of eroding or reconfiguring national sovereignty"). For a perspective on the EU that rejects the danger of the democratic deficit and accords more closely with our vision, see Andrew Moravcsik, *In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUD. 603 (2002).

22. LEONARD, *supra* note 6, at 45–46.

23. Beyond the EU system, the European Court of Human Rights ("ECtHR") has repeatedly forced European governments to change their domestic laws governing issues from prosecution of criminals to admitting homosexuals into the armed services. Governments are all entitled to a "margin of appreciation" in reconciling their domestic laws and practices with their treaty obligations, but the ECtHR is there to ensure that the margin does not grow too wide. *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (applying the margin of appreciation to freedom of speech); Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994) (holding the margin of appreciation breached in the prosecution of a journalist for racist speech); Lustig-Prean & Beckett v. United Kingdom, 29 Eur. Ct. H.R. 548, 587 (1999) (holding that the plaintiffs were wrongly discharged "on the grounds of their homosexuality" and requiring a change in UK policy toward sexual orientation in the military); Zana v. Turkey (No. 57), 1997-VII Eur. Ct. H.R. 2533 (holding that Turkey has a margin of appreciation in regulating incitement

Espen Barth Eide, a former state secretary in the Norwegian Foreign Ministry, writes that the "EU's 'soft' intervention in the 'domestic affairs' of EU member states is almost an everyday experience."[24] This is the hallmark of EU-style "post-Westphalian sovereignty," described so memorably by Robert Cooper, a top aide to Javier Solana, in *The Breaking of Nations.*[25] Eide and other leading European security strategists openly call for the extension of regional "integrative projects" based on the EU in Africa, Latin America, and Asia. The European Security Strategy, proposed by Javier Solana[26] and passed by the European Council in December 2003, fell short of openly embracing this vision, but recognized that the Association of Southeast Asian Nations ("ASEAN"), the Southern Cone Common Market ("MERCOSUR"), and the African Union "make an important contribution to a more orderly world."[27]

Spreading the European way of law beyond Europe, a process that is already underway, requires a broader rethinking of the functions of international law. As in Europe, the focus of a growing number of international rules is no longer interstate relations; it is increasingly governments' capacity and will to act in prescribed ways toward their own peoples. The result is a growing interaction between international law and domestic politics, in ways that have lasting implications for both.

II. The Future Functions of International Law

The all-too-often inadequate domestic response to transnational threats has three separate but related causes: a lack of domestic governance capacity, a lack of domestic will to act, and new problems that exceed the ordinary ability of states to address. International law has key leverage points to help improve the response of domestic governments in each of these three ways. International legal rules and institutions can enhance the capacity and effectiveness of domestic institutions. If properly designed and structured they can help backstop domestic political and legal groups trying to comply with international legal obligations. Finally, they can even compel or mandate action at the national level in response to a global threat. The following sec-

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by Kurdish politicians).

24. Espen Barth Eide, *Introduction: The Role of the EU in Fostering "Effective Multilateralism," in* Effective Multilateralism: Europe, Regional Security and a Revitalized UN 1, 1–10 (Espen Barth Eide ed., 2004).

25. *See generally* Robert Cooper, The Breaking of Nations: Order and Chaos in the 21st Century (2003).

26. Javier Solana is the Secretary-General of the Council of the European Union and the European Union High Representative for the Common Foreign and Security Policy. Should the proposed EU Constitution eventually enter into force, he is expected to be appointed Foreign Minister of the EU. The European Council is the "main decision-making body of the EU" and is composed of the ministers of the member states for any particular subject area. *See* Council of the European Union, http://ue.eu.int/cms3_fo/showPage.asp?id=242&lang=EN&mode=g (last visited Mar. 23, 2006).

27. Javier Solana, A Secure Europe in a Better World—The European Security Strategy 9 (2003), http://ue.eu.int/uedocs/cmsUpload/78367.pdf.

tions will examine each of these ways that international law can and in some cases is beginning to play a new role in domestic governance.

A. Strengthening Domestic Institutions

A primary limitation of the international system is the weakness of government institutions in so many states all over the world. Due to violence, poverty, disease, corruption, and limited technology or training, national governments all too often lack the resources, skills, and ability to provide adequate solutions to local and transnational problems. Examples are numerous: state failure in Somalia in the early 1990s, devastation from natural catastrophes like the 2004 tsunami, civil wars such as that in Angola from 1998 to 2003, or the rampant corruption all too evident in Russia in the mid-1990s. A 2004 report of the Commission on Weak States and U.S. National Security highlighted as a key national security concern the need to assist states "whose governments are unable to do the things that their own citizens and the international community expect from them: offer protection from internal and external threats, deliver basic health services and education, and provide institutions that respond to the legitimate demands and needs of the population."[28] Improving the capacity of government officials of all sorts—regulators, judges, and legislators—to actually govern is paramount.[29] Francis Fukuyama observes: "For the post–September 11th period, the chief issue for global politics will not be how to cut back on stateness but how to build it up."[30] International law has an important role to play in this process.

A critically important tool in strengthening the institutions of national governments is the formalization and inclusion of "government networks" as mechanisms of global governance. These largely voluntary networks link together domestic governmental officials from different countries in similar fields or spheres of responsibility. Such networks provide an effective means to harness national regulatory systems in the pursuit of common, international goals. Such networks can help harmonize national policies and can support the efforts of domestic officials vis-à-vis their own governments.

These networks of national government officials of all kinds are already operating across borders to regulate individuals and corporations operating in a global economy, combat global crime, and address common problems on a global scale.[31] They perform a range of functions that enhance the effectiveness of domestic governance. They build trust and establish relationships among their participants that create incentives to establish a good reputation and avoid a bad one. They regularly exchange information about their own activities and develop databases of best practices, or, in the judicial sphere,

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28. WEINSTEIN ET AL., *supra* note 13, at 6.

29. For a discussion of the importance of building state capacity, see PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES (Stephen Krasner ed., 2001).

