

Introduction

Essays in Honor of W. Michael Reisman

Two hundred participants, including former students, colleagues, coauthors, and friends of W. Michael Reisman gathered at Yale Law School on April 24, 2009 for a conference in his honor, entitled “Realistic Idealism in International Law.” As a leading member of the New Haven School of International Law, author of countless publications on nearly every subject within the field, esteemed arbitrator, and beloved teacher, Professor Reisman has influenced the lives of many. He is particularly important to this journal because of the integral role he played in its founding, in 1974, as *Yale Studies in World Public Order*. We have been proud to call him a founding father and patron of *YJIL* for the past thirty-four years of its existence, and we honor him with this collection of essays as a teacher and writer who has changed the way we understand and approach the study of international law.

The following conference essays commemorate the day of panels. Harold Hongju Koh remarks on Professor Reisman’s role at Yale Law School. Robert D. Sloane, Menachem Mautner, and Siegfried Wiessner examine his jurisprudence. Nicholas Rostow, James E. Baker, and Eyal Benvenisti discuss aspects of Professor Reisman’s scholarship on the use of force. Steve Charnovitz, Hi-Taek Shin, and Guiguo Wang write about his contributions in the field of trade, investment, and dispute settlement. Aaron X. Fellmeth and Monica Hakimi discuss his scholarship in human rights law. Finally, Rosalyn Higgins provides closing remarks.

We thank all of the conference participants and the organizers for their contributions. Above all, we thank Professor Reisman for all he has done in our lives and in the life of our journal.

Kate Heinzelman and Jeffrey Sandberg
Co-Editors-in-Chief

Michael Reisman, Dean of the New Haven School of International Law

Harold Hongju Koh[†]

I am Dean of the Yale Law School. I like to think of myself as Michael Reisman's "other Harold." His first Harold was, of course, the great political scientist Harold Lasswell who, along with Myres McDougal, founded the New Haven School of International Law. But for nearly twenty-five years, Michael Reisman has also been my senior colleague, and by osmosis, my teacher, as we have served together on the Yale Law School faculty. I like to think that he has granted me, a lifelong New Havener, admission as a "special student" in the New Haven School of International Law. That is an intellectual school in which I have been a fellow traveler and of which *Michael* has been the acknowledged Dean. And so, the irony: while I have been his "other Harold," Michael has been my "other Dean!"

All of us—the scholars, international lawyers, and students gathered at this Conference—gather today to celebrate four remarkable attributes of "Dean" Michael Reisman. The first is that Michael has been a scholar of stunning achievement and range. He is just astonishingly prolific and incisive. Trying to read all his work, in public and private international law, jurisprudence, and human rights, inevitably makes one feel inadequate. Michael Reisman can write faster than most scholars can read. Like a man bailing out a leaky boat, by the time you fill up one bucket, you find that five more buckets full have poured in! There is almost no way to read Michael's huge scholarly corpus *seriatim*. So over the years, what I have learned to do instead, whenever I come across a new topic in international law—whether corruption, prodemocracy intervention, review and enforcement of international judgments, treaty interpretation, or communications theory—is to look first for what Michael has written on the subject. He has always written something cogent. And every piece is elegant, powerful, and insightful, and gives me a new clarifying lens with which to view the subject.

More fundamentally, as we will hear in the panels in today's conference, Michael Reisman fundamentally transformed the New Haven School of International Law. As I have noted elsewhere, during the founding era of Myres McDougal and Harold Lasswell, the New Haven School was the

[†] Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School; Legal Adviser-Designate, U.S. Department of State. This Essay is a lightly edited and footnoted version of introductory remarks made at "Realistic Idealism in International Law: A Conference in Honor of W. Michael Reisman," held at the Yale Law School on April 24, 2009. It derives in good measure from an essay previously published in this journal, which considered the relationship of the traditional New Haven School of International Law to recent developments in international legal theory, which some have dubbed the "New New Haven School of International Law." See Harold Hongju Koh, Commentary, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559 (2007).

international law school for legal realists.¹ The School developed a functional critique of both legal formalism and legal positivism in international law. Like most schools, the New Haven School did not include all international lawyers who lived in New Haven, nor did all of its members ever reside there.² Today, McDougal's and Lasswell's insights continue to be developed through the work of a diverse array of scholars, many of whom reassemble here today, who share the School's process methodology while adopting a variety of views regarding law's social ends and policy values.

At the same time, however, the New Haven School employed its legal realist methods to critique Cold War *political* realism, offering, in one scholar's words, "a kind of socio-legal realism to combat the power-based realism that dominated the early Cold War period."³ McDougal and Lasswell found that the school of political realism both "underestimates the role of rules, and of legal processes in general, and overemphasizes the importance of naked power."⁴ Unlike the political realists, the New Haven School insisted on an abiding belief that, even in international affairs, law and rules do matter.

In a lifetime of work, Michael Reisman gave the New Haven School new insights and brought it into the twenty-first century. As great as McDougal was, it was Michael who gave the New Haven School its modern relevance and vitality. As we will hear, his technique has been fundamentally jurisprudential. Michael brilliantly argued that the New Haven School viewed international law as a "process of communication," which sees the legal process as comprising three communicative streams: "policy content, authority signal and control intention."⁵ This communications model, he argued, "liberates the inquirer from the . . . distorting model of positivism, which holds that law is made by the legislature," in favor of the notion that "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking."⁶

As fundamentally, under Michael's "deanship," the New Haven School recommitted itself to *normative values*. By treating international law as more

1. See Koh, *supra* note †, at 561.

2. As one student of the School put it:

The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass. . . . [I]nternational law is most realistically observed, not as a mere rigid set of rules but as the whole process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.

Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE J. WORLD PUB. ORD. 1, 30 (1974).

3. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 305 (2007). See generally OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 173-204 (2005) (reviewing tenets of political realism).

4. Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953).

5. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 113 (1981).

6. *Id.* at 107.

than just a body of rules, the New Haven School committed itself not simply to a study of bare process, but more fundamentally, to an examination of a process of authoritative decisionmaking dedicated to promoting a set of normative values. As Michael wrote, the New Haven School insisted “that the end of law and the criterion for appraisal of particular decisions was their degree of contribution to the achievement of a public order of human dignity.”⁷ As an unusually courageous president of the Inter-American Commission on Human Rights and an international arbitrator of global renown, Michael insisted upon maintaining and building the School’s *connection between law and policy*. The New Haven School became known as a school of policy-oriented jurisprudence, in no small part because of Michael’s conviction that international law rules are intended to reflect the needs of international policy arguments.⁸

Second, Michael is an outstanding teacher. No one has had more time for his students, and he has personally guided and inspired a generation of scholars and teachers, as evidenced by the large group gathered here today. Michael helped give birth to the *Yale Journal of International Law*, which fittingly publishes these conference proceedings in his honor. As Michael himself recalled, the then-Dean of Yale Law School actually rejected the original student proposal to form a journal of international law in 1974. But undaunted, with Michael’s support, the determined organizers insisted upon founding and publishing the journal anyway, working “[i]n secrecy, in the bowels of the international law library . . . at night . . . [in] an underground bunker,” using half of the graduate stipend of the first Editor-in-Chief to print the journal from 1974 to 1978.⁹

A third reason to celebrate Michael is for the remarkable mentor and role model he has been. During the quarter century that we have been together on the Yale faculty, Michael and his remarkable wife Mahnoush Arsanjani—an extraordinary international lawyer and scholar in her own right—have shown me the kind of graciousness and warmth that young international law professors can only dream of. I remember seeing them at a conference in Boston twenty years ago, which ended with their graciously giving me a ride all the way home (and giving me priceless advice along the way). On a few occasions, although we have rarely had time to lunch together in New Haven, we have shared meals together in Washington, D.C. or some foreign capital. But for me, the most memorable moments have been beautiful dinners at their home in North Haven, where amid the birch trees and wooded hills, my wife Christy and I have found ourselves breaking bread with international law figures I had always wanted to meet—ambassadors, international jurists, legal advisers—all of whom Michael and Mahnoush had lured briefly away from

7. W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 939 (1999).

8. See, e.g., Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* (Ronald St. J. MacDonald & Douglas Johnston eds., 1983).

9. W. Michael Reisman, *The Vision and Mission of The Yale Journal of International Law*, 25 YALE J. INT’L L. 263, 264 (2000).

New York City and the United Nations to become visiting students of the New Haven School of International Law.

The fourth, final, and most important point to recognize about Michael Reisman is that he is only in mid-career. His astonishing output continues unabated, his energy puts his younger colleagues to shame, and his zest to write and engage in the world of international action and ideas has never been greater.

So we come here today not just to honor Michael Reisman, the Dean of the New Haven School of International Law. We also take stock of a lifetime of work that is still very much in progress: the accomplishments of a scholar, teacher, mentor, and colleague who could say, to paraphrase John Paul Jones, "I have only just begun to write!" And, I would add, he has only just begun to influence the intellectual framers of a new global century that, after all, is only just beginning.

Essay

Michael Reisman's Jurisprudence of Suspicion

Menachem Mautner[†]

I. INTRODUCTION

In *Freud and Philosophy*, Paul Ricoeur presents Karl Marx, Friedrich Nietzsche, and Sigmund Freud as the “three masters of suspicion.”¹ What was common to all three, writes Ricoeur, was their assumption that consciousness was primarily “‘false’ consciousness,”² the domain of “illusions and lies.”³ The common problematic therefore that occupied all three was that of the relation between the “hidden” and the “shown,” the “simulated” and the “manifested.”⁴ Their effort of “demystification”⁵ not only established a new relation between “the patent and the latent,”⁶ writes Ricoeur; they also extended the boundaries of consciousness and “clear[ed] the horizon . . . for a new reign of Truth.”⁷

Michael Reisman's jurisprudence is “a jurisprudence of suspicion.” It is a jurisprudence aimed at demystifying our commonplace understanding of the phenomenon of legality and making it more truthful.

Reisman defines law as a combination of power and authority, but he sees power as lying at the root of authority, and authority as both concealing and legitimating power. Reisman's jurisprudence is aimed at exposing the many layers of legality that exist underneath the “official,” formal layer of state law. Not only does a discrepancy exist between what the law says and the law's actual implementation, but deviations from what the law says may constitute a normative system, Reisman maintains, so that the same conduct would be governed by two normative systems—the official law and the law that is actually applied. This last normative system would usually work, according to Reisman, for the benefit of elites that are involved in certain illicit conduct while at the same time invest efforts in maintaining the official normative system (for all the rest). Reisman writes about *lex imperfecta* and *lex simulata*: laws that are not meant to affect conduct, but rather to reaffirm beliefs in the vigor of an official layer of legality. Finally, Reisman exposes the existence of legality, i.e., a combination of power and authority, in our mundane, daily social interactions.

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1. PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 33 (Denis Savage trans., 1970).

2. *Id.*

3. *Id.* at 32.

4. *See id.* at 33-34.

5. *Id.* at 34.

6. *Id.* at 33.

7. *Id.*

One particular context to which Reisman's demystifying endeavor applies is that of the gap existing between the high ideals of the law and our culture in general, on the one hand, and the extent to which these ideals are actually realized in our social life, on the other. The claim that we are living amidst a severe crisis of normativity is a unifying thread that runs throughout Reisman's jurisprudence. The claim comes across with particular vigor in *Spiritual Exercise*, a novel published by Reisman under the pseudonym Deborah Shai, to which I shall later return.⁸

One context in which no normativity crisis exists, however, is Reisman's own life. On the contrary, if a gap does exist in Reisman's life it is that between his low-keyed verbal pronouncements as to how a person ought to lead his or her life and the unmatched high standards of conduct he has continuously demonstrated throughout his life in his relations with his students and colleagues. In *Spiritual Exercise* the protagonist undergoes conversion to Catholicism under the instruction of a Benedictine priest to whom the protagonist later on refers as "my father."⁹ Many of Reisman's students underwent jurisprudential conversion under his instruction and they refer to him as "their father," extending the term beyond the purely intellectual context.

II. LAW

A. *Defining Law*

The key to Reisman's jurisprudential writings is his departure point, namely his definition of law.

Law for Reisman is a process of decision that is both authoritative, i.e., conforms to the expectations of rightness held by members of the relevant group, and controlling, i.e., enjoys effectiveness over members of the group.¹⁰ The major function of law for Reisman is to determine the way resources, both material and symbolic, are distributed among members of a group, as well as to determine the procedures for the making of further decisions of that kind.¹¹

There is no one fixed formula as to the balance that needs to exist between authority and effectiveness for a legal norm to exist, maintains Reisman; the particular mix between the two may vary widely.¹² No law is ever wholly effective, however.¹³

8. DEBORAH SHAI, *SPIRITUAL EXERCISE* (2005).

9. *Id.* at 14.

10. See W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORM 17* (1979) [hereinafter REISMAN, *FOLDED LIES*]; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS 191, 192 (Myres S. McDougal & W. Michael Reisman eds., 1981); Michael Reisman, 1995 Seibenthaler Lecture, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 616 (1996) [hereinafter Reisman, *Political Superior*]; W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 121 (1992) [hereinafter Reisman, *New Haven School*].

11. Reisman, *Political Superior*, *supra* note 10, at 616-17.

12. Reisman, *New Haven School*, *supra* note 10, at 121; Reisman, *Political Superior*, *supra* note 10, at 616; see also McDougal et al., *supra* note 10, at 192.

13. McDougal et al., *supra* note 10, at 191-92.

Reisman's holding that law is an arena for the determination of the distribution of material and symbolic resources is heir to the normative claim of realism.¹⁴ As Reisman puts it, those who apply the law need "to consider every statement presented as 'law' in terms of its policy consequences."¹⁵ This approach makes law a humanistic enterprise through and through.

The realist claim that law should be evaluated in terms of its effects on the lives of those subject to it led to a complete reshuffling of law school curricula in the course of the twentieth century; to the emergence of the various "law and . . ." movements, first in American law and later on in the laws of other countries; and to the current perception of the law school, in the United States and in other countries as well, as "a mini university."¹⁶ It is in line with these processes that Reisman expects lawyers to be people versed in wide-ranging knowledge borrowed from all the disciplines of the social sciences and the humanities so that they will be able to assess the implications of potential decisions in which they are involved.¹⁷

B. *Law: Between the Professional and the Political*

The perception of law as a process in which the distribution of resources is determined invites two contradictory approaches as to the nature of law-making processes.

The first approach, identified with legal realism, sees law as a *professional* arena:¹⁸ lawyers are professional experts located in policymaking teams and working together with other professionals for the advancement of the well-being of their societies.

A second approach as to the nature of law-making processes, identified with Marxist tradition, sees law as a *political* arena in which various social

14. Legal formalism is premised on two major tenets. First, legal norms need to be organized in a system so as to turn legal decisionmaking processes into a procedure. (The outcome of a procedure is embedded in it so that the personality, character, life experience, etc., of the decisionmaker are eliminated from the process.) Second, the system of legal norms needs to be operated autonomously, i.e., in disregard of the effects of legal decisions on the lives of those subject to them. Legal realism undermined both tenets. In what may be referred to as the descriptive strand in realism, it has been shown that legal formalism is unable to make good of its promise to eliminate the decisionmaker from legal decisionmaking processes. In what may be referred to as realism's normative strand, it has been claimed that the supreme test for everything legal is its effects on the lives of the human beings subject to it.

15. Reisman, *Political Superior*, *supra* note 10, at 626; *see also* Reisman, *New Haven School*, *supra* note 10, at 121. Reisman presents this vision of law as one that runs counter to the formalist and positivist jurisprudential traditions which see law as an autonomous system of legal contents—mainly rules—found in books and developed by legal experts in accordance with the internal logic of the system and in disregard of law's effects on the lives of those on whom it applies. Reisman, *Political Superior*, *supra* note 10, at 616.

16. *See* George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983).

17. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, in INTERNATIONAL LAW ESSAYS, *supra* note 10, at 43, 49-50; Reisman, *New Haven School*, *supra* note 10, at 121. This, again, is presented by Reisman as running counter to the formalist and positivist traditions that expect lawyers to confine themselves merely to knowledge of the contents of the law. *Id.*

18. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 65-67 (1984).

and political groups, drawing on varying combinations of resources, struggle over the distribution of resources (both material and symbolic).

Where is Reisman's jurisprudence located between these two approaches? At first sight the answer seems to be straightforward: Reisman's jurisprudence focuses on the professional, rather than the political, aspects of law. But upon further reflection things prove to be more complex than that.

Reisman's jurisprudence is located at the level of the practicing lawyer who is expected to take part in decisionmaking processes. On the other hand, however, every word in Reisman's writings imparts the thrust of a conflictual approach that sees decisionmaking arenas as sites of struggle between competing social and political groups drawing on varying, unequally distributed resources. These processes usually end up in the triumph of what Reisman refers to as "the elite"—a group that routinely succeeds in promoting both its interests and its worldview.¹⁹ Thus what we have in Reisman's jurisprudence is a combination of an interest in nonpolitical decisionmaking arenas and processes—where, for Reisman, lawyers typically operate—together with an understanding that these arenas and processes are always sites of conflict, struggle, and competition.