30. FUKUYAMA, *supra* note 14, at 120.

31. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

different approaches to common legal issues. Finally, they offer technical assistance and professional socialization to members—whether regulators, judges, or legislators—from less developed nations.[32]

If their existence and capacities were more widely recognized, government networks could do far more to strengthen domestic governance. Building the basic capacity to govern in countries that often lack sufficient material and human resources to pass, implement, and apply laws effectively is itself an important and valuable consequence of government networks. Regulatory, judicial, and legislative networks all engage in capacity-building directly, through training and technical assistance programs, and indirectly, through their provision of information, coordinated policy solutions, and moral support to their members. In effect, government networks communicate to their members everywhere the message that the Zimbabwean chief justice understood when he was under siege and commented, "I am not alone."[33]

The best examples of transnational networks strengthening domestic governance may be in the area of regulatory export. Kal Raustiala offers a number of examples of regulatory export in the securities, environmental, and antitrust areas. According to one securities regulator he interviewed, a prime outcome of U.S. Securities and Exchange Commission networking is the dissemination of "the 'regulatory gospel' of U.S. securities law," including: "strict insider trading rules; mandatory registration with a governmental agency of public securities issues; a mandatory disclosure system; issuer liability regarding registration statements and offering documents; broad antifraud provisions; and government oversight of brokers, dealers, exchanges, etc."[34] In effect, U.S. regulatory agencies make their own jobs easier by offering technical assistance and training to their foreign counterparts, because strong foreign authorities with compatible securities, environmental, and antitrust regimes will effectively extend the reach of U.S. regulators.

The EU has enjoyed similar advantages through the International Competition Network ("ICN"). As a result, a growing number of countries, particularly in Eastern Europe, are copying the EU approach to competition policy rather than the U.S. model.[35] The opening conference of the ICN, led by the head of the German competition agency, was held in Italy in 2002. The network describes itself as "a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will

32. For examples of this phenomenon among judges, see Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000). For discussion in the regulatory context, see SLAUGHTER, *supra* note 31.

33. SLAUGHTER, *supra* note 31, at 99.

34. Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 843 (2003).

35. *See* SLAUGHTER, *supra* note 31, at 175. Although the United States originally pushed the idea of a global network of antitrust regulators under the Clinton administration, the Bush administration has proven less enthusiastic. The lack of U.S. engagement in the process presently gives the EU considerable influence on global regulatory development.

address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure."[36]

Other examples of such networks strengthening domestic capacity in the economic arena include the Basel Committee on Banking Supervision[37] and the International Organization of Securities Commissioners, which have been influential in enhancing the ability of national governments to regulate securities and maintain independent central banks.[38] The net result of these networks is twofold: first, convergence toward a set of standardized practices at the national level and, second, the creation of greater domestic regulatory capacity in participating nations.

It should not be assumed that regulatory expertise flows only from developed to developing countries. At least in the judicial arena, European and Canadian courts have learned as much from South African and Indian courts as vice versa.[39] Among regulators, local experience with a wide range of problems can count for a great deal in the exchange of best practices.

Governments can do much more to strengthen domestic governance through government networks. For example: strengthening the International Network for Environmental Cooperation and Enforcement, composed of environmental officials; expanding the inclusivity and representativeness of global financial and leadership networks (such as expanding the G-8 to the G-20); creating a Global Justice Network of justice ministers; creating a Global Human Rights Network of the government officials responsible for human rights conditions; and bringing networks of legislators together under the auspices of the United Nations and other international institutions. Such networks must be provided with both concrete tasks and the resources to accomplish them, enabling states to work together to strengthen both collective and individual governance capacity.

As the front line of authority, national government officials exercise an array of coercive and persuasive powers largely unmatched by international institutions. National governments, by operating through government networks, can bring these same powers to bear on behalf of international legal obliga-

36. International Competition Network, Memorandum on the Establishment and Operation of the International Competition Network, http://www.internationalcompetitionnetwork.org/mou.pdf (last visited Feb. 26, 2006).

37. *See* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 595 (2005).

38. *Id.* at 561; *see also* International Organization of Securities Commissions, 2002 ANN. REP. 22 (2002), http://dev.iosco.org/annual_report/PDF/IOSCO_2002.pdf.

39. For a general discussion, see SLAUGHTER, *supra* note 31, at 65–103. For an example of cross-citation by the South African Constitutional Court, see State v. Makwanyane, 1995 (6) BCLR 665 (CC) (S. Afr.). For an example of borrowing by a developed country, see Regina v. Bow St. Metro Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999), in which the English House of Lords cited to no fewer than twenty-one foreign judgments of countries including the United States, France, Israel, and Chile. The fact that such borrowing runs in both directions—from the developed world to the developing world and back again—goes far to counter the criticism that such networks are merely a form of neo-colonial imposition.

tions. They can coerce, cajole, fine, order, regulate, legislate, horse-trade, bully, or use whatever other methods that produce results within their political system. They are not subject to coercion at the transgovernmental level; on the contrary, they are likely to perceive themselves as choosing a specific course of action freely and deliberately. Yet, having decided, for whatever reasons, to adopt a particular code of best practices, to coordinate policy in a particular way, to accept the decision of a supranational tribunal, or even simply to join what seems to be an emerging international consensus on a particular issue, they can implement that decision within the limits of their own domestic power.

The international legal system could harness the power of transgovernmental networks much more effectively than it does currently. For example, international law could more explicitly recognize the role of such networks and the soft regulations they often produce. Hard legal instruments could mandate or facilitate the creation of transnational networks in a range of areas of critical state weakness such as justice and human rights. Where the weakness of a particular government in a functional area poses a threat to international order, the U.N. Security Council could require state participation in such a network. Government networks offer an important tool to improve state capacity. Actors within the international legal system would be well served to partner with such networks and more directly integrate them into larger international legal frameworks.

Once again, the international legal system would be taking a leaf from the EU's book in this regard. Most EU law gets made and implemented through transgovernmental networks of EU officials, from ministers on down. Indeed, Mark Leonard describes the EU as "a decentralised network that is owned by its member-states."[40] Reaching outside the borders of Europe, the EU has sought to extend the network model to the Middle East and North Africa through the Euro-Mediterranean Partnership.[41]

Beyond government networks, Stephen Krasner suggests that international law and institutions can strengthen state capacity by engaging in processes of shared sovereignty with national governments. Such shared sovereignty "involves the creation of institutions for governing specific issue areas within a state—areas over which external and internal actors voluntarily share authority."[42] Examples of these arrangements include the creation of special hybrid courts in Sierra Leone, East Timor, and, possibly, Cambodia, involving a mix of international and domestic law and judges. Similarly, a pro-

40. LEONARD, *supra* note 6, at 23 (citing MANUEL CASTELLS, THE END OF MILLENNIUM (2000)).

41. The Euro-Mediterranean Partnership, also known as the Barcelona Process, is a "wide framework of political, economic and social relations between the Member States of the European Union and Partners of the Southern Mediterranean" launched in Barcelona in 1995. European Union, Euro-Mediterranean Partnership/Barcelona Process, http://europa.eu.int/comm/external_relations/euromed (last visited Mar. 9, 2006).

42. Stephen D. Krasner, *Building Democracy After Conflict: The Case for Shared Sovereignty*, 16 J. DEMOCRACY, Jan. 2005, at 69, 76.

posed oil pipeline agreement between Chad and the World Bank would involve shared control and governance.[43] Such shared sovereignty, Krasner claims, can "gird new political structures with more expertise, better-crafted policies, and guarantees against abuses of power" onto weak or failing states.[44]

Even within a more traditional framework, the international legal system can employ a range of mechanisms to strengthen the hand of domestic governments. Legal instruments and codes of international best practices can set standards to give national governments benchmarks for enhancing their own capability.[45] International institutions can provide aid and assistance specifically targeted for the domestic institutions of the recipient state.

International financial institutions such as the International Monetary Fund ("IMF") and the World Bank may play a particularly powerful role in building domestic capacity. Conditionality requirements give these bodies strong influence over domestic outcomes. The IMF's success in enhancing the capabilities of domestic governments is much debated,[46] but the World Bank may have a better track record.[47] Part of the Bank's strategy in Africa has been to "put countries in the driver's seat" with a "platform of strong public capacity: capacity to formulate policies; capacity to build consensus; capacity to implement reform; and capacity to monitor results, learn lessons, and adapt accordingly."[48] Whatever their successes and failures to date, the IMF and the World Bank have significant leverage to enhance domestic government capacity. What they need is far more input from borrower countries, or at least reformers and political activists in borrower countries, about how best to achieve this goal.

Incorporating these types of mechanisms into future legal regimes as a means of promoting domestic capacity-building must be an ongoing priority. These mechanisms include building government networks, providing technical assistance, setting benchmarks and standards, or encouraging other forms of co-

43. *See generally id.*

44. *Id.* at 70.

45. In the field of judicial independence, the International Covenant on Civil and Political Rights provides a set of such benchmarks. *See* International Covenant on Civil and Political Rights arts. 9–11, Dec. 16, 1966, 999 U.N.T.S. 171. Additionally, the Rome Statute of the International Criminal Court offers further clarification and a potential legal testing ground. Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

46. For two sides of this debate, see Randall Stone, Lending Credibility: The International Monetary Fund and the Post-Communist Transition 233–34 (2002) (arguing that IMF conditionality is appropriate and beneficial) and James Vreeland, The IMF and Economic Development 160–65 (2003) (suggesting that IMF conditionality may retard domestic development).

47. *See* Poul Engberg-Pedersen & Brian Levy, *Building State Capacity in Africa: Learning from Performance and Results*, *in* Building State Capacity in Africa: New Approaches, Emerging Lessons 87 (Brian Levy & Sahr Kpundeh eds., 2004) (discussing the role of the World Bank in enhancing state capacity in Africa); *see also* Joel D. Barkan et al., *Emerging Legislatures: Institutions of Horizontal Accountability*, *in* Building State Capacity in Africa: New Approaches, Emerging Lessons 233–34 (Brian Levy & Sahr Kpundeh eds., 2004) (discussing increased awareness across anglophone Africa of developments in peer legislatures as a possible result of World Bank initiatives).

48. Frannie A. Léautier & Callisto Madavo, *Foreword to* Building State Capacity in Africa: New Approaches, Emerging Lessons, at v (Brian Levy & Sahr Kpundeh eds., 2004).

operation. Abram and Antonia Chayes have explained how this can be done through a "managerial model" of compliance.[49] According to this model, the task of maximizing compliance with a given set of international rules is a task more of management than of enforcement, ensuring that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance. To the degree Chayes and Chayes are correct,[50] formal international legal regimes must recognize and promote the capacity-building needs of domestic governance through government networks, technical assistance, benchmarks and standards, or other forms of cooperation.

More broadly, the success of many policies at the international level depends on political choices at the national level, for example, choices concerning the allocation of resources or the establishment of particular institutions. The effectiveness of international law may thus depend on its ability to shape political outcomes and institutional structures within states. At the same time, however, a feedback loop from domestic to international institutions becomes crucial for both accountability and effectiveness. Thus the various mechanisms canvassed above to strengthen domestic government institutions must be carefully designed.

B. Backstopping Domestic Government

A second means through which international law can foster more effective domestic governance is by backstopping domestic institutions where they fail to act. In some ways, this idea is not new at all, but rather follows from a long intellectual tradition. Without developed international institutions such as the International Criminal Court ("ICC"), cooperation among the criminal justice mechanisms of states provided a primitive form of backstopping by ensuring that some state would prosecute an accused criminal even if the territorial state of the crime failed to act. Indeed, as early as 1625, Hugo Grotius recognized that the domestic courts of various states could backstop one another. Referring to an early form of the prosecute or extradite requirement, Grotius observed: "[I]t seems reasonable, that the State where the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demanded person according to his Demerits, or else deliver him up to be treated at the Discretion of the in-

49. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 3 (1995).