Since Marx's *The German Ideology*,²⁰ we are aware that control over essential civil society and state institutions leads to control over culture, so that a social group that enjoys such control manages to widely—never completely—propagate cultural dispositions that promote its interests and worldview.²¹ This Marxist analysis of the relation between power and culture (which, of course, is part of what makes Ricoeur view Marx as advancing a "hermeneutics of suspicion")²² bears on the relation between power and authority in the law: if law is always a combination of authority and power, then power is primary and authority is secondary and derivative. Yet much in Reisman's writing, particularly his recurrent emphasis of the crucial importance of power in decisionmaking processes, resonates with this Marxist insight as to the inter-relationship between power and culture. Moreover, for Reisman the relation between power and authority is circular, so that it is not only that power establishes authority, but that authority further feeds power. Citing Harold Lasswell's Weberian statement that "possession of authority is itself effective power," Reisman adds: "[t]o refer to the 'power' of elites without explicit recognition of the role that authority plays in creating power and making it effective, is to ignore an important component of effective decision."²³

19. See REISMAN, FOLDED LIES, *supra* note 10, at 15-36; W. Michael Reisman, *A Theory About Law from the Policy Perspective*, in LAW AND POLICY 79, 84-85 (David N. Weisstub ed., 1976) [hereinafter Reisman, *A Theory About Law*].

20. KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* (C. J. Arthur ed., Lawrence & Wishart 1970) (1932).

21. Antonio Gramsci developed this theme by filling the Marxist concept of hegemony with new content. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); see also JEAN COMAROFF & JOHN COMAROFF, *OF REVELATION AND REVOLUTION* 1 (1991); Chantal Mouffe, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168 (Chantal Mouffe ed., 1979).

22. RICOEUR, *supra* note 1, at 32-34.

23. W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* 52 (1987).

C. *The Tasks of Jurisprudence*

If law is supposed to be the process through which decisions are made with the aim of advancing the welfare of human beings, the task of jurisprudence according to Reisman should be to provide lawyers with an understanding of the decisionmaking processes in which they are involved, the social processes in which they are expected to intervene by means of the law, and the various values that it is for the law to make part of the lives of human beings.²⁴ Put differently, for Reisman, jurisprudence should “seek[] to be as comprehensive as possible regarding the various factors that influence decision.”²⁵ Also, it should be premised on the understanding that policy decisions are taken in the context of varied institutions beyond the court system, and at times even illicitly.²⁶ Jurisprudence should therefore see it as its task to provide enlightenment as to the decisionmaking processes that take place in all institutions in which law is made.²⁷ Also, it should be a jurisprudence that “derives from the natural law tradition,”²⁸ and that stands in stark contrast to any jurisprudence that “drastically reduce[s] the universe of variables to a text or a few purportedly key social factors.”²⁹ In particular, jurisprudence should stand in stark contrast to the Austinian positivist tradition, which confines itself to the perspective of the “receiver of commands” who is expected to obey the dictates of the law.³⁰

D. *Gaps, Legal Pluralism and Lies*

Roscoe Pound's 1910 classic *Law in the Books and Law in Action* pointed out that in many instances a discrepancy exists between what the law says and law's actual implementation.³¹ Following Pound, voluminous literature, known as “Gap Studies,” grew in the course of the twentieth century, aimed at identifying the many manifestations of, and reasons for, the recurring discrepancy between what the law says and the actual conduct of the world.

Reisman adopts Pound's great insight,³² but he gives it a new and radical twist: deviations from what the law says (Reisman calls this the “myth

24. Reisman, *New Haven School*, *supra* note 10, at 119, 120; Reisman, *Political Superior*, *supra* note 10, at 618; W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 *YALE L.J.* 935, 936-37 (1999).

25. Reisman, *New Haven School*, *supra* note 10, at 121.

26. REISMAN & SCHREIBER, *supra* note 23, at 3.

27. Reisman, *New Haven School*, *supra* note 10, at 120.

28. *Id.* at 119.

29. *Id.* at 121.

30. *Id.* at 119.

31. Roscoe Pound, *Law in the Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

32. REISMAN, *FOLDED LIES*, *supra* note 10, at 15-16 (“The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things.”); *see also id.* at 7. Reisman applies the notion of the gap not only to the level of the norms of the law; the gap may apply with regard to the institutions instrumental in determining the contents of the law: it is often the case that a discrepancy exists between “formal legal institutions” and “actually effective institutions.” REISMAN & SCHREIBER, *supra* note 23, at 2. “[I]n many municipalities and organizations, in states and even in national politics, there are both formal institutions and effective ‘machines,’ i.e., informal institutions. The two are not always congruent.” *Id.*

system”) do not amount merely to discrepancies between law and actual conduct. Rather, the deviant conduct itself (Reisman calls this the “operational code”) may amount to a normative system, a “law,” so that “we encounter two ‘relevant’ normative systems: one that is supposed to apply; . . . and one that is actually applied.”³³ Based on his definition of law,³⁴ Reisman therefore conflates the phenomenon of the gap and that of legal pluralism. The existence of the gap is not merely a matter of deviance; the law in action is “law” as well that operates beneath state law and in competition with it.

Thus, for Reisman the same activity may be governed by two competing normative systems. Some people would abide by the official state system. Others, however, the “connoisseurs,” usually those belonging to the elite, would not only act according to the deviant normative system that would tell them “when, by whom, and how certain ‘wrong’ things may be done;”³⁵ they would usually also conceal their illicit activities, suppress all knowledge of their operational code while at the same time invest efforts in “maintain[ing] the integrity of the myth system.”³⁶ Also, the same person may at times act in accordance with the norms of one system and at other times in accordance with the norms of the other. Moreover, it might be the case that in a certain context, conduct would comply with neither of these two systems—actual behavior may be discrepant from both.³⁷ As a result of this complexity, “determining the ‘law’ or the socially proper behavior in a particular setting necessitates a much wider social inquiry than the simple consultation of the formal law.”³⁸

Roger Cotterrell recently suggested that it is important to keep separate discussion of the phenomenon of the gap and discussion of legal pluralism.³⁹ Ordinarily, this suggestion would make sense. But the radical move taken by Reisman shows that at times the divergent conduct may amount to a legality of its own, so that what we would otherwise regard as a gap would in fact amount to one more manifestation of legal pluralism. In doing that, Reisman not only demystifies the role played by state law in our lives; he also exposes the great complexity of the phenomenon of legality and further extends our understanding of it.

at 2-3. For example, formal documents may say that a City Council makes decisions. The fact of the matter, however, may be that “fundamental policy is actually made in a series of informal meetings taking place in country clubs, business lunches, periodic meetings of merchant associations and so on. The City Council, you may discover, really does no more than validate or promulgate decisions and policies clarified elsewhere.” *Id.* at 3; *see also* Reisman, *A Theory About Law*, *supra* note 19, at 79.

33. REISMAN, *FOLDED LIES*, *supra* note 10, at 16.

34. *See supra* text accompanying notes 10-17.

35. REISMAN, *FOLDED LIES*, *supra* note 10, at 1.

36. *Id.* at 23-24, 28.

37. *Id.* at 16.

38. *Id.* at 35; *see also* W. Michael Reisman, Book Review and Notes, 76 *AM. J. INT’L L.* 868 (1982) (reviewing ORAN R. YOUNG, *COMPLIANCE AND PUBLIC AUTHORITY* (1979)).

39. Roger Cotterrell, *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in *LIVING LAW: RECONSIDERING EUGEN EHRLICH* 75 (Marc Hertogh ed., 2009).

E. *Lies: Lex Imperfecta and Lex Simulata*

Reisman's complex understanding of the phenomenon of legality, and his efforts at exposing the means employed by elites for concealing this complexity, are also manifest in his discussion of two types of laws, in addition to the distinction he makes between mythic and operational legality: *lex imperfecta* and *lex simulata*.

The concept of *lex imperfecta* is well known. It refers to "laws without teeth," namely laws that are devised in such a way that no remedy or sanction would be invoked following violation of a legal norm. Reisman writes that *lex imperfecta* is often "a conscious operator or elite design for dealing with aggravated myth system and operational code discrepancies."⁴⁰

The concept of *lex simulata*, which to the best of my knowledge is Reisman's creation (and note that Paul Ricoeur presents the problem of "simulated" reality as the one lying at the basis of the writings of the three "masters of suspicion," Marx, Nietzsche, and Freud),⁴¹ is a highly interesting one. *Lex simulata* is meant to perform a function similar to that of *lex imperfecta*. It is "a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied."⁴² *Lex simulata* is not meant therefore to affect conduct. Rather, its function is "to reaffirm on the ideological level that component of the myth, to reassure peripheral constituent groups of the continuing vigor of the myth, and perhaps even to prohibit them from similar practices."⁴³ In the case of *lex simulata*, as in the case of any other legislation, writes Reisman, "the mere act of legislation functions as catharsis and assures the rank and file that the government is doing what it should, namely, making laws. Legislation here becomes a vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior."⁴⁴

When one adds the concepts of *lex imperfecta* and *lex simulata* to Reisman's distinction between the "myth system" and the "operational code," small wonder that one reaches with Reisman the conclusion that "in law things are not always what they seem."⁴⁵

F. *Microlegal Systems*

Reisman's jurisprudence is comprehensive not only in that it is premised on the assumption that law is being made in varied arenas and through varied processes. The anti-positivist traits in Reisman's jurisprudence, together with his definition of law as premised on a combination of authority and power, enable him to see law as being made and invoked in such varied contexts as the all-encompassing world arena, on the one hand, and micro social interactions, on the other. Also, Reisman, who writes about lawyers as expert

40. REISMAN, FOLDED LIES, *supra* note 10, at 29.

41. RICOEUR, *supra* note 1, at 33-34.

42. REISMAN, FOLDED LIES, *supra* note 10, at 31.

43. *Id.* at 31-32.

44. *Id.* at 32.

45. *Id.* at 7.

professionals operating in elite decisionmaking institutions, finds law also in the mundane, daily settings in which ordinary people live their lives. This last point needs further elaboration.

“The law of the state may be important,” writes Reisman, “but law, *real* law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction. Law is a property of interaction. Real law is generated, reinforced, changed, and terminated continually in the course of almost all of human activity.”⁴⁶ Thus, as “social relationships cannot operate without law,”⁴⁷ “[t]here are microlegal systems about looking at people, touching them accidentally, standing in line, laughing in public, talking, and so on.”⁴⁸

Indeed, if for law to exist there should be a combination of authority and power, it is possible to see why there is law in micro social interactions. First, as to authority, parties to such interactions share expectations that under the circumstances there is a right way of acting. Law does not require “expressly articulated codes,” writes Reisman.⁴⁹ Moreover, norms that govern social interactions may not only be uncodified; it is often the case that they operate below the level of overt consciousness, so that “the actors whose behavior is being influenced by those norms are unaware of knowing, acting on, and reacting to them.”⁵⁰ An additional set of expectations that exists in micro social interactions is that defections from the right way of acting “will lead to a common response among members of the microsituation that the defection was ‘wrong.’”⁵¹ This, in turn, “authorizes the injured party to respond in a way (otherwise impermissible) that may hurt or sanction the offending actor.”⁵²

As to the requirement of power, Reisman maintains that enforcement mechanisms that subject norm violators to sanctions are at work in micro social interactions. “Enforcement . . . does not require formal control by an authority,” writes Reisman. “[S]anctions may be embedded in the situation and may be no more than symbolic approval or disapproval of something substantial, like money or time.”⁵³

Reisman’s conceptualization of the legality of micro social interactions is part of a growing interest in the role of law in the everyday experiences of ordinary people. This interest is manifest in the rise of the constitutive approach to law⁵⁴ and the legal consciousness approach,⁵⁵ as well as in a

46. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 2 (1999); *see also id.* at 8-10.

47. *Id.* at 16.

48. *Id.* at 40.

49. *Id.* at 54.

50. *Id.* at 10.

51. *Id.* at 54.

52. *Id.*; *see also id.* at 13, 39.

53. *Id.* at 54; *see also id.* at 12, 39-40.

54. *See, e.g.,* *LAW IN THE DOMAINS OF CULTURE* (Austin Sarat & Thomas R. Kearns eds., 1998); *JUSTICE AND POWER IN SOCIOLEGAL STUDIES* (Bryant G. Garth & Austin Sarat eds., 1998); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 242-68 (1987); Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J.L. & HUMAN.* 95 (2001); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987); Roger Cotterrell, *Law as Constitutive*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES* 8497, 8497-500 (N.J. Smelser & P.B. Baltes eds., 2001); Gordon, *supra* note 18; Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 *LAW &*

growing literature on the role of law in everyday life.⁵⁶ (From a larger perspective, the interest in the everyday may be seen as part of a growing interest in the topic in recent decades in many disciplines, such as anthropology, sociology and history. This interest is manifest also, among many others, in the writings of the Cultural Studies Movement,⁵⁷ in Erving Goffman's pioneering *The Presentation of Self in Everyday Life*,⁵⁸ in Pierre Bourdieu's sociology of practice,⁵⁹ in Ann Swidler's understanding of culture as "tool kit,"⁶⁰ and in the writings of Michel Foucault.⁶¹) However, it is noteworthy that the constitutive approach, the legal consciousness approach, and studies of law in the context of everyday life are interested mainly in the role that *state law* plays in the everyday social interactions of people, i.e., in the way state law participates in shaping the way ordinary people perceive their social situations and their conduct in them. Reisman's micro jurisprudence is premised on a radically different move: he claims that legality per se is inseparably part of the social, so that it is impossible to properly understand the nature of everyday, mundane social interactions without accounting for the element of legality that is inherently embedded in them (even prior to deciphering the effects of state law on the structure of such interactions). In that, Reisman not only provides us with a fresh understanding of the nature of everyday social interactions; he also expands our understanding of the phenomenon of legality and of the reach of legal pluralism.

SOC'Y. REV. 1231 (1994); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001); Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145 (2001); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129 (2000); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

55. See, e.g., ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* (2006); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 1-24 (1975); LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* (1990); Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13 (David Nelken ed., 1997); Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117 (1994); Lawrence M. Friedman, *Legal Culture and Social Development*, in LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND BEHAVIORAL SCIENCES* 1000 (1969); S.S. Silbey, *Legal Culture and Legal Consciousness*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 8623.

56. See, e.g., *LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas R. Kearns eds., 1993); P. Ewick, *Law and Everyday Life*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 8457.

57. See, e.g., TONY BENNETT, *CULTURE: A REFORMER'S SCIENCE* (1998); *THE CULTURAL STUDIES READER* (Simon During ed., 2d ed. 1999); FRED INGLIS, *CULTURAL STUDIES* (1993); JEFF LEWIS, *CULTURAL STUDIES* (2002); GRAEME TURNER, *BRITISH CULTURAL STUDIES* (1990); N.K. Denzin, *Cultural Studies: Cultural Concerns*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES*, *supra* note 54, at 3121; Richard Johnson, *What Is Cultural Studies Anyway?*, 16 SOC. TEXT 38 (1986); Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 YALE J.L. & HUMAN. 69 (2001).

58. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

59. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1977).

60. ANN SWIDLER, *TALK OF LOVE: HOW CULTURE MATTERS* 6 (2001).

61. See ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994); Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval*, 17 LAW & SOC. INQUIRY 1 (1992).

III. SPIRITUAL EXERCISE

As mentioned earlier, in 2005 Reisman published a novel, *Spiritual Exercise*, under the pseudonym Deborah Shai. If Reisman's jurisprudence is "a jurisprudence of suspicion" aimed at exposing the many layers of legality and normativity that exist underneath the "official" normative layer of state law, the novel is an attempt to unfold the dynamic between the high ideals to which we vow allegiance in our culture and in our law and the actual normative situation that exists around us. Reisman portrays a bleak picture of the wide discrepancy that exists between declared ideals and their realization. The novel provides Reisman with the opportunity to emphasize and expand on some of the themes he has dealt with as a scholar, as well as to say some things he has not formerly said.

The book, for the most part, is an account composed by Stefan Fomes of his two years as a fellow at the Parker Gallery—a small private museum outside Philadelphia that also serves as an art research institute. Fomes, who was in his late twenties, comes across as a heartless, vicious, highly ambitious, highly opportunistic, and highly manipulative young man who will not abstain from anything for self-promotion and to destroy those he perceives as his rivals. At one time, Fomes's conduct amounts to nothing short of rape. Additionally, he makes a fellow at the Parker Gallery lose his job and get deported from the country. And if that is not enough, Fomes's ruthlessness causes a young woman to take her own life. But above and beyond anything else, the number one trait that defines Fomes's character is his sinister mendacity. Lying and pretense are his way of being in the world; they define his existential condition. Fomes's entire existence is premised on ceaseless lying and pretense.

Also, repeating a well-known Freudian theme, *Spiritual Exercise* presents the relation between sexual drives and culture as one in which a thin layer of culture works at suppressing, controlling, and channeling underlying turbulent sexual drives. Additionally, playing on a famous Marxist theme first set out in *The German Ideology*,⁶² *Spiritual Exercise* portrays a stratified class society in which the rich manage to determine central contents of culture so as to legitimate their control over society, promote their interests, and preserve and propagate their worldview. Reisman spells out therefore in unequivocal terms a point left somewhat ambiguous in his scholarship: true, law is always a combination of authority and power, but power is primary and authority is determined by it. Those who have power at their disposal enjoy the benefit of being able to constitute a culture that cloaks their power with authority. The dialectic of the patent and the latent that is so fundamental to Reisman's jurisprudence of suspicion is extended to an analysis of society and culture.

But there is an interesting and thought-provoking twist in the story of Stefan Fomes. After Fomes's death, some thirty years after the writing of *Spiritual Exercise*, the manuscript is discovered by Fomes's literary executor. At the time of his death, Fomes is one of the most influential people in the American art world. More interestingly, and surprisingly enough, for many

62. MARX & ENGELS, *supra* note 20.

years before his death, Fomes had been known as a considerate, generous, and scrupulously honest human being. How did this transformation happen? Fomes's literary executor finds out that *Spiritual Exercise* had been written in Venice, some time after Fomes's term at the Parker Gallery ended, when he received instruction and became a Catholic. Thus, *Spiritual Exercise* was prepared for the Benedictine priest who accompanied and instructed Fomes in the process of his conversion, the person to whom Fomes later on referred as "his father."

What does this transformation mean?

The claim that secularization left modern persons without a coherent framework of meaning, a "broader vision," as Charles Taylor puts it,⁶³ is a recurring theme in the discourse of modernity, much like the claim that modernity's neglect of substantive rationality contracted the world of modern persons to the realm of instrumental rationality (clearing the way for modernity's great atrocities).⁶⁴ Is Reisman a thinker who interprets modernity in such a way? Additionally, for many years now there has been an ongoing discussion of the means for ensuring moral conduct of persons. Aside from varied means such as moral education that have been discussed in this context, it has been suggested that religion may have the effect of inhibiting deviant behavior.⁶⁵ Is *Spiritual Exercise* to be read as Reisman's suggestion that religion may serve as effective means for avoiding the moral deterioration of persons and for rehabilitating the moral character of corrupt persons? If the responses to these questions are in the affirmative, Michael Reisman is not only a thinker suspicious of the patent manifestations of law and legality—he is also a thinker suspicious of modernity.

IV. CONCLUSION

Reisman's scholarship exposes an explosion of normativity—the existence of normative systems in the broad gamut that lies between the all-encompassing world arena and micro social situations, as well as in cases where gaps exist between what the law says and the actual conduct of legal subjects. However, Reisman also portrays a world in which the powerful manage to have the upper hand and to cloak their privilege with authority, as well as a world in which a troubling gap exists between declared ideals and their actual implementation in the lives of human beings.

Reisman's jurisprudence is therefore a reminder that the mere fact of the existence of a normative system does not imply anything about the normative value of that normativity. Rather, any normativity needs to be constantly reviewed and evaluated according to criteria borrowed from some body of high ideals, such as the doctrine of natural law and the doctrine of human

63. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 4 (1991); see also CHARLES TAYLOR: *A SECULAR AGE* (2007).

64. See, e.g., ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989).

65. For a review of the literature, see Colin J. Baier & Bradley R. E. Wright, "If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime, 38 J. RES. CRIME & DELINQUENCY 3 (2001). See also Jeffery T. Ulmer, Christopher Bader & Martha Gault, *Do Moral Communities Play a Role in Criminal Sentencing? Evidence from Pennsylvania*, 49 SOC. Q. 737, 738 (2008) (sources cited).

rights. Indeed, Reisman often argues in his scholarship that these doctrines should set ideals to be met, as well as to be invoked as criteria for evaluating extant systems of normativity.

All of this makes Reisman's jurisprudence even more ambitious and demanding. It is not only the case that lawyers need to attain extensive knowledge on the decisionmaking processes in which they are involved and on the societies their interventions are supposed to affect. According to Reisman, lawyers should also constantly look up to high human ideals, even if it is too often the case that these ideals fail to attain the place they deserve in our lives.

Essay

More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs

Robert D. Sloane[†]

*Any law that uplifts human personality is just.
Any law that degrades human personality is unjust.*
—Martin Luther King, Jr.¹

Describing Baruch de Spinoza, Matthew Stewart wrote:

Some philosophers merely *argue* their philosophies. When they finish their disputations, they hang up the tools of their trade, go home, and indulge in the well-earned pleasures of private life. Other philosophers *live* their philosophies. They treat as useless any philosophy that does not determine the manner in which they spend their days, and they consider pointless any part of life that has no philosophy in it. They never go home.²

The same, perhaps, may be said of jurisprudence. If so, then, like Spinoza, W. Michael Reisman, this conference's honoree, falls clearly into the latter category. His jurisprudence informs his work and his life—as a scholar, teacher, practitioner, friend, and public citizen. Having been privileged to know or work with him in most of these capacities, I have often been struck by how the methods and injunctions of the New Haven School shape his personal, no less than professional, character traits. He exhibits an acute sensitivity to context, cultivates a studied habit of disengaging from biases, and always reflects on arguments before replying: he *responds* rather than reacts. Not coincidentally, the New Haven School encourages these traits, and no living scholar or practitioner is identified more closely with it than Reisman. Below, beyond describing some precepts of the School, I want to focus on a few areas in which Reisman made signature contributions to its jurisprudence of *realistic idealism*.

In many introductory jurisprudence courses, students learn that the topic asks two fundamental questions: first, what distinguishes legal norms from other norms, for example, those of etiquette (theories of law); and second, how do, or should, judges decide hard cases, that is, those in which the law does not clearly dictate a single right answer (theories of adjudication)? For the international lawyer, it should be immediately apparent that the utility of both questions is profoundly limited. Consider their respective assumptions: first, that qualitative features of certain norms (pedigree or other criteria of

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1. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1963), *reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR.* 289, 293 (James Melvin Washington ed., 1986).

2. MATTHEW STEWART, *THE COURTIER AND THE HERETIC* 54 (2006).

legal validity) *do* distinguish genuine legal norms from other sorts of norms; and second, that judges constitute the paradigmatic, if not exclusive, applicers of law.

In the notoriously decentralized and often unstable international legal system, neither assumption necessarily holds. International lawyers must ascertain the extent to which a host of putative governing norms (whether traditionally deemed legal or not) affect the decisions of diverse, politically relevant actors,³ meaning those with effective power in equally diverse contexts: from domestic courts to *sui generis* international tribunals to diplomatic fora to “informal channels”⁴ that many might not even recognize as jurisgenerative. And despite the proliferation of international tribunals,⁵ it is still true that comparatively little international law is made, interpreted, or enforced by courts—a *fortiori* if, by courts, we mean domestic courts within a hierarchical legal system with reliable and effective enforcement powers.

That is why Reisman has repeatedly stressed that Holmes’s aphorism—that “[t]he prophecies of what the courts will do . . . are what I mean by the law”⁶—is so misguided in international law.⁷ Outside the few contexts in which authority (legitimacy) and control (power) converge in a tribunal of some sort, the international lawyer would be professionally derelict to make decisions or advise clients based on a jurisprudence conceived in terms of a hierarchy of courts applying appropriately pedigreed norms. International lawyers, in particular, but indeed all lawyers, need a methodology that can capture the myriad facts and factors that influence the processes of decision in different legal and political contexts.

Most jurisprudential scholarship regrettably offers them little help.⁸ In his “Short Guide for the Perplexed” to the “Hart-Dworkin” debate,⁹ Scott Shapiro notes that this debate has dominated jurisprudential scholarship in the United States for more than forty years, since Ronald Dworkin published *The Model of Rules* in 1967, critiquing H.L.A. Hart’s influential reformulation of legal positivism.¹⁰ Remarkably, however, and all the more so because Hart devoted a chapter to international law in *The Concept of Law*,¹¹ one searches the literature on the Hart-Dworkin debate in vain for further attention to international law. Of course, international lawyers have engaged in their own vibrant debate about the nature of international law, generating sundry

3. Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188, 189-92 (1968).

4. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in INTERNATIONAL INCIDENTS 3, 13 (W. Michael Reisman & Andrew R. Willard eds., 1988).

5. See Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT’L L. 267, 268-69 (2001).

6. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

7. See, e.g., Reisman, *supra* note 4, at 10-11.

8. Jeremy Waldron’s work stands out as an exception. E.g., Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL’Y 15 (2006); see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 238-45 (1980) (conceptualizing customary international law).

9. Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007).

10. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

11. H.L.A. HART, *THE CONCEPT OF LAW* 213-37 (2d ed. 1994).

jurisprudential schools analogous to those in the domestic arena.¹² But most mainstream theories of law still tend to beg the question of international law's status by presupposing the apparatus of a functional state as the paradigm of *real* law.

This is unfortunate and ironic. Hart aspired to elucidate the *concept* of law, not of any particular legal system.¹³ He concluded that international law, while perhaps not to be derided in Austinian terms as mere "positive morality,"¹⁴ lacks the secondary rules that characterize all mature legal systems.¹⁵ Yet perspective, as the New Haven School insists, is crucial. Within a statist paradigm, the conclusion that international law lacks what Hart called secondary rules is virtually tautological. Disengaged from those tacit assumptions, I believe it is clear that international law does have secondary rules—or their rough analogue, what the New Haven School denotes constitutive processes, viz., decisions about how decisions will be made, where, and by whom. It is just that those processes bear scant resemblance to the formal symbols and institutions of law in states. Their complexity, dynamism, and sensitivity to power also render the idea of capturing them in a monolithic rule of recognition even more fanciful than in the domestic sphere.¹⁶ If Hart therefore erred in denying that international law is genuine law, then it should stand as an objection to *any* theory of law writ large that it cannot comprehend the international legal system or offer international lawyers *practical* guidance. For jurisprudence is not, or should not be, a pejoratively academic enterprise. In fact, international lawyers, even more than their domestic counterparts, have a deeply practical need to understand how the legal system in which they operate actually functions. Only then can they responsibly and accurately determine whether and how they might influence it.

To those familiar with his work, it will come as no surprise that Reisman, like his intellectual forebears Myres S. McDougal and Harold D. Lasswell, always took a dim view of positivism, critiquing it on descriptive and normative grounds.¹⁷ In part, this is because its explanatory force is so manifestly weak in the international sphere. In part, it is because some early and unsophisticated forms of legal positivism, at bottom, mistakenly equate law with naked power. But it is also, in part, because positivism purports to *be* purely descriptive.¹⁸ Like the American legal realists, whom the New Haven School critiqued but upon whose insights it simultaneously built,¹⁹ Reisman regards jurisprudence as inescapably—and *appropriately*—normative. Pretense to a value-free jurisprudence at best obscures normative goals. In

12. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 187-90 (1996).

13. HART, *supra* note 11, at 239-40.

14. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (David Campbell & Philip Thomas eds., Dartmouth Publ'g 1998) (1832).

15. See HART, *supra* note 11, at 236-37.

16. Cf. Dworkin, *supra* note 10, at 41-42 (analogous critique in the domestic legal sphere).

17. See generally McDougal et al., *supra* note 3, at 243-60.

18. See *id.* at 247.

19. W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 936-37 (1999).

fact, if the New Haven School has a birth date, it is the 1943 publication of *Legal Education and Public Policy: Professional Training in the Public Interest*, in which McDougal and Lasswell argued in relevant part:

Even those who still insist that policy is no proper concern of a law school tacitly advocate a policy, unconsciously assuming that the ultimate function of law is to maintain *existing* social institutions in a sort of timeless *statu quo* [sic]; what they ask is that their policy be smuggled in, without insight or responsibility.²⁰

Indeed, McDougal and Lasswell conceptually linked the pretense to a policy-neutral legal education to the “outburst of racialism in [Nazi] Germany, . . . one of several profound recessions from the ideal of deference for the dignity and worth of the individual.”²¹ From the outset, they therefore insisted on the indispensability of goal clarification, or the identification of preferred policies—a project unified by the moral postulate that law’s ultimate goal should be to promote human dignity. Only after clarifying the policies to be pursued can lawyers *responsibly* perform their quintessential task: to make, or help others to make, decisions. And the continuous process of authoritative and controlling decision *is*, in the New Haven School’s view, law itself.

This may initially seem counterintuitive. In liberal democracies, lawyers grow accustomed to conceptualizing decisionmaking as a function that follows, rather than precedes, identification of law. But law, like everything else, is in a constant state of flux. The decisions of judges, executive officials, administrative officers, and other elites—those who qualify as politically relevant actors in liberal democracies—tend to be far more predictable than those made in the international legal system because of the congruence of expectations of authority and control in a well-ordered state. Still, it is the process of authoritative and controlling decision about the distribution of values that constitutes law in the sense that matters to clients. That is why Reisman often stresses that to be truly effective, lawyers must distinguish a legal system’s “myth system” from its “operational code.”²² As he wrote in one characteristic exposition:

Whatever you may mean by law, [clients] have a practical interest in how things are done in a certain setting and by law they mean those expectations shared by relevant members of the group about the right way of doing things, expectations taken seriously enough by group members so that they will probably be sustained by some individual or group effort.²³

Analytically, Reisman and his colleagues therefore conceptualized law-making, or norm prescription, in terms of three coordinate communicative dimensions: (1) *policy content*, the extent to which a norm communicates a directive or prohibition: “thou shalt” or “thou shalt not”; (2) *authority signal*, the extent to which, empirically, the processes generating that norm and the symbols attached to it convey a sense of legitimacy or propriety to the

20. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 207 (1943).

21. *Id.*

22. W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 16 (1979).

23. W. Michael Reisman, *Law from the Policy Perspective*, in INTERNATIONAL LAW ESSAYS 1, 2 (Myres S. McDougal & W. Michael Reisman eds., 1981).

normative communication's recipients; and (3) *control intention*, the extent to which those recipients expect that those with effective power will invest sufficient resources to make the norm effective—in common parlance, to enforce it.²⁴ All norms vary in clarity or strength along these dimensions. By methodically inquiring into each, the lawyer will be able to advise clients and shape the law far more effectively than by focusing solely on the familiar epistemic units of state law: statutes, administrative rules, appellate decisions, and other sources.²⁵

Of course, in a well-ordered legal system like that of the United States, lawyers at times justifiably assume that authority and control will converge in identifiable institutions, especially courts. That is why appellate decisions generally offer a reliable prophecy of “what the courts will do in fact.”²⁶ Given the authority of courts in the United States and their reliable ability to enforce their decisions with state coercion, it is also why the prophecies of what the courts will do matter so much to U.S. clients. Yet it would be a manifestly catastrophic mistake to transpose Holmes's maxim to, say, nineteenth-century Venezuela, in which the formal trappings of a legal system—replete with jurists, courts, legislators, executive agents, and so forth—existed but in fact served as a veneer for *caudillismo* (de facto rule by a “strong man or Boss to whom subordinates owe personal rather than formal authority”).²⁷ Still, many lawyers assume, consciously or not, that Holmes's vision can be transposed to the international legal system: small wonder that they conclude, with Austin, that there is no international law “properly so-called.” To be effective in the international system, lawyers must scrutinize unfamiliar epistemic units, well beyond case law and texts. They must appreciate how the social processes to which international law is attached work, viz., who *actually* makes authoritative and controlling decisions—where, when, and how.

Ironically, many critique the New Haven School as impracticable—too abstruse to be useful to practitioners.²⁸ Nothing could be further from the truth, and Reisman's work, as a scholar and practitioner, is living proof. The School's methodology is not easy. In its quest for *informed* decision in the service of *clear* goals, it seeks comprehensively to map and scrutinize the factors, which, within any legal system, will be genuinely enlightening. It has developed methodical modes of inquiry in this regard, drawn from the social sciences, which seem almost Aristotelian in their precision and categories:

24. See generally W. Michael Reisman, International Lawmaking: A Process of Communication, The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981), in 75 AM. SOC'Y INT'L L. PROC. 101 (1981).

25. Reisman, *supra* note 4, at 5-8.

26. *Id.* at 9; see also Holmes, *supra* note 6, at 461.

27. W. Michael Reisman, Book Review, 29 AM. J. COMP. L. 727, 727-28 (1981) (reviewing ROGELIO PÉREZ PERDOMO, EL FORMALISMO JURÍDICO Y SUS FUNCIONES SOCIALES EN EL SIGLO XIX VENEZOLANO (1978)) (describing the coexistence of legal formalism and the operational code of *caudillismo* in nineteenth-century Venezuela). Roscoe Pound's sociological jurisprudence and, in particular, his distinction between “law on the books” and “law in action” supplies an influential antecedent of this distinction. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

28. E.g., Oscar Schachter, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 268 (1985).

four intellectual tasks,²⁹ seven dimensions of the social process,³⁰ seven decision functions,³¹ and eight values.³² Yet this is one reason why the School, for all its apparent complexity, *has* proven so durable and attractive, not only to U.S. lawyers, but to generations of foreign students. It strives to identify and map the factors that lawyers would ideally know before advising others about, making, or appraising decisions in *any* legal environment: from the microlegal system governing “Looking, Staring, and Glaring,”³³ to domestic legal systems of varying levels of stability and order, to the dynamic and often disorganized processes of international law.

One of Reisman’s signature contributions to the New Haven School lies in his ability to expound its methods succinctly—to show, despite its facial complexity, how practical it proves.³⁴ Consider one example: Secretary-General Ban Ki-moon asks you to advise the United Nations on how best to restore a degree of order sufficient for the supply of humanitarian aid to Somalia’s people to resume.³⁵ How, as a lawyer, would you approach this problem? Reliance on text, precedents, and logical operations performed on traditional legal sources may make good sense in judicial or arbitral fora: contrary to a common misconception, the New Haven School jurist would not counsel, for example, the transnational business lawyer in an arbitration to engage in an “endless quest for shared expectations, value preferences and power relations on a global scale.”³⁶ In *that* context, familiar lawyerly tasks would be contextually appropriate, and insofar as traditional legal materials (texts, precedents, etc.) may be expected to be authoritative and controlling in *context*, the New Haven School jurist would be as likely to rely upon them as any other. But often the international lawyer’s tasks defy resort to traditional methods and sources, which at best reveal the myth system rather than the operational code of a legal system.

In the context of seeking to effect the resumption of humanitarian aid in Somalia, formal legal sources alone would be manifestly inadequate to the task. This is not to say that they don’t matter; only that their contextual relevance differs immensely. They may supply information about normative trends or preferred policy outcomes. But textual reliance alone would be absurd. To the New Haven School jurist, however, it would be equally mistaken to characterize the situation in Somalia as *legal* anarchy. Where a

29. Clarification of perspective, selection of appropriate focal lenses, mapping of community processes, and deliberation culminating in choice—itself a process subdivided into five steps: goal clarification, trend analysis, factor analysis, predictions, and invention of alternatives. Michael Reisman, 1995 Seibenthaler Lecture, *A Jurisprudence from the Perspective of the “Political Superior,”* 23 N. KY. L. REV. 605, 613-20 (1996).