50. This model is distinct both in underlying assumptions and in the resultant variables that govern state compliance from carrot-and-stick or norm-socialization approaches. *See, e.g.*, George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996) (offering a carrot-and-stick model); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005) (linking compliance to state socialization); Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (suggesting the importance of norm internalization). These alternate theories of compliance produce considerably different prescriptions for how international law may best alter state behavior.

jured party."[51] Centuries later, in the early 1920s, M. Maurice Travers developed the concept of "*la superposition des compétences législatives concurrentes*," suggesting that the layering of overlapping jurisdiction of a number of states would allow national courts to reinforce one another.[52] What is new today is that international institutions—rather than the national courts of third states—are making a conscious effort to backstop their national counterparts. Structural rules that explicitly seek to further this backstopping function are now embedded in the very statutes of international tribunals and institutions.

The most obvious example of international law as a backstop is the complementarity provision of the Rome Statute of the International Criminal Court. The ICC is designed to operate only where national courts fail to act as a first line means of prosecution. Article 17 of the Rome Statute provides that the Court shall determine a case is inadmissible if "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[53] The ICC can step in and provide a second line of defense in cases where domestic institutions fail "due to a total or substantial collapse or unavailability of its national judicial system,"[54] or where a state is unwilling to prosecute "independently or impartially."[55] In other words, if the United States or Iraq were a member of the ICC and both states proved unable or unwilling to prosecute fully *all* members of the military involved in the abuses at Abu Ghraib, the ICC would have jurisdiction.

Other forms of international institutional design may similarly result in a backstopping function. In various human rights courts, the requirement that individuals first exhaust local remedies gives states—and particularly their domestic courts—an incentive to reach conclusions acceptable to the international institution so that the international court need not intervene to review the case.[56] Similarly, the dispute resolution mechanisms of the North American Free Trade Agreement ("NAFTA") have served as an international backstop

51. 2 Hugo Grotius, The Rights of War and Peace 1062 (Richard Tuck trans., Liberty Fund 2005) (1625).

52. M. Maurice Travers, Le droit penal international et sa mise en oeuvre en temps de paix et en temps de guerre (1922). The key to Travers' argument is that concurrent legislative authority could, in turn, empower the judicial institutions of a number of states to act against any given criminal and thereby create overlapping judicial authority without the need for a formal international tribunal.

53. Rome Statute, *supra* note 45, art. 17(1).

54. *Id.* art. 17(3).

55. *Id.* art. 17(2).

56. Article 35 of the European Convention on Human Rights provides that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222; *see also* Organization of American States, American Convention on Human Rights art. 46, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing, "[a]dmission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements . . . that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law").

for domestic resolution of antidumping cases.[57] Under NAFTA, international arbitral panels are given the authority to review domestic administrative decisions and can remand decisions back to the issuing agency with guidance on acceptable outcomes. If the agency issues an acceptable ruling, no further action is taken. Yet, if the panels remain unsatisfied with the agency's response, they can issue a further ruling and remand the case yet again.[58] Like the Rome Statute's complementarity regime, this remand procedure gives domestic institutions within NAFTA countries an incentive to act first and to get it right. Where they fail to do so, the international process provides a backstop.

The actual effect of such backstopping provisions in international institutional design is twofold.[59] First, and most obvious, is the provision of a second line of defense when national institutions fail. Second, and potentially more powerful, is the ability of the international process to catalyze action at the national level. This second effect most often occurs when a domestic legal or political process exists that could be utilized, should the domestic government decide to do so, but government officials, or at least some powerful group of such officials, deem that the political or financial costs of domestic action outweigh the benefits. In such cases the existence of an international tribunal with concurrent jurisdiction can provide structural incentives that shift the cost-benefit calculation and result in the use of a domestic process that would otherwise have been neglected. The political benefits of adjudicating matters domestically rather than giving jurisdiction to an international tribunal over which domestic officials have little or no control creates new incentives to act locally.

The ICC already appears to be having such a catalytic effect in two of the first situations it is investigating: the Democratic Republic of Congo, and the Darfur region of Sudan. In the wake of the ICC Prosecutor's 2003 announcement of an investigation in Congo, a range of efforts were initiated by certain elements within the Congolese government to reform the Congolese judiciary so as to be able to assert primacy over the ICC and undertake

57. The 1988 Canadian-American Free Trade Agreement and the more recent NAFTA both contain provisions for the creation of international panels to review the legality of administrative decisions with respect to antidumping and countervailing duty obligations. *See* Free Trade Agreement, U.S.-Can., ch. 19, Jan. 2, 1988, 27 I.L.M. 281; North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904(1), Dec. 17, 1992, 32 I.L.M. 289 ("each Party shall replace judicial review of final antidumping and countervailing duty determinations with bi-national panel review"). Though not a traditional international court or arbitration tribunal, these panels act in a judicial capacity and issue decisions binding on state parties. Certain non-traditional aspects of the panels include the fact that domestic judicial review is not completely foreclosed. *See* Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541, 546 (1996).

58. *See* Goldstein, *supra* note 57, at 551.

59. The potential for international institutions to produce these backstopping effects will often depend on the international institution having jurisdiction over the state in question or individuals within that state. After all, these effects often arise as a result of the threat of potential international adjudication. Where national governments have refused to accept the jurisdiction of international courts, such effects will be limited.

national proceedings.[60] Similarly, after the Prosecutor opened an investigation in Darfur, local courts, though of questionable legitimacy, were established to initiate domestic proceedings.[61] The ICC Prosecutor has himself suggested that complementarity may encourage domestic prosecutions. As he argued upon his swearing-in as the Court's first Prosecutor, "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[62]

International legal institutions operating as a backstop need not be limited to purely international courts. Adjudication in foreign domestic courts may likewise enhance the willingness of national judiciaries in territorial states to act themselves. The recent advances by Chilean courts toward the prosecution of Augusto Pinochet is, in part, due to the international community—acting largely through the Spanish and English judiciaries—getting serious about ensuring accountability for his crimes.[63] The prosecution by Spain and the proceedings in England[64]—though they did not result in a conviction—made clear to the Chileans that other options existed if they

60. Reform efforts to date have included attempts to reunify the divided judiciary through nationwide judicial conferences, establishing commissions on legislative reform, and launching a Truth and Reconciliation Commission. Interview by Yuriko Kuga, Leslie Medema, and Adrian Alvarez with Honorius Kisimba-Ngoy, Minister of Justice, Dem. Rep. Congo, in Kinshasa (Oct. 29, 2003). According to the Director of the Cabinet to the Minister of Human Rights, one "local commission [is] studying how to adapt the ICC to the DRC." Interview by Yuriko Kuga, Leslie Medema, and Adrian Alvarez with Olela Okondji, Director of the Cabinet to the Minister of Human Rights, Dem. Rep. Congo, in Kinshasa (Oct. 29, 2003). Similarly, "a permanent committee within the Ministry [of Justice has been established] for reforming the domestic law" and is "learning how to implement the ICC" crimes into domestic law. The Commission's formal name is the Commission Permanente de Réforme du Droit Congolais. *Id.* A Truth and Reconciliation Commission grew out of the Inter-Congolese Dialogue and is written into the new interim constitution. CONSTITUTION DE LA TRANSITION, JOURNAL OFFICIEL DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO, 44 année, 5 Avril 2003, art. 154 ("*Les Institutions d'appui à la démocratie sont: . . . La Commission vérité et réconciliation*."). Despite the consideration of a number of draft laws, as of early 2004, an organic law for the commission has yet to be adopted. Interview with Dr. Kuye Wadonda, President of the Truth and Reconciliation Comm'n, Dem. Rep. Congo, in Kinshasa (Oct. 28, 2003). For a more detailed discussion, see William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005).

61. *See Sudan Insists Own Courts Must Try Darfur Crimes*, SUDAN TRIB., Jan. 10, 2006, http://sudantribune.com/article.php3?id_article=13485.

62. Louis Moreno-Ocampo, Chief Prosecutor, ICC, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf. Similarly, an expert paper published by the Office of the Prosecutor notes: "The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes." INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003), http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

63. The Chilean Supreme Court has recently ruled that Pinochet may stand trial domestically for international crimes against Chilean citizens committed during his rule. *See* David Sugarman, *Will Pinochet Ever Answer to the People of Chile?*, TIMES (London), Sept. 14, 2004, at 10.

64. *See* Regina v. Bow St. Metro Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999).

themselves refused to prosecute and may have bolstered the willingness of Chilean courts to hold Pinochet accountable.[65]

The backstopping effect of international institutions will take different forms and often be case specific. Sometimes, the international institution will generate incentives for domestic governmental authorities to act at home as an alternative to international prosecution. At other times, particularly where powerful actors within a national government lack the political will to act at home, the international institution may alter the balance in a domestic power struggle, strengthening the hand of those national officials who want to act. Alternatively, where the domestic government truly lacks the capacity to act, the international institution can backstop domestic courts by genuinely providing another forum. In any of these situations the international institution directly affects domestic government decisions, changing the incentives for domestic action and providing a second, international, forum for legal action.[66] It becomes a tacit actor in domestic political processes, pressuring national governments to reach specific political outcomes and helping to create the conditions to make them possible.

C. Compelling Action by National Governments

The effectiveness of international law in responding to new transnational threats will, to an ever greater degree, require the active cooperation of national institutions. Despite the proliferation of international courts and tribunals,[67] national governments have retained the nearly exclusive use of their instruments of coercive authority. In most cases, national governments alone can use the police power, a national judiciary, or the military—the tools necessary to address transnational threats before they grow and spread. In many cases, backstopping and strengthening domestic institutions will be sufficient to ensure that national governments use their power to address present and potential dangers. At times, however, domestic governments may be unwilling to use these institutions, either due to differing perceptions of national interest, a lack of political will, or infighting within governments themselves. In these cases, international law can be effective only by finding

65. For a discussion of potential problems this may pose for domestic democratic processes, see *infra* text accompanying notes 85–86; *cf.* Cutis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2130 (1999) (discussing the "fundamental issue of whether any international criminal process is appropriate when a nation, like Chile, has addressed the human rights abuses of a prior regime through a domestic political compromise that facilitated a transition to democracy"). One of the authors, however, has argued that such domestic compromises should not be given extraterritorial respect where they lack domestic legitimacy. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467 (2001).

66. Obviously, where the state in question has rejected the authority of the international tribunal or failed to ratify its Statute, such as the U.S. policy toward the ICC, none of these effects may materialize.

67. *See generally* Christian Tomuschat, *International Courts and Tribunals*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 92–99 (Rudolph Dolzer et al. eds., 1981).

new ways to ensure that national governments actually use the tools at their disposal to address such threats before they spread.

International legal rules have long sought to constrain or mandate the behavior of states toward other states and toward other states' citizens. More recently, international treaties have required national governments to enact domestic legislation of various sorts, such as the domestic criminalization of certain transnational acts.[68] The type of compulsion described here, however, specifically directs domestic government institutions to go about what was formerly purely domestic business in particular ways. And it does so not by specific agreement on particular legal obligations that must then be domestically implemented, but rather by establishing general goals and requiring domestic governments to achieve them through a broad range of measures. EU directives work this way; in U.S. law, however, Congress is specifically prohibited from imposing broad general mandates requiring individual states to devise and pass specific legislation to achieve them.[69]

The use of international law to combat terrorism immediately after September 11, 2001, is a prime example of how specific obligations can be imposed on U.N. member states that they can fulfill only by directing domestic institutions to act in specific ways at the national level. U.N. Security Council Resolution 1373, for example, requires states to "prevent the commission of terrorist acts" and "deny safe haven to those who finance [or] plan . . . terrorist acts."[70] The resolution demands, among other things, the domestic criminalization of the financing of terrorism, freezing of terrorist assets by national authorities, use of domestic courts to bring to justice those involved in terrorist acts, and ratification by domestic authorities of relevant anti-terrorism conventions.[71]