30. Participants, perspectives, situations, bases of power, strategies, outcomes, and effects. Reisman, *supra* note 23, at 4, 13.

31. Intelligence, promotion, prescription, invocation, application, termination, and appraisal. *Id.* at 4.

32. Power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 12-13 (1959).

33. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 21 (1999).

34. See, e.g., Reisman, *supra* note 4, at 3; Reisman, *supra* note 23, at 1; W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118 (1992).

35. I have adapted this example from Reisman’s 2007 Hague Academy lectures.

36. Schachter, *supra* note 28, at 268.

community exists, so does law. The legal systems (plural) within the *politically* anarchic state of Somalia would be quite complex and variable. But the careful jurist would find that diverse processes of authoritative and controlling decision indeed exist, overlap, and interact throughout Somalia.

So how should the international lawyer plausibly think about Secretary-General Ban's assignment in Somalia? With whom should she deal? To be effective, she *must* first be able to identify all the participants, understand their roles, appreciate their modes of decision, and comprehend their relationships to one another. She would likely find the local scene controlled by a complex blend of private armies, clans, criminal gangs, multinational corporations seeking to protect their investments, agents of foreign governments trying to promote political or economic interests, religious leaders with authority among sectors of the local populace, nongovernmental organizations trying to ameliorate sickness and hunger, and transnational terrorist networks seeking to establish a safe haven. She would need to identify the relevant loci of authority and control that together would determine the likely efficacy of efforts to instantiate new norms—in this case, norms that might enable aid supplies to resume. But where, as in Somalia, effective institutions do not exist, she would also need to consider how to craft legal arrangements so that either (1) politically relevant actors perceive them as in their self-interest, or (2) external actors may be mobilized, if necessary, to deploy coercion—which, it should be stressed, need not mean violence; it includes diplomatic, ideological, and economic, as well military, means.

Beyond mapping the decision process for purposes of prediction and efficacy in a range of legal settings, the New Haven School seeks to enhance that process—to empower individuals to participate effectively in it and to promote the optimal shaping and sharing of values. This makes its jurisprudence particularly attractive to the disenfranchised. It supplies them with the tools to become effective *participants* in the legal process—and not simply politically inferiors, searching for rules to obey. Unlike positivism, the New Haven School encourages lawyers to adopt the perspective of the political superior, a perspective particularly well suited to international law. The instability, decentralization, and diversity of the international system, while often lamentable, generates ample opportunities for lawyers to shape and creatively influence international law. The School seeks to identify those opportunities as a means to empower lawyers “to influence the way social choices are continuously made about the production and distribution of resources, including considerations about the ways that decisions *should* be made about those things.”³⁷

Because, in international law, the convergence of authority and control is often the exception rather than the rule, the practice of international law requires, as Reisman has often said, the cultivation of realism, especially about the role of power.³⁸ Yet the extent to which “power trumps” in many areas of international law must not, as he has been equally quick to insist, lead lawyers to lose their sense of indignation at injustice and violations of human

37. Reisman, *supra* note 29, at 616-17 (emphasis added).

38. Reisman, *supra* note 4, at 10, 13.

dignity. A parochial focus on power, without recognizing that all power is relative, and without the creative formulation and pursuit of goals, culminates in nihilism—or in a sterile intellectualism that denies the efficacy of international law without appreciating the extent to which this kind of cynicism is a self-fulfilling prophecy. Understanding power's role in international law does not mean apologizing for it:

That, international law notwithstanding, a large state will intervene in the affairs of a smaller state if it deems its own security threatened does not mean that it is right for it to do so. . . . It does mean that people in the smaller or larger state who are trying to develop a *realistic* set of matter-of-fact expectations . . . will be wise to put this possibility into their reckoning.³⁹

How, then, can international lawyers ultimately be effective in a system in which myth system and operational code frequently diverge? The answer lies in another of Reisman's key contributions to the New Haven School: If every legal system can best be understood in terms of a continuous flow of normative communications with varying levels of authority and control, then the more authoritative the communication, the less it will need to rely on coercion; conversely, the less authoritative the communication, the more law must rely on coercion. That is why well-ordered legal systems with authoritative formal institutions seldom need to rely on overt coercion to preserve the law or compel enforcement. Effective institutions would be preferable in the international system as well. Yet until international law reaches that point (and that day is surely not near), *effective international lawyering requires crafting arrangements such that sufficient numbers of politically relevant participants see those arrangements as in their self-interest*. That, in brief, is what a jurisprudence of realistic idealism in international law requires. The legacy of Reisman's jurisprudence of realistic idealism emerges not only in his scholarship and practice, but in the many students and colleagues, including those in attendance today, whose intellectual and professional lives he has indelibly marked.

39. Reisman, *supra* note 23, at 9 (emphasis added).

Essay

Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman

Siegfried Wiessner[†]

Words cannot do justice to the man who has transformed the lives of so many of us who have gathered at the Yale Law School today. But words are all we have to share our feelings, as we must, over space, and over time.

Michael Reisman is the man we have the pleasure and deep satisfaction to honor and to celebrate: our teacher, our guide, our mentor, our friend. He has touched our lives in a variety of ways. In my case, the introduction to his magnificent work was made by a young South African scholar at the Peace Palace in The Hague, and I never looked back. His jurisprudence of insight and empowerment was a liberation indeed—a fountain of truth on how law is really made and changed, and a treasure trove of wisdom on what considerations should guide the decisions we consciously and unconsciously make. He made us, who call themselves professionals of the law, realize that we are not mere *bouches de la loi*; he challenged us to live up to the role we actually play in society and to assume the responsibility that comes with leadership. This statement of friendship and respect is designed to highlight our honoree's distinct place in the pantheon of jurisprudence (Part I); his keen sense of observation and analysis (Part II); his consummate skills of communication (Part III); and his abiding quest for a public order of human dignity (Part IV).

I.

The subtitle to Michael Reisman's book *Jurisprudence* says it best: Jurisprudence is about “understanding and shaping” the law.¹ Understanding what is called “the law” means going outside of our inherited lenses of observation narrowed to commands of the sovereign in the modern nation-state; it means removing those blinders and setting out to grasp the reality of what is called “the law” in the “manifold of events” that constitute the social process on this planet.² Law is a process of authoritative and controlling decision;³ within that process, the lawmaking function is essentially a process

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1. W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1986).

2. HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 240-67 (1930) (focusing on events within and among individuals that engender social process of communication).

3. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967).

of communication.⁴ It focuses on messages of policy content, i.e., decisions, sent by persons with authority within a certain community to members of that community, messages backed up by a threat of severe deprivation of values or a high expectation of indulgences or benefits.⁵ It allows us to move from theories “of” law, in the vein of Kelsen, Montesquieu, von Savigny, and Rawls, to, more appropriately, theories “about” law⁶—in diverse communities over space and time, from the global to the local, from the personal to the territorial, from the permanent to the short-lived⁷—beyond, but including, the community that is still key to the distribution of values and resources today: the nation-state.⁸ Within those communities, it demands a focus on the realities of authority and control, eschewing naked power and pretend law.

This opening of the eyes of lawyers to the empirical context of their professional lives was originally conceived in the most fruitful cooperation between Harold Dwight Lasswell and Myres Smith McDougal,⁹ a collaboration that started in the 1930s. They shattered the walls of separation between their original home disciplines—political science and psychology (Lasswell) vs. the law (McDougal)—as they developed a powerful intellectual framework for the analysis of social problems and the development of solutions to them through law, a framework that included the orienting concept of eight human values encompassing the totality of human aspirations. In the early 1960s, Michael Reisman joined this creative enterprise that has come to be known variously as the “New Haven School,” “Policy-Oriented Jurisprudence,” or “Law, Science, and Policy.”¹⁰ He has left his imprint on that theory about law. It is centered around him today.

II.

Michael Reisman’s unique contributions have been fueled by his keen and incorruptible sense of observation which helps him analyze most

4. W. Michael Reisman, *International Law-Making: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101 (1981).

5. See W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575 (2007).

6. W. Michael Reisman, *A Theory About Law from the Policy Perspective*, in MARK MACGUIGAN ET AL., LAW AND POLICY 75 (David N. Weisstub ed., 1976) [hereinafter Reisman, *Law from the Policy Perspective*]; W. Michael Reisman, *Theory About Law: The New Haven School of Jurisprudence*, 1989/90 WISSENSCHAFTSKOLLEG JAHRBUCH 228 [hereinafter Reisman, *Theory About Law*].

7. For an overview, see Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988).

8. While other communities gain ever more importance, states remain the primary organizations and value providers. W. Michael Reisman, *Designing and Managing the Future of the State*, 8 EUR. J. INT’L L. 409, 416 (1997).

9. For details of their cooperation, and the content of their jurisprudence, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

10. These terms have been used interchangeably to designate this unique configurative, problem- and policy-oriented theory about law. See, e.g., Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188 (1968); Reisman et al., *supra* note 5, at 575 n.2 (referring, inter alia, to the classical statement of the approach in LASSWELL & MCDUGAL, *supra* note 9); Reisman, *Law from the Policy Perspective*, *supra* note 6; Reisman, *Theory About Law*, *supra* note 6; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT’L L. 96 (2001).

effectively the special process of communication that the law constitutes. Some of the most compelling samplings of his observations are to be found in the book *Law in Brief Encounters*.¹¹ As he describes how law, albeit “micro-law,” is made by the signaling of expected behavior between ordinary persons who look, gaze, or stare at each other, or just happen to stand in line (i.e., law made in quite fleeting types of momentary community), one can only marvel at the acuity with which Reisman isolates pertinent types of conduct, articulates the motivations underlying them, and draws inferences from those observations regarding normative expectations among the group’s members. Like all those using the approach, he is interested in real encounters, real people, and real relationships; the discussion is about real resources and the distribution of real values.

This extraordinary faculty of discerning observation may also have spurred him to develop the genre of incident studies,¹² a useful tool in determining lawfulness of conduct between states as they signal approval or disapproval of certain unilateral claims put forward by other states in justification of certain key actions, called “incidents.” This process may help to clarify the content of what traditionally is called “customary international law” in the field.¹³

More generally, his quest for empirical truth has led him to sharpen the distinction between the “law on the books” and the “law in action,” deepening Karl Llewellyn’s contribution with the difference between what Reisman has called the “myth” and the “operational code.”¹⁴ This realist view of the law is applied, most convincingly, in his contribution to the 1981 *International Law Essays* book, co-edited with McDougal,¹⁵ where Reisman uses the approach to determine the real figures of authority and control in an imagined community—a quest far beyond the inherited search for written constitutional or statutory legitimacy. *Folded Lies*,¹⁶ a book about bribery translated into a number of languages, including Spanish, Russian, and Japanese, confirms, as the example of corrupt societies vividly illuminated, the global validity and appeal of such a distinction between what the law pretends to be and what it really is. Whether the incidents put forward are historical or imagined, Michael Reisman uses them most skillfully to make his point—the hallmark of a superb communicator.

As appropriate, and highlighted by science itself, Reisman acknowledges inherent limits to the claim to objectivity of the scientific method. He recommends that the observer take a thorough look inside him or herself and clarify his or her “observational standpoint”¹⁷ vis-à-vis the objects

11. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

12. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1 (1984).

13. W. MICHAEL REISMAN & ANDREW R. WILLARD, *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (1988).

14. W. Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229 (1977).

15. W. Michael Reisman, *Law from the Policy Perspective*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 1 (1981).

16. W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* (1979).

17. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 120 (1992).

of observation. Those lenses might be skewed by genetics, upbringing, class, gender, race, location at the center or the periphery of society, etc. He does not suggest a goal of a total exclusion of such predispositional factors from the process of decisionmaking, as this would be unrealistic. Rather, he would recommend that the observer and, in law, the decisionmaker, make him or herself aware of these factors, particularly potential biases that might distort or otherwise influence his or her decision.

Upon this critical self-assessment, Reisman then recommends that the scholar perform a number of important tasks that would help him or her achieve the goal of solving problems in a most rational and comprehensive, or as the classical New Haven School would say, “configurative,” way. These tasks include: (1) the exact delimitation of the problem in the light of all of its parameters in order to reach the intended goal; (2) the analysis of conflicting claims, claimants, perspectives, identifications, bases of power, etc.; (3) the identification of past trends in decision in light of their predispositional and environmental conditioning factors; (4) the prediction of possible future decisions based on developmental constructs oscillating between the most pessimistic and the most optimistic scenarios; and (5) insofar as the projection of probabilities suggests a discrepancy from goals, the invention of alternatives and the recommendation of solutions.¹⁸ Those who use the techniques of the New Haven School are always guided by the overriding concept of a global public order of human dignity, which sets as its goal the maximization of access by all to all the values humans desire,¹⁹ i.e., the things they want out of life (and not just those things they need as determined usually by someone other than themselves).

The unique virtue of this intellectual framework is that it allows all aspects of a problem to be addressed—to know the entire playing field and all the players. Legislators are well served in undertaking this analysis before prescribing solutions to pressing social problems. More often than not, their view of the issues is clouded by lobbyists representing powerful organized constituents; the interests of many in the public at large are overlooked because they are not effectively represented. Applying the New Haven approach would make sure that all the conflicting claims and claimants are being taken into account. However, whereas McDougal and Lasswell have put great emphasis on the importance of the use of the metalanguage needed to convey this taxonomy to achieve a measure of ever greater precision, Michael Reisman—outside of his writings dedicated to theory—often does not apply the framework and its terminology expressly. While this empowering methodology undergirds much of his writing, he does not feel compelled to always use some of its specific terminology, and does what he does best:

18. See *id.* at 123-24.

19. W. Michael Reisman, *Development and Nation-Building: A Framework for Policy-Oriented Inquiry*, 60 ME. L. REV. 309, 311-12 (2008); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 26 THESAURUS ACROASIAM 129, 144-45 (1997); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 333-34 (1999).

capture the audience with his unmatched mastery of the English language and any subject matter he chooses to address.

III.

When Michael Reisman starts to speak, the room falls silent. Any sentence he utters on a podium can be safely entered into an article or a book. He does not need a teleprompter or a manuscript to achieve this effect. His skillful and precise use of words from an immense vocabulary—not only in his native tongue, but also from the numerous other languages he speaks—stills the audience into rapt attention. Most recently, he came to Miami to speak on the Cuban embargo. To a mesmerized audience, he declaimed: “Keep in mind that when you destroy an economy, you destroy lives. You destroy families. It’s not peaceful.”²⁰ More often than not, he sees aspects of the problem that others have overlooked.

This attention he commands is not only due to his uncommon skills of oratory. Audiences listen to Michael Reisman because they sense the authenticity of his convictions and the wisdom of his message. His commitment to the truth and human values shines through every word he speaks. He is beyond pettiness and dedicated to the rationality of the discourse. That is why even many of the natural opponents of the New Haven approach hold him in highest esteem, as is reflected in the enthusiastic response we have received from amongst international lawyers of all jurisprudential stripes to the project of a *Festschrift* in his honor.

Michael Reisman is convinced of the analytical power and the creative potential of the New Haven approach. No other approach holds similar promise if the task of lawyers is seen as devising solutions to social problems. He is, however, open to any other frameworks or suggestions that might do a better job. Referring to Chairman Deng Xiaoping and the Chinese proverb he made famous, he stated recently:

It does not matter whether a cat is black or white but whether it catches mice. Our loyalty is to the values of human dignity and our goal is a world order producing and distributing those values. The New Haven School was established to refine and apply tools to achieve that goal. If there is a better cat around, we would be the first to use it. As far as we have been able to tell, there is not.²¹

The touchstone of a good theory is its practical application. Or, as Reisman quotes Kurt Lewin in the introduction to his *Jurisprudence* book: “There is nothing so practical as a good theory.”²² In the practice of law, beyond the area of explicit legislation or regulation, the application of such prescriptions often takes place in a highly institutionalized environment which mandates adherence to certain pressures of role and structure of argument. In order to reach the goals the explicitly value-oriented New Haven School postulates, such environmental restrictions need to be heeded to be at all

20. Ana Rodriguez-Soto, *Cuban Embargo: Right or Wrong?*, FLA. CATH. ONLINE, Oct. 30, 2008, http://www.thefloridacatholic.org/mia/2008_mia/2008_miaarticles/20081107_mia_embargo.php.

21. Reisman et al., *supra* note 5, at 582.

22. REISMAN & SCHREIBER, *supra* note 1, at 1.

effective. That is why it is not surprising that Reisman applies traditional legal methodologies to the solution of problems he has to solve when he performs the function of an arbitrator²³ or when he addresses courts both domestic and international. The parties come to these highly structured fora with expectations about the content of the prescriptions applied to their dispute, and they ought not to be surprised by a decision *ex aequo et bono* when they have not accorded the decisionmaking body any such power. Thus it comes as no surprise that Reisman has applied traditional forms of legal argument, especially interpretation, in the many cases he has been called on to serve as an arbitrator or as counsel to arbitration and litigation. That is the dialect spoken in these fora; it is the only cat around. To the extent that it allows for creative argument, e.g., regarding the policy interpretation of open-ended prescriptions, it still leaves room for effective use of New Haven's configurative jurisprudence.

IV.

Ultimately, Michael Reisman is dedicated to the goals of a world order of human dignity. He does not content himself with mere observation and empirical research of interesting phenomena. He makes judgments on whether the phenomena described, in particular, certain types of human conduct, by individuals or groups, should persist in light of the values of human dignity.²⁴

This position in favor of a world order of human dignity has been caricatured as serving as the international legal spearhead of the U.S. government, or at least its handmaiden, in the Cold War. Certain stances taken by McDougal and Reisman were controversial, particularly regarding instances of American use of force.²⁵ Strong battles of opinion raged over the

23. Michael Reisman laid a solid foundation for his influential arbitral practice in his magisterial J.S.D. thesis, W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971). *See also* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992); THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008).