The White House describes Resolution 1373 as setting "new, strict standards for all states to meet in the global war against terrorism."[72] Likewise, the International Convention for the Suppression of the Financing of Terrorism ("Financing Convention") and the International Convention for the Suppression of Terrorist Bombing ("Bombing Convention") require states to take concrete domestic action. The Financing Convention obliges states to "take appropriate measures . . . for the . . . seizure of any funds used or allocated

68. For example, many treaties in the area of international criminal law require criminalization of certain behavior at the national level. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

69. New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (holding Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

70. S.C. Res. 1373, ¶ 2(c)–(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

71. *Id.*

72. The White House, National Strategy for Combating Terrorism 13 (2003), http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.

for" the financing of terrorism,[73] while the Bombing Convention requires domestic criminalization of terrorist acts and the affirmative use of national judicial institutions to bring to justice the perpetrators of terrorist acts.[74]

Resolution 1373 links both the compelling and strengthening functions of the international legal system. Beyond merely mandating domestic action, the resolution establishes a Counter-Terrorism Committee that is tasked with monitoring the implementation of the resolution and increasing the "ability of States to fight terrorism."[75] The Committee requires regular reporting by states of steps taken to comply with Resolution 1373 and provides expert advice on issues ranging from legislative drafting to customs requirements and policing.[76] Working jointly with international, regional, and sub-regional organizations, the Committee shares "codes, standards and best practices in their areas of competence."[77] In addition, the Committee makes available a database of technical assistance and a team of expert advisors to assist states in compliance.[78] By April 2005, at least one report had been received from all 191 member states; the Secretary-General has described state cooperation with the Committee to date as "unprecedented and exemplary."[79]

The Security Council's recent initiatives in the area of non-proliferation have imposed similar obligations on national governments and their respective sub-state institutions to take affirmative domestic action. Security Council Resolution 1540, for example, requires states to adopt national legislation prohibiting the manufacture or possession of weapons of mass destruction by nonstate actors and to establish export control regulations and physical protection regimes for weapons and related technologies.[80] While not going as far as the creation of the Counter-Terrorism Committee, the Security Council again recognized the importance of capacity-building in ensuring domestic action and invited states to offer assistance and resources to one another.[81] Likewise, functional international organizations such as the International Atomic Energy Agency ("IAEA") have compelled states to act through their own institutions. IAEA Safeguards Agreements with nuclear states, for ex-

73. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, ¶ 8, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

74. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, ¶¶ 5–7, U.N. Doc. A/RES/52/164 (Dec. 15, 1997).

75. Security Council Counter-Terrorism Committee, http://www.un.org/sc/ctc/ (last visited Feb. 26, 2006).

76. CTC: About the CTC—How Does the CTC Work with States?, http://www.un.org/Docs/sc/committees/1373/work.html (last visited Feb. 26, 2006).

77. CTC: Assistance to States—Working Together to Raise State Capacity, http://www.un.org/Docs/sc/committees/1373/capacity.html (last visited Feb. 26, 2006).

78. CTC: Assistance to States—How Can the CTC Help States?, http://www.un.org/Docs/sc/committees/1373/help.html (last visited Feb. 26, 2006).

79. *Id.*

80. S.C. Res. 1540, ¶ 2, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

81. *Id.* ¶ 7.

ample, require a national system of materials controls and the use of particular accounting mechanisms.[82]

Admittedly, these new functions of international law may not always provide sufficient leverage to produce desired outcomes of state behavior or consistent compliance with international legal obligations. Particularly where states have purposefully excluded themselves from international institutions or lack the will to comply (such as is arguably the situation with the alleged Iranian nuclear weapons program in 2006), resort to other methods—ranging from diplomatic isolation to economic sanctions and, in extreme cases, the use of military force—may be needed. In such hard cases, the best hope of international law is simply to push states toward participation in international institutions and the international legal system generally so that the functions of international law identified here can take hold and influence state behavior and outcomes.[83]

To effectively respond to new international threats, international legal rules must penetrate the surface of the sovereign state by requiring governments to take specific domestic actions to meet specified targets. Sometimes simple backstopping of national institutions may be sufficient to accomplish this task. In other circumstances, assistance and the bolstering of weak state capacity may be an essential prerequisite. At yet other times, international law may have to actively compel state action. When it does so, it once again seeks to alter the political choices of national governments and to compel states to utilize their national institutions in new ways.

The most effective approach will often involve some combination of all three functions of international law. Leaders and legislators should then be held accountable by both their peers and their publics for whether and how their governments respond.

III. The Dangers of Using International Law To Shape and Influence Domestic Politics

On one level, using international law to build the will and capacity of states to act domestically offers great opportunities to enhance the effectiveness of the international legal system. National governments will have new incentives to act. Domestic institutions will grow stronger, and can be harnessed in pursuit of international objectives. States can thus respond to transnational threats more effectively and efficiently.

Yet each of the new functions of the international system suggested here—backstopping, strengthening, and compelling—is a double-edged sword. Backstopping national institutions can be counterproductive to the degree

82. *See, e.g.*, Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States, Nov. 18, 1977, 32.3 U.S.T. 3059.

83. This goal of inclusion reflects Chayes and Chayes's recognition of the new sovereignty as a right to be included in international institutions, rather than the traditional right to exclude other states from interference. *See generally* Chayes & Chayes, *supra* note 49.

states may defer to an international forum as a less politically and financially costly alternative to national action.[84] Well-intentioned efforts to help, often through NGOs as well as international institutions, can end up weakening local government actors by siphoning off both funds and personnel. The process of strengthening domestic institutions, if not properly designed and implemented, can also squeeze out local domestic capacity.[85] Finally, and most dangerously, by compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches.[86]

The most significant danger inherent in these new functions of international law, however, lies in the potential of national governments to co-opt the force of international law to serve their own objectives. One of the modern limits to Westphalian concepts of sovereignty is the obligations imposed by international law—particularly human rights law—on the conduct of states toward their own citizens. Yet, by strengthening state capacity, international law may actually make states more effective at the very repression and abuse the interference challenge seeks to overcome. Similarly, by compelling state action, international law may give national governments new license to undertake otherwise illegal or unjust policies. Where critical values such as human rights and state security are seen to be in conflict, international legal compulsion of policies that favor one value may come at the expense of the other. This tension is particularly problematic where a repressive regime is able to use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.