24. W. Michael Reisman, *Autonomy, Interdependence and Responsibility*, 103 YALE L.J. 401 (1993) (commenting on Walter Otto Weyrauch & Mauren Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993)).

25. *See, for example,* McDougal and Reisman's advocacy of humanitarian intervention to stop mass slaughter, genocide, and other massive violations of fundamental human rights—as in the case of Biafra—or to rescue nationals, as in the Entebbe and Tehran Hostage Rescue incidents. W. Michael Reisman, *Humanitarian Intervention To Protect the Ibos*, reprinted in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973) (prepared in 1968 as a petition to the United Nations written with the collaboration of Myres S. McDougal) [hereinafter Reisman, *Ibos*]; Myres S. McDougal & Michael Reisman, Letter to the Editor, *The Entebbe Rescue and International Law*, N.Y. TIMES, July 16, 1976, at 16; Michael Reisman, *Exchange: The Rescue Mission: Humanitarian Intervention*, 230 THE NATION 612 (1980); *see also* W. Michael Reisman, Editorial Comment, *Coercion and Self-determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990). For more recent, significant statements on the lawfulness of the use of force, *see* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-defense*, 100 AM. J. INT'L L. 525 (2006); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); and W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (2004).

Vietnam War, even amongst early adherents of the approach.²⁶ What is often overlooked in the evaluation of these struggles is the fact that the approach's guiding light, defined as an order which maximizes access by all persons to all the values of human dignity, is much more complex and multifaceted than many critics care to explore.

Throughout his life, Michael Reisman, has adhered to the principle that an ideal legal order should allow all individuals, and particularly the weakest among them, to realize themselves and accomplish their aspirations. His early writings, in 1968, articulate the lawfulness of international concern over Ian Smith's Southern Rhodesia²⁷ and the situation in South West Africa.²⁸ With Myres McDougal, the same year, he asserted the continuing validity of humanitarian intervention—now a staple of international law, after Kosovo and Rwanda—in the case of the bloodily crushed attempt of the Ibos to secede from Nigeria,²⁹ hardly an imperialist proposal. In 1971, he promoted ratification of the International Convention on the Elimination of All Forms of Racial Discrimination,³⁰ as well as taxing businesses for human rights.³¹ His consistent struggle against bribery³² makes him scarcely a proponent of Washington realpolitik. He was concerned about unauthorized coercion in 1983,³³ and he issued a passionate plea for an absolute prohibition of torture in 2006.³⁴ He thought and wrote about some of the most vulnerable communities, indigenous peoples, since the early days of his career.³⁵ He suggested listening to their voices, to explore their “inner worlds,”³⁶ to heed their cries about the taking of their lands, the disappearance of their language, the termination of their ways of life. As the President of the Inter-American Commission on Human Rights, he oversaw the drafting of a proposed American Declaration on the Rights of Indigenous Peoples³⁷—a project that, unfortunately, has languished since his departure and sterling leadership. He drew attention to the often dire effects of economic sanctions on the people of

26. Compare JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* (1972), and John Norton Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 1061 (Richard A. Falk ed., 1969), with Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW*, *supra*, at 445. Reisman was not an active participant in that debate.

27. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1 (1968).

28. W. Michael Reisman, *Revision of the South West Africa Cases*, 7 *VA. J. INT'L L.* 1 (1966).

29. See Reisman, *Ibos*, *supra* note 25.

30. W. Michael Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 *DENV. J. INT'L L. & POL'Y* 29 (1971).

31. Michael Reisman, *Polaroid Power: Taxing Business for Human Rights*, *FOREIGN POL'Y*, Fall 1971, at 101.

32. REISMAN, *supra* note 16; W. Michael Reisman, *Campaigns Against Bribery*, *YALE ALUMNI MAG.*, Feb. 1979, at 17.

33. W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 *EMORY L.J.* 499 (1983).

34. W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 *AM. J. INT'L L.* 852 (2006).

35. W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 *ST. THOMAS L. REV.* 25 (1996).

36. *Id.* at 30.

37. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L./V/II.95, doc. 6 (1997), reprinted in 6 *INT'L J. CULTURE PROP.* 364 (1997); W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 *AM. J. INT'L L.* 350 (1995).

the targeted countries.³⁸ In his complete redrafting of the casebook *International Law in Contemporary Perspective*, that I had the pleasure of co-authoring, he decided to include a central chapter on human rights and place it ahead of the traditional section on the “Allocation, Protection and Regulation of Use of the Resources of the Planet.”³⁹

The priorities are thus set straight: Michael Reisman, as he stated in his 2007 General Course on International Law at The Hague Academy, sees the international lawyer of the twenty-first century as a “world citizen.”⁴⁰ For those of us committed to a world order of human dignity, he, however, is indeed more than a citizen: Michael Reisman, the realistic idealist, is a beacon of hope, a bridge between cultures, a light in troubled waters. We are blessed to know him, and to count him as a friend. We wish for many more years of his enlightened leadership.

38. W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86 (1998).

39. W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 445 (2d ed. 2004).

40. W. Michael Reisman, Hague Academy, General Course on Public International Law: International Law in the Twenty-First Century (Summer 2007) (unpublished Background Materials), available at <http://www.ppl.nl/summercourses/2007/reisman.doc>.

Essay

Jupiter as Everyman: Michael Reisman and the Scholar as Teacher

James E. Baker[†]

The scholar is not The Intellectual. He is Man Thinking. Man Thinking is not the member of a race apart. He is the citizen performing the function appointed for all citizens in a civilized state, a function without which there would be no civilized state. He is Everyman purposefully apprehending the meaning of things Between the true scholar and the teacher there is no fundamental incompatibility but a fundamental affinity of the most intimate kind.

—A. Whitney Griswold¹

Quod licit jovi, non licit bovi. What is permitted of Jupiter is not permitted of cows. I do not know Latin, but I do know this phrase. I learned it from Michael Reisman. It stuck with me because it captures the authority of the president in the area of national security. While serving as the Legal Adviser to the National Security Council (NSC), I found it useful in explaining to NSC staff why the president could accept gifts, but they could not. He was Jupiter and they were cows.

Today, the phrase offers a point of departure for considering Michael's contribution to the field of national security law. Although I am hesitant to suggest that Michael's academic colleagues are somehow cows (they are not), I have no hesitation in calling Michael Jupiter. That is because Michael's contributions stand apart.

There is, of course, his scholarship: twenty-two books, three hundred articles, and counting. This work is comprehensive, realistic, and it bridges the gap between law and legal policy because it describes where we should go, not just where we are, or have been. For that reason, it is useful to the national security practitioner.

Michael has also prepared countless students for careers in public service—in government and academia. He has done so directly in the classroom and in countless letters of recommendation. He has also done so indirectly by offering a distinct and distinctive voice at Yale on matters of international law, constitutional law, and jurisprudence.

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1. A. WHITNEY GRISWOLD, *LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL* 36-37 (Yale Univ. Press 1962) (1959).

Michael is Jupiter because he is a Scholar-Teacher, not one or the other, but both as one—representing “a fundamental affinity of the most intimate kind.”² In this role, this most uncommon writer, intellect, and tutor is what Griswold called the “Everyman purposefully apprehending the meaning of things.”³ What is more, Michael exemplifies many of the traits most useful to the practice of national security law. No wonder that through his scholarship, teaching, and example, Michael has informed, tested, and inspired generations of lawyers.

I appreciate that now. However, I will admit that I did not feel so inspired the first time I talked with Michael. He did not seem like Griswold’s Everyman. And I felt like a cow.

* * * *

The knock on the door was followed by, “Come!” Lunch ensued in the faculty lounge. Michael had just invited me to co-write a paper on covert action based on a single comment I made in class. We continued “the discussion” at lunch, which meant that Michael and Myres McDougal continued the discussion. I grazed. I didn’t understand a word they said. Were they speaking Latin? No. It was a legal dialect I came to refer to as “Ladougalman”—a form of perfect prose derived from the scholarship of Professors Lasswell, McDougal, and Reisman, laced with phrases like “constitutive process,” “human dignity,” “modalities,” and “minimum and optimum world public order.”

What had I gotten myself into? After lunch, I called on Professor Eli Clark, whose reputation as the warm and kind undergraduate Master of Silliman College also characterized his open-door policy at the law school. I sat below the map Eli used as a pilot during “Operation Market Garden,” the Allies’ bold, but ultimately unsuccessful, attempt to drop airborne troops to seize the lowland bridgeheads to the Rhine. Then, I reported my predicament. Did he have a dictionary that would define the foreign phrases I heard at lunch? He did not. I would have to devise my own. But he did have words of encouragement and told me to jump at the invitation.

When I hit the ground, I found friendship, rigor, and an Everyman scholar dedicated to the study of force, minimization of suffering, and the advancement of human dignity and the law.

* * * *

Constitutional government is not on autopilot. It is a constant and incremental grind that depends on the moral integrity of the lawyers who wield the Constitution’s power and promise. This is especially true in the area of national security where much remains unseen and beyond external validation.

2. ALFRED WHITNEY GRISWOLD, IN THE UNIVERSITY TRADITION 112 (1957).

3. *Id.*

[E]xperience has obscured the fact that, no matter how carefully defined and administered, no government of laws is insensible to what Plato termed “the endless irregular movements of human things.” Laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself.⁴

Michael’s work reflects this understanding. It stands apart in its willingness to address the three dimensions of national security law: the substance of the law; the process of decision; and the nature of legal practice, including the role that personality plays, or what he might call “human agency.” Indeed, without understanding process and practice, substance can become an abstraction. Without understanding process, the lawyer cannot meaningfully apply the law because he won’t be in the room to provide advice to the decisionmaker. He will also be excluded from the decisionmaking forum if he does not understand how to apply law to policy in a realistic, but value-based manner.

Michael’s analysis is realistic. He analyzes the law as it is (or is not, as the case may be), not as he or others might wish it to be. Hence, Michael distinguishes between what he refers to as the operational code and the aspirational or normative myth system. “By operational code is meant a set of norms that operate in a certain sector and that actors deem to be authoritative even though the norms may be inconsistent with formal legal codes.”⁵ Thus, the operational code recognizes that all states are not equal in defining international law, and on some matters, elites matter more than other persons. *Quid licit jovi, non licit bovi*. This is not a cynical view, nor a matter of *Pax Americana*; it is descriptive.

It is the operational code that informs policymaking. Thus, Michael’s scholarship is immediately relevant to practitioners, that is to say, the President, national security principals, congressional leadership, and the lawyers who advise them. If you believe, as I do, that the law should regulate decisionmaking and can guide actors toward informed and wise choices, then these individuals are your most important audience. And decisionmakers need to know what the law is at the outset, without policy spin or preferential lean, just as they need to know what the intelligence is, without spin or lean. That does not mean lawyers should limit themselves to “yes,” “no,” or “I don’t know,” any more than intelligence analysts should eschew predictions or best judgments. It means they should indicate what is hard law, what is nuanced or debatable law, and what is legal policy directed toward preferred outcomes.

Michael’s work is policy-based because it is value-based. Michael is realistic without losing sight of the law’s ideal and the overriding objectives of human dignity and optimum public order. This interjection of values is accomplished not by pretending the law is something it is not, but by articulating what it should become by identifying preferred outcomes, showing decisionmakers how to achieve those outcomes, and demonstrating

4. GRISWOLD, *supra* note 1, at 161.

5. W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777, 777 n.3 (1989).

why those values improve our physical security and advance our liberty interests.

[I]t is not sufficient for the scholar simply to identify and assemble trends in decision. Trends must then be tested against the requirements of world public order as a means of assessing their adequacy. Insofar as they are found wanting, scholars should take the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future.⁶

In short, the difference between the operational code and preferred outcomes is the difference in practice between telling the decisionmaker what the law is, and advising the decisionmaker on the pros and cons of choosing one legally available option over another and how best to shape the law. The latter is legal policy. Put more bluntly, Michael is not on an academic hamster wheel. He aims to close the gap between the academic and the practical. He writes to inform, to guide, and to change, so that the law might better preserve public order and advance human dignity.

Michael's work is also distinctive because it identifies and incorporates the critical influence that process (good, bad, or absent) plays in legal and policy decisionmaking. Indeed, process and practice are often more important than substance, particularly if the decisionmaking process is colored by the pathologies of secrecy, speed, and immediacy, as is often the case in national security practice.

This understanding of process is reflected in the seven functions of decisionmaking: intelligence, promotion, prescription, invocation, application, termination, and appraisal.⁷ While the terminology is dense, the analysis is precise, with substantial emphasis on the first and last criteria. Decisionmakers learn at their peril that mastery of the intelligence instrument is integral to their roles. This understanding is crucial where the use of force is contemplated and the distinction between evidence and actionable intelligence is critical.

If the United States is sometimes found wanting in the area of long-range intelligence, it is even more wanting in the area of effective appraisal. In theory, and sometimes in practice, this happens during the process of decision—at Principals and Deputies meetings. But the focus tends toward the immediate and not the enduring consequences of policy choice. Moreover, rarely is there an effective process of ongoing appraisal—internal or external—to ensure that decisions are implemented as intended and that one problem solved does not mutate into a new problem requiring policy adjustment.

Michael also appreciates the sometimes dominant role of informal rather than formal processes of decisionmaking, as well as the role personality has in shaping decisions, whether those decisions are made at NSC meetings or faculty meetings. This is an operational code of a different sort. Lawyers, and

6. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 6 (1999).

7. Michael Reisman, 1995 Seibenthaler Lecture, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 612 (1996).

certainly law schools, tend to focus on the formal—the textual conveyance of law or process. Michael looks behind the curtain to determine how and where decisions in fact are made, and by whom. This awareness of human influence does not reflect the scholar apart. This is the scholar as part of the human condition—Everyman contributing to the meaning of things.

Whether or not you agree with his voice, students who are exposed to it “often spen[d] the rest of their lives under the influence of his ideas or contending with them,” which is how Michael himself described Professor McDougal.⁸ First, that means contending with the notion that the Constitution is designed to uphold and defend our physical security and our liberty interests—not one or the other, but both. The liberty interest entails the preservation of our constitutional values, including those values based on due process and tolerance, but also the notion of physical defense, found in the Preamble to the Constitution and enumerated Articles that follow. Security means not only physical safety, but also the sense of secure space that allows us to carry on a way of life that is diverse and tolerant. Second, one must also contend with Michael’s view that international law is not the aspirational refuge of the complex, elite, or weak. Shaped well and wielded wisely, international law is an instrument that advances our physical security and upholds our legal values.⁹

But these observations of Michael’s work represent the tip of the iceberg. The scholar who believes in law must also believe in the conditions that foster the law. That entails the training of men and women not just in the substance of the law, but in the process, practice, and values of law. In short, the scholar must also serve as teacher. If Michael’s scholarship has informed generations of national security officials, his teaching has directly shaped generations of national security lawyers. It is this contribution as the Scholar-Teacher that runs deepest, but it is hidden in plain view, disguised by an overwhelming written legacy and hidden beneath the waves in the practice of others.

It turns out that Michael’s attributes as the Scholar-Teacher include many of the values necessary to meaningfully practice national security law. In no area of law are these values more vital than in addressing questions involving intelligence and the use of force. The pressure is greatest where lives are at stake and the law most subject to malleable claims of authority. I will describe a few of the traits I have in mind.

Rigor. The best skills training I ever received as a lawyer was as a Marine Corps infantry officer. I got screamed at a lot, operated under pressure, and was held accountable for the decisions I made, or should have made. The best analytic training I ever received came from Michael Reisman. The Reisman tutorial was my Legal Boot Camp. It was there that fledgling arguments were broken down, tested, and rebuilt as I gained the intellectual confidence to find my legal voice and then defend it.

8. Richard A. Falk et al., Comment, *Myres Smith McDougal (1906-1998)*, 92 AM. J. INT’L L. 729, 733 (1998).

9. James E. Baker, *What’s International Law Got To Do with It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT’L L. 639, 651-54 (2007).

When we were working on our book, the first chapter I submitted to Michael was met with a single-word response: “No.” This was succinct feedback. It was also a bit “Marine” in character. But it came with something more, which made all the difference. Michael also conveyed the confidence of high expectations and the certainty that he knew I could do better. He asks for rigor because he expects rigor, and in expecting rigor, he shows respect for his students and his colleagues. This is the difference between the teacher who assumes a student is up to the task, and the teacher who assumes that the student is not.

Endurance. I was startled when I was asked to contribute to a celebration of Michael’s seventieth birthday. Naturally, I was happily surprised that I was asked at all. I was also surprised because it never occurred to me that Michael was seventy years old. He is ageless. His scholarship is ageless. His engine is stuck in full steam ahead, and it always has been.

I once met someone who went to grade school and high school with Michael. “Really?” I asked. It had not occurred to me that Michael entered this world as something other than a professor. I had to ask, did he speak in prose then as he does now? “Yes.” Did he write book reports, or just books? “Just books,” was the answer. Ageless indeed!

Work ethic. John Kenneth Galbraith was renowned for the spontaneity of his written voice. When asked the secret to this spontaneity, he responded: five drafts.¹⁰

In contrast, Michael is known for speaking in publishable prose. In 1992, I attended a conference at the Naval War College on the use of force. The audience was invited to comment after the primary presentation. Hands shot up throughout the hall; Michael spoke first. Following his remarks, the presenter again asked for comment; not a hand went up. Nobody wished to follow Michael’s publishable observations. Fortunately, with some coaxing, the conversation continued.