Nowhere is this danger more apparent than in the legal compulsion of counter-terrorism activity. Mary Robinson, former U.N. high commissioner for human rights, observes: "Repressive new laws and detention practices have been introduced in a significant number of countries, all broadly justified by the new international war on terrorism."[87] Similarly, Kim Scheppele has documented the number of exceptions to international and domestic legal protec-

84. One of the authors has described this as a moral hazard problem. *See* William W. Burke-White, Multi-Level Global Governance in the Enforcement of International Criminal Law ch. 4 (2006) (unpublished Ph.D. dissertation, University of Cambridge) (on file with author). The most obvious example of this is the government of Uganda's self-referral to the ICC concerning the Lords Resistance Army. Press Release, International Criminal Court, President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), http://www.icc-cpi.int/pressrelease_details&id=16.html. In all likelihood, the Ugandan government could have addressed this situation domestically if it had not had the option of referring the situation to the ICC.

85. Fukuyama argues that "[t]he international community, including the vast numbers of NGOs that are an intimate part of it, comes so richly endowed and full of capabilities that it tends to crowd out rather than complement the extremely weak state capacities of the targeted countries." *See* FUKUYAMA, *supra* note 14, at 103.

86. For a discussion of the importance of such domestic experimentation, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

87. Mary Robinson, *Shaping Globalization: The Role of Human Rights*, 19 AM. U. INT'L L. REV. 1, 12 (2003).

tions that states have invoked under the cover of fighting terrorism.[88] Among the worst offenders, according to Human Rights First, are Tanzania, Indonesia, Russia, Pakistan, and Uzbekistan, each of which has undertaken "draconian anti-terrorism laws" that compromise human rights and strengthen the hand of government vis-à-vis opposition groups.[89]

If these new purposes of international law are to be both effective and just, the goal must be to maximize the benefits of the backstopping, strengthening, and compelling functions while avoiding the dangers evident in the counter-terrorism case. The theoretical base of these new functions of international law is that domestic institutions can be used to further international legal objectives. Yet these same institutions can become sources of abuse by national governments. The challenge, then, is to design rules that will harness the strengths of well-functioning domestic institutions while targeting and restricting the reach of abusive ones.

One way of making such distinctions is for international law to consider directly the quality of domestic institutions. States with robust and independent institutions, strong constitutional frameworks, transparent political processes, and embedded systems of checks and balances are least likely to appropriate international law for their own purposes and engage or abuse their newfound power. In these states, domestic legal protections and other institutions within the national government can prevent abuse or counter-balance the strength of other institutions. Abuses will still occur in states with good institutional frameworks; however, the assumption built into institutions like the ICC is that when abuses do occur in a well-governed state, that state's own domestic system will provide an internal correction mechanism. It is these states with independent and transparent domestic institutions that should be most receptive to the new functions of the international legal system. European states, at least, largely bear out this prediction.

The problem, of course, is that it is often the states that lack institutional independence and embedded checks and balances that are most in need of capacity-building or compulsion to address threats and challenges at home before they spread. Where international law does target such states, international rules, regimes, and institutions will have to be designed to address both the capacity and quality of domestic governance. Checks and balances will have to be embedded into the system itself, pushing not only for particular substantive outcomes, but also for legitimate domestic processes to achieve those goals. Similarly, international regimes themselves will have to balance a range of competing values—such as human rights and national security—rather than focus on one particular goal when compelling state action.

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88. *See* Kim L. Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2000).

89. HUMAN RIGHTS FIRST, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES 76–79 (2003).

Finally, as is already becoming apparent, both this overall conception of international law and the specific functions described here will meet with fierce resistance from states with very strong domestic legal systems, such as the United States, and from many states with very weak legal systems but strong political rulers. European states, as noted above, are accustomed to daily "soft intervention." Other states, however, will be far less comfortable with such intervention. The United States will not be alone here, but it may well find itself with a number of unsavory bedfellows. On the other hand, many European powers may find it more difficult than they expect to promote an EU-inspired model of pooled sovereignty among wary former colonies.

IV. International Law, Domestic Politics

International lawyers and political scientists alike have long been fascinated with the blurring of the boundaries between domestic and international rules and institutions. In 1956, Philip Jessup made a hegemonic move, claiming for international lawyers not only the classic domain of international law, but also "all law which regulates actions or events that transcend national frontiers," which he dubbed "transnational law."[90] Forty-five years later, then-Justice Sandra Day O'Connor, a relative newcomer to the world of international law, observed: "[I]nternational law is no longer confined in relevance to a few treaties and business agreements. Rather, it . . . regulates actions or events that transcend national frontiers."[91]

In political science, James Rosenau has popularized the concept of the "domestic-foreign frontier."[92] On this frontier, "domestic and foreign issues converge, intermesh, or otherwise become indistinguishable."[93] In his conception, whereas a boundary is an imaginary line, a frontier is "a new and wide political space . . . *continuously shifting, widening, and narrowing, simultaneously undergoing erosion with respect to many issues and reinforcement with respect to others*[.]"[94] What Rosenau finds striking about relations along this frontier is that individuals work out a wide range of solutions to various problems through a mix of domestic and international rules, rather than "through the nation-state system."[95]

Our proposition is actually a quite different one. We endorse the division between domestic and international affairs, at least conceptually. Although

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90. Phillip Jessup, Transnational Law 2 (1956).

91. Sandra Day O'Connor, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

92. Rosenau observes that "[d]omestic and foreign affairs have always formed a seamless web . . . . [W]e can no longer allow the domestic-foreign boundary to confound our understanding of world affairs." James N. Rosenau, Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World 4 (1997).