But if Michael is a verbal printing press, he gains his insight the old-fashioned way—through study, inquisition, and an open mind. James Russell Lowell said that President Abraham Lincoln was a great lawyer because he was able to see both sides of every argument.¹¹ No one who has benefited from Michael’s presence at Yale will fail to see that, where international and constitutional law are in play, there are at least two sides to every argument. Here the iceberg metaphor remains apt. There is much hard work beneath the waves of prose.

Humility. The first rule of intelligence is to know what you do not know. Michael is a lifelong learner because he knows what he does not know. In 2001, I co-taught a course with Michael entitled “Managing National Security.” I was uncertain at the outset about the allocation of speaking roles. At the first class, when it was clear that Michael did not intend to speak, I

10. Interview by Harry Kreisler, Inst. of Int’l Studies with John Kenneth Galbraith, *Intellectual Journey: Challenging the Conventional Wisdom: The Art of Good Writing* (Mar. 27, 1986), available at <http://globetrotter.berkeley.edu/conversations/Galbraith/galbraith2.html>.

11. See James Russell Lowell, *Abraham Lincoln*, in *ESSAYS ENGLISH AND AMERICAN* 441, 455 (Charles W. Eliot ed., 1910).

began to talk about the subject of national security process. After one hour, I was near the end of my “contingency” outline. During the break I asked, “Aren’t you going to say anything?” Michael responded: “Why would I? I am learning too much.” This exchange also reminds me of something else Griswold said about teaching: “From the standpoint of the student, . . . if he’s at all curious intellectually . . . he’s bound to learn more from the man who is himself learning than he is from the man who just tells him about learning.”¹² That is the scholar as teacher. On the train ride home, I prepared a detailed outline for the remainder of the course.

Grace. Michael may be an intellectual drill instructor, but he instructs with grace. He respects his students and his colleagues, even if he disagrees with their arguments. Michael’s answer to a bad idea is a better idea, not a louder voice.

Moreover, Michael bears the moral authority of someone who “practices what he teaches.” In practice, Michael remains focused on the use of force, humanitarian values, and the realization of minimum, if not optimum, public order through law. He then, in turn, applies and teaches these concepts. Consider, for example, his tireless efforts to bring the Eritrea-Ethiopia boundary dispute to peaceful resolution and his work on the Inter-American Commission. Michael honors the legal profession and the academy by acting as well as professing to advance the interests in which he believes. This informs his teaching and it inspires others to do the same.

Moral courage. Finally, Michael illustrates in the academic context what it means to be Teddy Roosevelt’s “Man in the Arena.”¹³ Michael is not a fence-sitter and he does not play to the audience. He calls it as he sees it. And, if you are on a fence, he will ask you off.

He makes predictions. He is wrong some of the time, but he is right most of the time. Consider that Michael was writing about nonstate actors and terrorism in the 1970s.¹⁴ And, in the 1990s, when the executive branch was having trouble attracting congressional support to amend the law to better counter terrorism, Michael was speaking about the looming threat.¹⁵ Michael said the following in 1995 regarding the threat of terrorism:

Terrorism appears to be evolving into the preferred form of covert action of weaker states and, to an extent that cannot yet be gauged, of groups that are not affiliated with any state. . . . One way, if not the only way, to prevent terrorist incidents is by covert counter-action. Are we witnessing the birth of a holy war against irregular terrorist forces about the planet? If so, it is likely to be a “dirty” war unless the normative restraints that are appropriate are carefully clarified and applied.¹⁶

12. GRISWOLD, *supra* note 1, at 197-98.

13. Theodore Roosevelt, The Man in the Arena: Citizenship in a Republic, Address at the Sorbonne, Paris (Apr. 23, 1910), in THEODORE ROOSEVELT: LETTERS AND SPEECHES 778-98 (Louis Auchincloss ed., 2004).

14. See, e.g., W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT’L L. 1 (1973).

15. See, e.g., W. Michael Reisman, Remarks, *Covert Action*, 20 YALE J. INT’L L. 419, 423 (1995).

16. *Id.* at 424.

For those with innate confidence, the Arena is a welcome mat. But for those persons with innate modesty, the transition from student to advocate to public official can be difficult. Nowhere will the scrutiny become more glaring for the lawyer than where questions of force are involved. We should hope so in a system of democratic accountability. But it is good to have a role model like Michael when the kitchen gets hot.

Because Michael is always in search of preferred outcomes to better serve human dignity and public order, he is often in that kitchen. That, in turn, puts him in the Arena. And, like the man in Roosevelt's Arena, he takes his shots. Consider Michael's article on the 1996 Qana incident in which he suggested that states should assume compensatory responsibility for collateral damage as a matter of humanitarian instinct and as a vehicle to reinforce discrimination in targeting.¹⁷ The article was not embraced in government circles. But the marketplace of ideas was better for contending with an idea that had as its goal the minimization of suffering in warfare.

In short, he is not the critic, but Man Thinking, apprehending the meaning of things and how the law might inform a more civilized society.

* * * *

As Scholar-Teacher, Michael has brought credit to Yale and its law school. He has honored Yale University's commitment to public service, measured in the scholarship and deeds of teachers, judges, presidents, civil servants, and the many lesser-known names on the walls of the Woolsey Hall rotunda, whose commitment to service was greatest of all. Most of all, he has used his remarkable intellect in the interest of a civilized society founded on order, dignity, and law. In this regard, Michael is everyman, or at least Griswold's Everyman. He is also Man Thinking, a scholar dedicated to apprehending the meaning of things to advance our common interest in a civilized state. And, for this, I thank him.

17. W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397-98 (1997).

Essay

Rethinking the Divide Between *Jus ad Bellum* and *Jus in Bello* in Warfare Against Nonstate Actors

Eyal Benvenisti[†]

I. THE CHANGING LEGAL LANDSCAPE

A. *Eschewing Dichotomies*

Not very long ago the regulation of warfare by international law was conveniently organized according to several sets of dichotomies: the right to use force was determined by the presence or absence of an actual armed attack; the type of the military conflict was either international or internal, each with its unique set of norms; the regulation of the hostilities was founded on the dichotomy between combatants (and military targets) and noncombatants (and nonmilitary targets); and the obligations of parties to the conflict and those of neutral third parties were strictly distinguished. But, perhaps due to its counterintuitiveness, the most prominent of all dichotomies has been the sharp distinction between the *jus ad bellum*, the law governing resort to force, and the *jus in bello*, the law governing the conduct of hostilities.

Over time most of these binary choices have evolved into continua, and the sharp distinctions have softened into overlapping sets of norms. Exceptions to the prohibition on the use of force have been recognized in response to new types of challenges ranging from imminent attacks,¹ protracted and low-level attacks by nonstate actors,² and humanitarian catastrophes.³ Some would say, in addition, that the development of weapons of mass destruction capability could also at times legitimate a preemptive strike.⁴ The significance of the distinction between international and

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1. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985).

2. W. Michael Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUS. J. INT'L L. 317 (1989).

3. W. Michael Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, 91 AM. SOC'Y INT'L L. PROC. 431 (1997); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 75; W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000).

4. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999) [hereinafter Reisman, *International Legal Responses to Terrorism*]; W. Michael Reisman & Andrea Armstrong, *Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006); W. Michael Reisman, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 142 (2003).

noninternational armed conflicts has also been muted by the recognition that both humanitarian and human rights obligations are relevant to both types of conflicts. Guerrilla tactics that exploited the law's distinctions between combatants and noncombatants, and between military and nonmilitary targets, required the transformation of these sharp distinctions into a set of points along elaborate continua. Both pragmatic and normative reasons have led to the recognition of *erga omnes* applicability of the obligation to ensure compliance with the laws of war and have therefore obliged neutral states to be vigilant and even to take action.⁵

Curiously, however, the insulation of *in bello* legal assessment from *ad bellum* considerations has resisted this trend almost entirely.⁶ This dichotomy is still in vogue among most international lawyers and philosophers.⁷ Michael Walzer famously referred to these two sets of norms as “logically independent,”⁸ and even those who question the morality of this distinction understand its institutional significance. Yet there appear to be good reasons to question this distinction. In this brief Essay, I undertake to question the logic of the dichotomy by examining the growing influence of *ad bellum* considerations in assessing compliance with *in bello* obligations in the context of asymmetric warfare against nonstate actors.

B. *The Challenge of Asymmetric Conflicts*

This exercise suits a publication that celebrates the jurisprudence of Professor W. Michael Reisman. His close attention to changes in the underlying political, economic, and social factors inspired the recasting of many of these binary dichotomies as continua. Reisman also devoted much attention, as early as the 1980s, to the challenges that asymmetric conflicts pose to the regulation of warfare⁹ due to the demise of the “dynamic of reciprocity and retaliation”¹⁰ when nonstate actors are “neither beneficiaries of nor hostages to the territorial system.”¹¹

Perhaps as a response to the decline of that dyadic dynamic of reciprocity and retaliation, a new, broader dynamic has emerged, one that involves a host of other actors.¹² These actors—governments, international

5. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9).

6. Although the *jus ad bellum* assessment does depend on *jus in bello* considerations, a response to aggression that harms noncombatants excessively would be regarded itself as a *jus ad bellum* violation. Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK Y.B. U.N. L. 99, 124 (2007).

7. See, e.g., Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 723-34 (2008); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

8. MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (4th ed. 2006).

9. Reisman, *International Legal Responses to Terrorism*, *supra* note 4.

10. W. Michael Reisman, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT'L L. 82, 86 (2003).

11. *Id.*

12. See Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQUIRIES L. 97 (2006) (explaining the development of third-party review mechanisms by the erosion of bilateral reciprocity).

organizations, humanitarian nongovernmental organizations, and civil society—have been translating their growing sensitivity to crises and human suffering to the promotion of new types of monitoring and retaliatory mechanisms ranging from divestment to criminal prosecutions of those whom they find to have violated the law.

These various new actors and observers, and the institutions they have developed, address a new type of battlefield that challenges the distinctions upon which the law of war is founded. The tactics of nonstate actors exploit, and hence undermine, two basic assumptions that have sustained the *jus in bello* since its inception: first, that it is possible to compartmentalize the battlefield and single out with sufficient clarity military from civilian targets and; second, that there are obvious military goals, such as gaining control over territory, that can reliably tell us whether the collateral civilian damage was or was not excessive relative to the effort made to achieve those goals. The combination of these two assumptions gave rise to the possibility that humanitarian conflict, one in which armies would strive to induce each other into submission without recourse to “total war,” was achievable. War was about inducing concessions from the defeated party by degrading its military capabilities and weakening and disabling its fighters, without necessarily killing them.¹³

Unfortunately, neither assumption typically holds in warfare against nonstate actors. First, there are very few purely military targets. This dramatically limits the ability of a regular army to identify arenas where it can legitimately project its power. In fact, as the 2003 invasion of Iraq showed, the relatively weaker army will try to reduce these arenas by reverting to guerrilla tactics. Moreover, it is no longer clear what can be considered military gain, especially since control over enemy resources and territory often proves to be a liability rather than an asset. Without tangible military goals, commanders are tempted to simply capture or kill as many of their opponents as possible, or to intimidate their opponents’ noncombatant constituency.

Nonstate actors therefore pose a challenge that is fundamental to the vitality and content of the *jus in bello*. Which military objectives could be considered legitimate in an asymmetric warfare against nonstate actors? How should one gauge the legitimacy of collateral civilian damage? In what follows I suggest that bridging the divide between *jus in bello* and *jus ad bellum*, and expanding the *jus in bello* proportionality test to include aspects of the *ad bellum* conditions, offers a possible response to these challenges. *Jus in bello* proportionality analysis can take into account not only the *ad bellum* question of who is to blame for the *commencement* of hostilities, but also incorporate the decision of one of the parties to pursue unrelated goals or to prolong the military confrontation instead of negotiating its end, thereby offering a more comprehensive assessment of the legality of the military

13. As the 1868 St. Petersburg Declaration of the International Military Commission posited: “[t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy [F]or this purpose it is sufficient to disable the greatest possible number of men.” Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [St. Petersburg Declaration], Nov. 29-Dec. 11, 1868, 18 MARTENS NOUVEAU RECUEIL (ser. 1) 474, available at <http://www.icrc.org/ihl.nsf/FULL/130>.

action. Whereas according to the traditional *jus in bello* standard each enemy is entitled to pursue its adversary until its total defeat, it increasingly becomes relevant to inquire—at least in political discourse, if not in positive law—to what extent continuing the fight is necessary.¹⁴ For example, would it have been legitimate, during the 1991 campaign, for the coalition forces not only to drive the Iraqi forces out of Kuwait, but also to invade Iraq and replace the Iraqi regime? Under this framework, the party who had either no legitimate reason to resort to force, or no good reason to pursue it further, would be more limited in its ability to justify the infliction of harm on noncombatants when pursuing its military objectives. If these propositions become part of the law, they would effect a major change: the traditional *in bello* proportionality analysis never required the attacker to explain the necessity of attaining the military objective; the necessity of such action was taken for granted.

II. INTRODUCING *JUS AD BELLUM* CONSIDERATIONS INTO *JUS IN BELLO* ANALYSIS

A. *Observing State Practice*

The reasons for maintaining the “total separation” between *jus ad bellum* and *jus in bello*, which are generally valid, are both moral and pragmatic. Yet they become strained in the context of warfare against nonstate actors. As a result, it is possible to observe a shift in the attitude of different actors, who inject *ad bellum* considerations into their assessment of the legality of certain military measures. In this Part, I first articulate the observation concerning the changing practice and then discuss its normative basis.

Even the adherents of the separation between *ad bellum* and *in bello* admit that “conflicts continue to be viewed in terms of ‘good’ and ‘evil’ . . . [and that] the reality is that such differences, real or perceived, matter.”¹⁵ For example, during the Gulf War of 1991 both the coalition forces and the international community took into consideration the illegality of the Iraqi invasion of Kuwait when assessing the proportionality of the military tactics adopted by the coalition forces. As Gardam noted, “[i]n the assessment of proportionality, civilians, and to a lesser extent combatants, of the aggressor state were accorded less weight in the balancing process than combatants of the ‘just side.’”¹⁶ Reactions during the military conflict in Lebanon in the summer of 2006 conflated *ad bellum* with *in bello* obligations.¹⁷ Similarly, in reaction to the Israeli attack in the Gaza Strip in December 2008 and January

14. While some believe that the *jus ad bellum* assessment is applicable throughout the military conflict, see, e.g., Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 REV. INT’L STUD. 221 (1983), others maintain that the *ad bellum* proportionality requirement becomes irrelevant once war is raging, see, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 237-42 (4th ed. 2005). But even Greenwood maintains that the *ad bellum* and the *in bello* norms that apply simultaneously should remain insulated from each other.

15. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 41 (2008).

16. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 412 (1993).

17. E.g., Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779 (2006).

2009, key observers linked *ad bellum* and *in bello* considerations. When asked whether Israel's attacks were disproportionate, the U.S. ambassador to the United Nations responded: "Israel has the right to defend itself against these rocket attacks and we understand also that Israel needs to do all that it can to make sure that the impact of its exercise of right of self defense against rockets is as minimal and no affect [sic] on the civilian population."¹⁸

B. *The Implications of the Shifting Praxis: Reisman's Incident Analysis Approach*

To what extent do such reactions matter in law? In this inquiry, I follow Reisman's theory of the incident as a decisional unit in international law,¹⁹ which takes seriously the task of observing the responses of various actors to assertions of rights and obligations under international law. By observing reactions to incidents, it is possible to "mak[e] inferences about the normative expectations of those who are politically effective in the world community."²⁰ A responsible legal adviser must conclude from such reactions that the perceived justness of one's cause influences third parties' assessment of the proportionality—and hence the legality—of one's military actions. Such an observation is bound to shape the evolution of international practice and hence also the law.

C. *Evaluation*

Thus far I have articulated the proposition that *ad bellum* considerations do matter in *in bello* proportionality analysis, at least in political parlance. The "incident theory" suggests that further support for the proposition is likely to entrench it as the prevailing law. The task is now to reflect on this trend and to ask to what extent the proposition reflects sound policy considerations. Most contemporary scholars oppose the proposition based on two main arguments. First is the argument from dyadic reciprocity. To ensure compliance with *jus in bello*, both sides should enjoy its equal protection. The aggressor will have no incentive to comply with the law if the defender is relieved from the law's constraints. And because each side tends to view itself as just, unless *jus in bello* is insulated from *ad bellum* considerations, the two camps will immediately descend to ruthless brutality.²¹ The argument from reciprocity is convincing, and is even morally compelling,²² when conditions for reciprocity obtain. But warfare between a regular army and nonstate actors is not subject to the dyadic reciprocity rationale. The asymmetric relationship in fact incentivizes *both* sides to eschew reciprocal considerations: the nonstate actor

18. Press Release, U.S. Mission to the U.N., Statement by Ambassador Zalmay Khalilzad, U.S. Permanent Representative, on the Situation in Gaza (Dec. 31, 2008), available at http://www.usun-ny.us/press_releases/20081231_381.html.

19. W. MICHAEL REISMAN, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (1988); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984) [hereinafter Reisman, *International Incidents*].

20. Reisman, *International Incidents*, *supra* note 19, at 2.

21. See Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 889 (2004).

22. Yitzhak Benbaji, *The War Convention and the Moral Division of Labour*, 59 PHIL. Q. (forthcoming 2009) (on file with author).

resorts to terrorism, whereas the stronger regular army is tempted to inflict excessive harm upon noncombatants, to conflate military objectives with killing combatants, and to treat captured combatants as outlaws.

However, as mentioned above, the growing involvement in such conflicts of third parties, with their diverse modalities for reviewing the belligerents' actions, shifts the incentive structure from the traditional dyadic dynamic of reciprocity between the parties to a much broader dynamic.²³ The dueling parties must take the attitude of those third parties into account as the combat is played out not only bilaterally but also concurrently in the global arena. Toleration or condemnation by key international actors, including public and private actors and observers, as well as by foreign and international courts, often proves to be an effective constraint at least on the state party to the conflict. The state party will not descend into barbarism regardless of what the enemy does if it has an incentive to maintain its good reputation globally or to avoid criminal sanctions. Since third-party observers assess both *ad bellum* and *in bello* considerations, the percolation of *ad bellum* considerations into the *jus in bello* proportionality analysis can prove a rather sophisticated and effective constraint on the stronger regular army. The introduction of *ad bellum* considerations into the analysis of *jus in bello*'s vaguer concepts—which often call for balancing of competing considerations, such as the determination of excessive harm to civilians or the targeting of individuals “for such time as they take a direct part in hostilities”²⁴—would not provide either side with more freedom of action or impose greater risks to noncombatants. Quite to the contrary, a state party must convince the international community that its military operations are aimed at just causes to be able to justify the military goals it pursues. This fuller account of the *jus in bello* proportionality analysis²⁵ examines not only the necessity of the collateral harm to noncombatants but also the legitimacy of the pursuit of the military goals. What the traditional law takes for granted—that *in bello* all military goals are equally and always legitimate—can now be questioned by the emerging new assessors and indirect enforcers of the law.

This is not to suggest that whatever the aggressor does would be tainted as a *jus in bello* violation, nor that its population would thereby become fair game. The basic rules of the *jus in bello* need not change; the prohibitions on intentionally killing noncombatants, on denying quarter, etc., must remain insulated from *ad bellum* considerations. Once thrown into combat, combatants belonging to the aggressor would still be entitled to protect themselves and their population from attacks by their enemies, and their defensive military goals would be regarded as legitimate. Moreover, the party that initially defended itself against aggression may subsequently overreact or

23. See Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 482 (2007).

24. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), *adopted* June 8, 1977, 1125 U.N.T.S. 3.

25. On the difference between “thin” and “thick” meanings of *jus in bello* proportionality, see Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law* (Jan. 3, 2009) (unpublished manuscript, on file with author).

decline opportunities to settle the conflict, at which stage its margin of discretion will be reduced.

Besides the argument from reciprocity, the other possible argument against this suggested linkage between *in bello* and *ad bellum* is a moral one. This argument sets out from the assumption that the insulation of *jus in bello* from *ad bellum* considerations is moral because of the equal protection *jus in bello* accords to combatants and noncombatants regardless of their affiliation. Walzer calls it “[t]he moral equality of soldiers,” who “have an equal right to kill.”²⁶ Unequal application of the law is problematic because it divests combatants and noncombatants of protection despite their lack of responsibility for their leaders’ aggression.²⁷

There are two moral objections to this argument for *jus in bello* equality, which also support the injection of *ad bellum* considerations. The first objection is that we should not accord morally equal weight to the pursuit of unjust aggression.²⁸ Yet even those who raise this objection nevertheless accept that the laws of war—as distinguished from the morality of the war—must treat both goals as equal, because of the dyadic reciprocity between armies and their respective beliefs in the justness of their causes.²⁹ However, as argued above, this moral concession to practical constraints is not imperative under conditions of asymmetric warfare, where dyadic reciprocity is nonexistent and alternative mechanisms to assess justness exist. The availability of third-party institutions that enforce compliance with the law, and identify where justice lies, relieves the moral assessment from the shackles of pragmatic reasoning.

The second moral objection to the argument in support of the insulation of *jus in bello* from *ad bellum* considerations challenges the depiction of the *jus in bello* as evenly balanced. The focus on the law’s impartiality between the different combatants is misleading when one takes into account the *communities* that fight each other. The laws of war are inherently biased in favor of the stronger armies that can translate their relative economic power into military gains. The weaker party that fights for a just cause must nevertheless play by the rules that portend its defeat. The burden of obeying the law—and indeed the burden of the insulation of *jus in bello* from *ad bellum* considerations—therefore rests on the shoulders of the weaker side. Small wonder that the constituency of the weak finds the insulated *jus in bello* morally corrupt. Weaker communities might be more inclined to subscribe to a law that also takes into account the justness of the cause.

III. CONCLUSION OF AN OVERTURE

This short Essay can only outline the need to rethink the dichotomy between *jus ad bellum* and *jus in bello*, and hint at the potential for more

26. WALZER, *supra* note 8, at 34, 41.

27. *But see* Benbaji, *supra* note 22 (manuscript at 2, 14-17) (offering an alternative explanation).

28. Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 708-09 (2004); *see also* Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 44 (2005).

29. Hurka, *supra* note 28, at 45; McMahan, *supra* note 28, at 729-30.

nuanced law. Obviously, one can anticipate several refinements that may lie on the horizon, for example, in the context of individual criminal responsibility or the authority of an occupying power. One major concern is the precariousness of a system that relies on third parties, whose impartiality and skillfulness in assessing the actions and motivations of parties to a conflict may be called into question. Yet this is the very same system that we use to assess *ad bellum* lawfulness. Far from perfect, it is the best available system to measure compliance in asymmetric warfare against nonstate actors, and this system already shapes the behavior and expectations of the various nonlegal actors, including the parties to the conflict themselves. It is time for lawyers to digest and expound the meaning of this new practice.

Michael Reisman was able to anticipate the evolution of the law by constantly questioning time-honored postulates in light of “the common interests of the aggregate of actors.”³⁰ In his view, it is “the responsibility of the international lawyer . . . to assess innovative claims carefully for their contribution, in present and projected contexts, to the essential goals of law.”³¹ This short Essay seeks to apply Reisman’s insights and methodology to the study of the impact of *ad bellum* considerations on *in bello* proportionality. In an era when armed conflict was the business of professional armies detached from population centers and governed by reciprocity, dichotomies made eminent sense. They enabled enemies to communicate their mutual expectations. Binary messages—“yes” or “no” to the disproportionate killing of noncombatants—were feasible and effective. But most contemporary conflicts are different. Under such conditions, the insulation of *jus in bello* proportionality analysis from *ad bellum* considerations may prove at times to be more of a detriment than a contribution to the essential goals of the law. It is therefore the responsibility of the international lawyer to reassess what is perhaps the last remaining dichotomy in the laws of war.

30. Reisman, *supra* note 10, at 89.

31. *Id.*

Essay

International Law and the Use of Force: A Plea for Realism

Nicholas Rostow[†]

I. INTRODUCTION

Since the adoption of the U.N. Charter in 1945, there has been almost continuous debate regarding the provisions governing the international use of force. On the one hand, the U.N. Charter Chapter on “Principles” prohibits “the threat or use of force against the territorial integrity or political independence of any state.”¹ On the other hand, the Chapter on “Action with respect to threats to the peace, breaches of the peace, and acts of aggression” affirms “the inherent right of individual or collective self-defence if an armed attack occurs.”² Arguments have persisted because of the centrality of these provisions to the maintenance of even minimum international order.

Two schools of thought have predominated.³ They are exemplified by the commentary on the United Nations Charter, edited by International Court of Justice (ICJ) Judge Bruno Simma,⁴ by a number of opinions of the ICJ since 1986,⁵ and by the 2004 Report of the U.N. Secretary-General’s High-level Panel on Threats, Challenges and Change.⁶ Despite the extensive literature on this subject since 1945, no consensus exists.⁷

The following Essay surveys anew familiar issues in the international law governing the use of force. It concludes that adherence to the

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1. U.N. Charter art. 2, para. 4.

2. *Id.* art. 51. On versions in other authoritative languages, see 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 803 n.140 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter U.N. CHARTER COMMENTARY].

3. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 416-20 (Humphrey Waldock ed., 6th ed. 1963). The Brezhnev Doctrine and Soviet attitudes toward international law ceased to have policy relevance after 1989. See Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

4. U.N. CHARTER COMMENTARY, *supra* note 2. The sumptuous binding conveys an impression of authoritativeness.

5. Legal Consequences of a Wall in Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

6. Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

7. BRIERLY, *supra* note 3; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 95 (2d ed. 2004); Christine Gray, *The Charter Limitations on the Use of Force*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 86-98 (Vaughan Lowe et al. eds., 2008).

requirements of economy of coercion—the principles of necessity and proportionality—holds out the best hope that those using force in self-defense will follow the laws of war while achieving their lawful objectives against those who engage in asymmetrical warfare⁸ without regard to such laws.

II. THE DEPARTURE FROM REALISM

The Simma commentary on the U.N. Charter provides a starting point. It sums up the argument as follows:

The UN Charter did not intend to exclude self-defence entirely, but restricted its scope considerably. A comparison of the different wording of the two provisions [Arts. 2(4) and 51] illustrates that, remaining uncertainties apart, ‘armed attack’ is a much narrower notion than ‘threat or use of force’. If Art. 51 is thus read in connection with Art. 2(4), the stunning conclusion is to be reached that any State affected by another States’s unlawful use of force not reaching the threshold of an ‘armed attack’, is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force, which are thus often totally ineffective. This at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible. Until an armed attack occurs, States are expected to renounce forcible self-defence. Because of the pre-eminent position of the SC [Security Council] within the Charter system of collective security, the affected State can in that situation merely call upon the SC to qualify the violations of Art. 2(4) as constituting a breach of the peace and to decide on measures pursuant to Arts. 41 or 42. Only if and when the prohibited use of force rises to an armed attack can the State concerned resort to forcible measures for its defence.⁹

Further, a state may not use force to end another state’s unlawful behavior.¹⁰

Simma’s perspective resonates in international legal institutions. In the last twenty years, the ICJ, for example, has developed a body of jurisprudence consistent with the Simma view that has drawn severe, reasoned criticism¹¹

8. See generally Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

9. U.N. CHARTER COMMENTARY, *supra* note 2, at 790 (citations omitted). Thomas Franck argues that state practice has made Article 51 more flexible than the drafters intended. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 49-51 (2002); see also Antonio Cassese, *Article 51*, in JEAN-PIERRE COT & ALAIN PELLET, *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE*, 1329, 1358-59 (3d ed. 2004).

10. U.N. CHARTER COMMENTARY, *supra* note 2, at 794. Some suggest that contemporary international law bars one State from aiding another to suppress a rebellion. As a result, today, in the event that we had to live again through the Spanish Civil War, we could expect to hear arguments that assistance to the government of Spain would be unlawful. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 251-52 (1985). Under the theory advanced in the Commentary, one may well wonder if the U.S. attack on Afghanistan in 2001 should have been viewed as legitimate absent such endorsement. After all, the “armed attack” took the form of crashing civilian airliners into buildings.

11. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6); *Advisory Opinions: Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). All of these opinions are the subject of much commentary. For a few examples, see Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 720-22, 730-32 (2008); Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT’L L. 26, 36 (2005); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-defense*, 100 AM. J. INT’L L.

and led some governments, including the United States, to avoid the Court and other international tribunals wherever possible. Among the difficulties with this body of jurisprudence is the suggestion that there is some legally discernible quantum of force that constitutes an armed attack and some legally principled way to distinguish between armed attacks and attacks, whether armed or not, that do not constitute “armed attacks” within the meaning of Article 51. As a former Legal Adviser to the U.S. State Department put it, defining an armed attack in terms of its gravity

would encourage States to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses. Moreover, if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts.¹²

The Simma view states that the law requires the defender to absorb a first strike. This proposition is unrealistic and, in the wake of the events leading to World War II—Manchuria, Abyssinia, Rhineland, Spain, Austria, Czechoslovakia, and Pearl Harbor—was known to be so in 1945. The interpretation also is at odds with the notion, as Justice Jackson put it, that law is not a “suicide pact.”¹³ It attempts to fix a definition of permissible self-defense in a changing context¹⁴ and appears to see the defender as more dangerous than the attacker.

Second, the commentary’s analysis of Article 51 is incomplete, ignoring the text and structure of the U.N. Charter. Article 51 uses the term “inherent”¹⁵ to describe the right of self-defense. Earlier writers stressed the importance of this wording as meaning that the right predated the Charter and that the Charter reaffirmed the existing legal contours of that right.¹⁶ Thus, Sir

525, 533-37 (2006); Nicholas Rostow, *Wall of Reason: Alan Dershowitz v. The International Court of Justice*, 71 ALB. L. REV. 953, 972-84 (2008); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 80-93 (2008).

12. William H. Taft IV, *Self-defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300-01 (2004).

13. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

14. Or, as was written at the beginning of the U.N. Charter age:

The Charter, like every written Constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies an interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. . . . No state can reasonably be expected meekly to accept an interpretation of the Charter which it considers completely wrong, however large the majority in favour of such an interpretation may be. . . . This remark does not apply to an interpretation given by the International Court of Justice or other bodies which *may be* authorized to give a binding interpretation.

Pollux, *The Interpretation of the Charter*, 23 BRIT. Y.B. INT’L L. 54, 54-57 & n.2 (1946) (emphasis added). This is not to say that a “living” document means whatever one wants it to mean.

15. *See supra* text accompanying note 2.

16. *See, e.g.*, LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 345 (3d ed. 1969); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 1952-II RECUEIL DES COURS 451. Reisman also ignores the significance of the word “inherent” as indicating a recognition that the right existed prior to the Charter and is not impaired by it. Reisman & Armstrong,

Humphrey Waldock argued that the Charter did not further restrict the customary

general right of self-protection against a forcible threat to a State's legal rights. . . . Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an "armed attack."¹⁷

Neither was Waldock impressed by assertions that Article 51 circumscribed the customary right of self-defense articulated in connection with the 1837 *Caroline* case involving British action on American soil against supporters of rebellion in Canada:¹⁸ the government claiming an exception to the general rule against a first strike, even in self-defense, and on another state's territory must present facts that "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁹ Waldock's reformulation of the *Caroline* doctrine corresponded to the emerging technological context defined by nuclear weapons and intercontinental ballistic missiles:

legitimate self-defence has three main requirements:

- (1) An actual infringement or threat of infringement of the rights of the defending State[;]
- (2) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and
- (3) Acts of self-defence strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.²⁰

Waldock concluded that one should understand that the law of self-defense needs to reinforce the mechanisms of peace, not create advantages as a matter of law for aggressors.²¹

The world lacks a central police power or reliable U.N. Security Council. Accordingly, how does one ensure that those who exercise policing responsibilities, whether or not blessed by the U.N. Security Council, do so responsibly and in support of an international law of minimum world order? The answer propounded by previous generations was the balance of power.²²

supra note 11, at 532. Yoram Dinstein argues both that the Charter does not allow for the use of force in self-defense in the absence of an armed attack and that

[t]here is no need to wait for the bombs to fall—or, for that matter, for fire to open—if it is morally certain that the armed attack is under way (however incipient the stage of the attack is). The victim State can lawfully (under Article 51) intercept the armed attack with a view to blunting its edge.

YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 183, 187 (4th ed. 2005).

17. Waldock, *supra* note 16, at 496-97.

18. See generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

19. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Minister (July 27, 1842), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

20. Waldock, *supra* note 16, at 463-64.

21. *Id.*

22. Martin Wight, *The Balance of Power*, in *DIPLOMATIC INVESTIGATIONS: ESSAYS IN THE THEORY OF INTERNATIONAL POLITICS* 149 (Herbert Butterfield & Martin Wight eds., 1966); see also HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 101-25 (1977);

Today, under the hydraulic pressure of nuclear and other indiscriminate and highly lethal weapons, the goal remains an international community governed by a rule of law sensitive to technological realities and encouraging minimum order,²³ and the answer lies in the twin cores of the customary international law governing the use of force, necessity, and proportionality.

III. THE HIGH-LEVEL PANEL

In 2004, the United Nations published the report of the Secretary-General's High-level Panel on Threats, Challenges and Change: *A More Secure World: Our Shared Responsibility*.²⁴ U.N. Secretary-General Kofi Annan had called for the study in his first comprehensive comment on the 2003 U.S.-U.K. invasion of Iraq.²⁵

Where we disagree, it seems, is on how to respond to these threats [e.g., terrorism and weapons of mass destruction]. . . . Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. . . . Now, some say this understanding is no longer tenable, since an armed attack with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while the weapons systems that might be used to attack them are still being developed. According to this argument, States are not obliged to wait until there is agreement in the Security Council. . . . My concern is that, if it were to be adopted, it would set precedents that resulted [sic] in a proliferation of the unilateral and lawless use of force, with or without justification.²⁶

Against this background, the High-level Panel's Report, adopted by consensus,²⁷ addressed (among other things) the law governing the use of force that should apply to contemporary threats.

LUDWIG DEHIO, *THE PRECARIOUS BALANCE* (1962); EDWARD VOSE GULICK, *EUROPE'S CLASSICAL BALANCE OF POWER* (1955); F.H. HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1963).

23. But see Cassese, *supra* note 9, at 1336, which treats this view as presumptively misguided and necessarily "méta-juridique." Other authors

soulignent justement que a) il n'est pas vrai que la norme coutumière en question prévoyait la légitime défense préventive [but that is precisely what it did do]; b) l'article 51 a de toute façon effacé tout le droit préexistant, sans laisser aucun espace à la légitime défense contemplée par le droit coutumier si ce n'est dans les limites où elle est explicitement autorisée par la Charte de l'ONU.

Id. The problem with this point of view is that it is wrong as a matter of history, including the history of international relations under the U.N. Charter, and of common sense.