93. *Id.* at 5.

94. *Id.* at 4–5 (emphasis added).

95. *See id.* at 5–6; *see also* Mathias Albert & Lothar Brock, *Debordering the World of States: New Spaces in International Relations*, 35 New Pol. Sci. 69 (1996).

it is quite possible, indeed likely, that international law is expanding to include all sorts of rules and institutions that have a hybrid domestic-international character, as well as domestic rules reaching beyond borders, we suggest that traditional public international law, meaning treaties and custom operating among nations in their mutual relations, has a distinct identity and a distinct set of functions. We simply argue that those functions are changing fast.

Our claim "that the future of international law is domestic" refers not simply to domestic *law* but to domestic *politics.* More precisely, the future of international law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors in domestic politics. International rules and institutions will and should be designed as a set of spurs and checks on domestic political actors to ensure that they do what they should be doing anyway, that is, what they have already committed to do in their domestic constitutions and laws.

In this conception, it is perfectly acceptable to continue to distinguish concretely between an "international" and a "domestic" sphere, even as we recognize that the boundary between them has blurred and that they intersect and even conflict in growing ways. Indeed, it is valuable for domestic political actors—the prosecutors trying to bring a former government official to justice, the judges seeking to resist executive pressure to decide a case a particular way, the parliamentary faction trying to fight global warming—to be able to point to a mandate, consequence, or spur from a distinct and separate political space. The result will be ever more elaborate two-level games,[96] but each game will remain on its own board, no matter how complex and dense the links between them.

What must change profoundly, however, is the legitimacy of allowing the architects of international rules and institutions to look within the domestic political sphere of all states actually and hypothetically subject to the rule or institution in question. This scrutiny cannot be undertaken with reference to specific parties and actors in actual states, but rather must be based on data culled from history and the social sciences about the likely incentives of those parties and actors in varying circumstances. The critical question must be how the content of specific rules and the processes and procedures of institutions are likely to interact with, influence, or even change these incentives.

In consequence, the very concept of sovereignty will have to adapt to embrace, rather than reject, the influence of international rules and institutions on domestic political processes. A harbinger of this shift is the new doctrine of the responsibility to protect. The responsibility to protect first emerged from the International Commission on Intervention and State Sovereignty ("ICISS"), headed by former Australian foreign minister Gareth Evans and

96. *See generally* Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

Special Advisor to the U.N. Secretary-General Mohamed Sahnoun.[97] In December 2001 the ICISS issued an important and influential report entitled "The Responsibility to Protect," which essentially called for updating the U.N. Charter to incorporate a new understanding of sovereignty.[98]

In the Commission's conception, the core meaning of U.N. membership has shifted from "the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations,"[99] to recognition of a state "as a responsible member of the community of nations."[100] Nations are free to choose whether or not to sign the Charter; if they do, however, they must accept the "responsibilities of membership flowing from their signature."[101] According to the ICISS, "[t]here is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: *from sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties."[102] Internally, a government has a responsibility to respect the dignity and basic rights of its citizens; externally, it has a responsibility to respect the sovereignty of other states.

Further, the ICISS places the responsibility to protect on both the state and on the international community as a whole. The ICISS insists that an individual state has the primary responsibility to protect the individuals within it.[103] However, where the state fails in that responsibility, a secondary responsibility falls on the international community acting through the United Nations. Thus, "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."[104]

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97. In September 1999, Kofi Annan called on all U.N. members at the opening of the General Assembly to "reach consensus—not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom." Kofi Annan, Two Concepts of Sovereignty, Address Before the U.N. General Assembly (Sept. 20, 1999), *in* KOFI ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL (1999).

98. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE ICISS (2001). The ICISS began from the premise that "in key respects . . . the mandates and capacity of international institutions have not kept pace with international needs or modern expectations." *Id.* ¶ 1.11. More specifically, the ICISS argued that the intense debate over military protection for humanitarian purposes flowed from a "critical gap" between the immense and unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order. At the same time, it noted a widening gap between the rules and the principles of the Charter regarding non-interference in the domestic affairs of member nations and actual state practice as it has evolved since 1945. The ICISS frames the "responsibility to protect" as an "emerging principle" of customary international law—not yet existing as law but already supported both by state practice and a wide variety of legal sources. *See id.* ¶¶ 2.24–2.27.

99. *Id.* ¶ 2.11.

100. *Id.* ¶ 2.14.

101. *Id.*

102. *Id.*

103. *See id.* ¶ 2.29.

104. *Id.* at XI.

These shifts may seem dramatic; they are certainly bold. But in the view of a group of leading European policy thinkers asked to consider how the EU should respond to the U.N. Secretary-General's High-Level Panel Report on Threats, Challenges, and Change, EU states should go considerably further. They should "[p]romote 'the Responsibility to Protect,' while also reframing the sovereignty debate to cover a principle of both *enhancing* effective and legitimate sovereignty of weak states, (through international assistance) and *conditioning* sovereignty on state behavior."[105]

International law and the international community itself are thus coming to have not only the right but in many cases also the obligation to intervene in and influence what were previously the exclusive jurisdiction and political processes of national governments. By strengthening, backstopping, and compelling action at the national level, the international legal system has powerful tools at its disposal to alter domestic political outcomes. The future of international law ultimately depends on the future of international politics: the problems raised and the aspirations generated. If those problems and aspirations arise from within states rather than between them, international law must follow suit to shape and regulate domestic government institutions. But if it is simultaneously to remain a distinct body of *international* law, it must develop a whole new set of effective relationships with those institutions and with entire bodies of domestic law.

The EU is a great experiment with precisely this type of system, although one underpinned by a unique history and culture generating the necessary domestic political will and economic and social forces. The world is not likely to replicate this experience in terms of actual political and economic integration monitored by coercive supranational institutions. But to the extent that the European way of law uses international law to transform and buttress domestic political institutions, it is a model for how international law can function, and in our view, will and must function to address twenty-first-century international challenges.

105. Eide, *supra* note 24, at 9.