24. See Report of the High-level Panel on Threats, *supra* note 6.

25. Statement of the Secretary-General, U.N. GAOR, 58th Sess., 7th plen. mtg. at 2-4, U.N. Doc. A/58/PV.7 (Sept. 23, 2003). On September 16, 2004, Kofi Annan said that the 2003 invasion was illegal under the U.N. Charter. *Iraq War Was Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, http://news.bbc.co.uk/2/hi/middle_east/3661134.stm. But see Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq*, 34 *ISR. Y.B. HUM. RTS.* 15 (2004); William Howard Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 *AM. J. INT'L L.* 557 (2003).

26. Statement of the Secretary-General, *supra* note 25, at 3. The Secretary-General's speech merits its own *explication de texte* as an example of selective understanding of the history of international relations in the U.N. Charter era.

27. The fact of consensus is as remarkable as what the document said. Panel members included persons with such diverse perspectives as Gareth Evans (former Australian Foreign Minister and proponent of the Responsibility to Protect), Amr Moussa (former Egyptian Foreign Minister and Secretary-General of the Arab League), Yevgeny Primakov (former Russian Prime Minister), and Brent Scowcroft (National Security Adviser to President Ford and President George H.W. Bush).

The Panel unanimously agreed that the older interpretation of self-defense under the U.N. Charter was correct:

[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.²⁸

The Panel concluded that Article 51—the law of self-defense—ought neither to be rewritten nor reinterpreted. It then took up the issue of preemption.²⁹ It wrote that in the first instance a state should make the case for preventive military action

to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to revisit again the military option.

For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.³⁰

The Panel reaffirmed a status quo.

The Panel thus affirmed that the law of self-defense incorporated anticipatory self-defense, provided the threat was imminent.³¹ It also set forth a procedural response to the challenge posed by the events of September 11, 2001. If a state perceives a threat of the sort made real on September 11, it should go to the Security Council for action before taking measures of self-help. In short, a state in such a situation should exhaust its administrative remedies before taking action. The Report would side with anticipatory military action if a state believed it necessary to intercept an attack.

28. Report of the High-level Panel on Threats, *supra* note 6, ¶ 188. The quotation of Article 51 of the U.N. Charter in this paragraph omits the significant word “necessary” after “measures.” The situation created by Iran’s nuclear program exemplifies the problem. Israel perceives an Iranian nuclear weapons capability as a *per se* threat to Israel’s existence because of Iran’s hostility to Israel’s existence and its support of entities such as Hizbollah and Hamas that are committed to the destruction of Israel. There is much talk at this time of Israel undertaking military action against Iran at least to slow down Iran’s progress toward creating a nuclear weapons arsenal. At the same time, the United States has made clear that any nuclear attack on its allies or friends will be met with a maximum U.S. response—a euphemism for the use of nuclear weapons. See Stephen Hadley, Nat’l Sec. Adviser, Remarks to the Center for International Security and Cooperation (Feb. 8, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080211-6.html> (“As many of you know, the United States has made clear for many years that it reserves the right to respond with overwhelming force to the use of weapons of mass destruction against the United States, our people, our forces and our friends and allies.”).

29. The U.S. National Security Strategy of September 2002 had highlighted “pre-emption” as an issue. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

30. Report of the High-level Panel on Threats, *supra* note 6, ¶¶ 190-91.

31. *Contra* Reisman & Armstrong, *supra* note 11, at 532.

Apart from advocating a process, the High-level Panel recognized that, at the end of the day, states would do what they believe is necessary.³² The Panel endorsed above all the principle of necessity that has been at the heart of the law governing the use of force.³³ It also endorsed a contextual view of necessity—reasonableness given the circumstances, including the procedural circumstances, and the belief about the threat to be addressed. As Messrs. McDougal and Feliciano noted more than forty years ago, this approach is the “most comprehensive and fundamental test of all law, reasonableness in particular context.”³⁴ What is reasonable and who decides?³⁵ Enter the multiplicity of commentators, observers, and decisionmakers in the international community.

IV. NECESSITY AND PROPORTIONALITY: THE ANSWER TO THE CONUNDRUM³⁶

The principles of necessity and proportionality, informed by reasonableness under the circumstances, offer a solution to the difficulties posed by the present international context and the intellectual knots it offers. They lie at the core of the international law governing the use of force.³⁷ This idea is hardly original yet seems more obscure than necessary.³⁸ For example, Israel’s war in 2006 with Hizbollah or invasion of the Gaza Strip in 2008-2009 generated commentary on the question of “proportionality”—were Israel’s actions in both cases proportional?³⁹ In a similar vein, NATO’s Kosovo campaign, which inflicted casualties without absorbing them, provoked similar questions.⁴⁰ One may not like the goal of making one’s

32. Report of the High-level Panel on Threats, *supra* note 6, ¶ 196; DINSTEIN, *supra* note 16, at 187.

33. MCDUGAL & FELICIANO, *supra* note 16, at 217-18; Sloane, *supra* note 11, at 52 & nn.27-28.

34. MCDUGAL & FELICIANO, *supra* note 16, at 218.

35. In 1995, New York University Law School held a symposium on this subject, including Nicholas Rostow, “*Who Decides*” and *World Public Order*, 27 N.Y.U. J. INT’L L. & POL. 577 (1995).

36. As this Essay was being written, Thomas M. Franck published *On Proportionality of Countermeasures in International Law*, which properly emphasizes the importance of subsequent review. See Franck, *supra* note 11, at 762-67. Article 51 of the U.N. Charter makes much the same point in asserting that the Security Council may end the period in which the right of self-defense exists by taking “measures necessary to maintain international peace and security.” This phrase ought to impose an effectiveness test, but may not do so. The phrase does not receive much notice in the standard commentaries. See U.N. CHARTER COMMENTARY, *supra* note 2, at 789-806; GOODRICH ET AL., *supra* note 16, at 342-53.

37. See generally DINSTEIN, *supra* note 16, at 208-11, 219-51.

38. See, e.g., Thomas Hurka, *Proportionality and Necessity*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 124 (Larry May ed., 2008) (discussing proportionality and necessity in the context of “just war theory”).

39. Franck, *supra* note 11, at 732-34; Sloane, *supra* note 11, at 96-100.

40. See generally the following debate in the *American Journal of International Law*: Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834 (1999); Christine M. Chinkin, *Kosovo: A “Good” or “Bad” War?*, 93 AM. J. INT’L L. 841 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT’L L. 857 (1999); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824 (1999); W. Michael Reisman, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 860 (1999); and Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828 (1999). See also Sloane, *supra* note 11, at 96.

enemy pay a higher human cost of unlawful attack than the defender, but that feeling does not make the action unlawful. Enemy tactics, such as using human shields, may raise the risk of civilian casualties. That fact does not make the lawful use of force in pursuit of lawful goals, including the destruction of military targets, unlawful. Objectivity is hardly attainable in this area. If one accepts the proposition that Hizbollah in Lebanon and Hamas in Gaza share a goal of destroying Israel, one may reach one conclusion. If one leaves those policy contexts aside and examines just what determined Israel to use force in Lebanon and in Gaza—the *casus belli*—one may reach a different conclusion. And, if one regards facilities with military and civilian uses (dual use) as unlawful as military targets one may reach one conclusion about war crimes just as one might reach another depending on one's outlook.⁴¹

The discussion involves an older and a newer view. The newer view (which in fact is a revival of the much older concern with just war⁴²) worries about proportionality in the context of whether the military action is just, the perpetrators/victims are innocent, and whether the goals are “good.”⁴³ The real legal issue, however, is different and less subjective: it has to do with whether or not an action is reasonably necessary to put an end to the delict giving rise to the right to use force in the first place. In this context, the goal is “economy in coercion.”⁴⁴ That, together with the distinction between military and nonmilitary targets,⁴⁵ encompasses legally permissible military action or other forms of coercion and allows for technological differences among competing forces.

V. CONCLUSION

The structure of international society and international relations has changed little in centuries. Since World War II and the adoption of the U.N. Charter, we have lived, as we did before, in a global system of independent states.⁴⁶ Its structure represents worldwide values. In the eighteenth century, Montesquieu wrote that the law, in its most fundamental meaning, embodies

41. See Charles J. Dunlap, *Targeting Hearts and Minds: National Will and Other Legitimate Military Objectives of Modern War*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 117, 117 (discussing the Crossed Swords monument in downtown Baghdad as a target); W. Hays Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 65, 112-16; see also Franck, *supra* note 11, at 733; Ruth R. Wisse, *Now, About That “Proportionality”*, COMMENT., Mar. 2009, at 27. This point is not made to excuse violations of the chief principle in the laws of war, discrimination between military and civilian personnel and targets. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27-33 (2004) (discussing the basic distinction in international law of armed conflict).

42. See, e.g., WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR (1981); MICHAEL WALZER, JUST AND UNJUST WARS (1977).

43. Hurka, *supra* note 38; see also Sloane, *supra* note 11; Public Ethics Radio, Transcript of Episode 7, Jeff McMahan on Proportionality (Jan. 25, 2008), http://www.cceia.org/resources/transcripts/0109.html/_res/id=sa_File1/PER_Episode_7_Transcript.pdf.

44. MCDUGAL & FELICIANO, *supra* note 16, at 218.

45. See DINSTEIN, *supra* note 41.

46. See BULL, *supra* note 22, at 38-40.

the nature of things.⁴⁷ This insight is worth recalling in the international context because we do not have a world polity with a monopoly of force and the ability to enforce a rule of law on a global basis.⁴⁸ The latter task is left to the states that comprise the international system. In times of stress, whether threatened by states or nonstates, they will look to their ability to defend themselves even if all they can do is call for aid. That is a reality the law, to be the law, must respect.

47. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 1 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (“Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things.”).

48. In the international community, there also is no one authoritative source of international law. See Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 410-13 (2007); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 *AM. SOC’Y INT’L L. PROC.* 118 (1992).

Essay

The Enforcement of WTO Judgments

Steve Charnovitz[†]

Inspiration for my Essay comes from an influential article written by Michael Reisman four decades ago titled *The Enforcement of International Judgments*.¹ His article presented a “model” for improving enforcement of international judicial decisions in cases between states.² The tribunal that Reisman referred to most often was the International Court of Justice (ICJ). Although there have been some developments in the ICJ since 1969 that benefited from his insights, the tribunal in which Reisman’s ideas have flowered the most is the dispute system of the World Trade Organization (WTO). The purpose of my Essay is to point out how the WTO Dispute Settlement Understanding (DSU) achieved much of what Reisman envisioned with respect to systematic enforcement of multilateral tribunal decisions.

My Essay begins by summarizing the institutional improvements Reisman recommended. Then this Essay demonstrates how the WTO’s DSU achieves many of those objectives in law and practice. Finally, this Essay takes note of continued confirmation of Reisman’s thesis in the Appellate Body decision in the new *United States—Continued Suspension* case, a dispute about how to judge compliance and when to lift trade sanctions.³

In his article, Reisman brought much-needed scholarly attention to international enforcement. Noting the approach taken in the ICJ that “simply presumes compliance,”⁴ Reisman proposed that the international community give explicit attention to developing better mechanisms to achieve enforcement. He defined enforcement as “the transformation, by community means, of authoritative pronouncement into controlling reality.”⁵ Two strategies for enforcement exist: (1) direct enforcement on the delinquent state (e.g., physical transfer of assets) and (2) indirect enforcement, which consists of “sanctions on the miscreant in order to persuade him to comply with community norms.”⁶ Reisman put forward a hypothesis that “the expectation of the effectiveness of enforcement mechanisms is a factor inducing compliance.”⁷

To show how a compliance expectation among governments can be fostered, Reisman laid out a “functional model of enforcement” with these

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1. W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT’L L. 1 (1969).

2. *Id.* at 8-14.

3. Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (*adopted* Nov. 14, 2008) [hereinafter *U.S.—Continued Suspension Appellate Body Report*].

4. Reisman, *supra* note 1, at 2.

5. *Id.* at 6.

6. *Id.*

7. *Id.* at 7.

four elements: the target state that loses the judgment, the enforcers, the power bases of the enforcers, and the strategies employed.⁸ The potential enforcers include, among others, “functional agencies” and a state directed by an authoritative organization.⁹ Economic sanctions are one type of indirect enforcement, and Reisman explained that “[c]arefully planned sanctions may bring about compliance without the dysfunctional results of the total embargo.”¹⁰ Reisman noted that while enforcement directives in the United Nations Security Council can be blocked, directives from functional organizations have a higher probability of success.

Another contribution to enforcement theory are the principles Reisman put forward to secure compliance with international law and to generate expectations of effectiveness. First, he noted that international commerce can provide for a “scale of equivalence” so that “substitutes can be found in lieu of the original object of the dispute.”¹¹ Second, he proposed anticipatory enforcement whereby judgment funds are prepaid into court. Third, he called for enforcement strategies to be “launched promptly” and explained that dispatch can “prevent domestic politicization of compliance decisions.”¹² Fourth, he argued that an enforcement program “should draft as wide a participation as possible.”¹³

In addition to these conceptual contributions, Reisman’s article offered some specific policy recommendations for improving the ICJ Statute. Notably, he sought to give the ICJ an explicit role in “post-judicial” enforcement.¹⁴ For example, he would empower the ICJ to “specify principles to govern compliance” and to set a time limit for compliance.¹⁵ Once that time has expired or on the initiative of the winner, the “winning party could reapply unilaterally for a declaration of non-compliance.”¹⁶ Reisman anticipated that the losing party might “claim compliance” when in fact it has not complied.¹⁷ If so, he suggested that “[a] finding by the Court of non-compliance would tend to undermine the position of the loser, emphasize the finality of the judgment and expedite coercive enforcement.”¹⁸ Reisman also called for greater attention to the possibility of using the delinquent state’s own domestic courts to enforce the international judgment. This could be effectuated by a protocol to the ICJ Statute plus “appropriate internal implementing legislation by each contracting state.”¹⁹

Unfortunately, over the past forty years, the United Nations has not moved forward on any of these recommendations for strengthening the ICJ’s

8. *Id.* at 9. Reisman notes that his model may be applied to other international decisions beyond the ICJ. *Id.* at 9 n.26.

9. *Id.* at 9.

10. *Id.* at 14.

11. *Id.* at 22.

12. *Id.*

13. *Id.* at 23.

14. *Id.*

15. *Id.* at 26.

16. *Id.* at 24.

17. *Id.*

18. *Id.*

19. *Id.* at 25, 27.

role in enforcement. Political conditions, particularly in the United States, have not been conducive to strengthening judicial enforcement either in the ICJ or through the Security Council. Nevertheless, it should be said that the contemporary ICJ is a much more vibrant court than it was in the late 1960s, and is no longer guilty of the pathology diagnosed by Reisman of being “so incapable of effective decision that it must retreat from the most critical cases.”²⁰ Moreover, for ICJ final judgments, the record of compliance by states has been strong in recent decades.

Although Reisman’s *The Enforcement of International Judgments* focused mainly on the ICJ, he examined economic agencies (e.g., the International Monetary Fund) in an earlier article about international enforcement published in 1965 in *International Organization*.²¹ That article did not mention the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO. But it postulated a normative proposition that was relevant to the GATT and later to the WTO. Reisman’s 1965 article stated: “No international organization is an island; the maximum effectiveness of the economic agencies is integral with an interdependent international community. It is important that the economic organizations view themselves as a part of that community and, when possible, accept the obligations which membership imports.”²²

Unlike the ICJ Statute, the WTO treaty system does not presume governmental compliance with authoritative judgments. Instead, the system presupposes that governments will sometimes fail to comply. Indeed, the DSU takes note of the contingency that a WTO member government “fails to bring the measure found to be inconsistent with a covered agreement into compliance.”²³ Because it is based on a realistic appreciation of how governments behave, the DSU contains a sophisticated postadjudication system of “Surveillance of Implementation of Recommendations and Rulings.”²⁴ In addition, the DSU provides for a menu of ways that a WTO dispute can end (when a violation exists) besides withdrawal of the WTO-illegal measure. That menu includes a mutually acceptable solution, compensation to the complaining WTO member, and the “last resort” of temporarily suspending the application of concessions or other obligations vis-à-vis the noncomplying member.²⁵ I have used the acronym SCOO as the name of this ultimate remedy of suspension of concessions or other obligations.

In designing the DSU, the negotiators sought to construct a dispute system that would avoid the dysfunctions of the GATT system such as blocking the appointment of a panel, the adoption of its report, or the approval

20. *Id.* at 26.

21. William M. Reisman, *The Role of Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach*, 19 INT’L ORG. 929 (1965).

22. *Id.* at 942.

23. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

24. *Id.* art. 21.

25. *Id.* art. 3.7.

of a SCOO.²⁶ Reisman notes that enforcement directives from the Security Council could be blocked by one country, but such blocking is now impossible in the WTO Dispute Settlement Body (DSB), which has an automatic procedure for approving a SCOO following a failure to comply.²⁷

In line with Reisman's model providing for sanctions on the miscreant in order to persuade it to comply with community norms, the DSU utilizes the SCOO as indirect enforcement. Back in 2001, I put forward a thesis that the WTO had transformed the remedy that was prescribed under the GATT (but never used) into a true "sanction" that would be imposable upon a scofflaw country.²⁸ The WTO jurisprudence since 2001 has solidified the evidence for my thesis that the SCOO is recognized as a trade sanction aimed at inducing compliance.²⁹ Indeed, it is interesting to compare Reisman's statement that the expectations of the effectiveness of enforcement measures is a factor inducing compliance to the Appellate Body's holding in *U.S.—Continued Suspension*; having to remove the SCOO simply because an offending government declares that it has complied "would undermine the important function of the suspension of concessions in inducing compliance" and "would significantly weaken the effectiveness of the WTO dispute settlement system and its ability to provide security and predictability to the multilateral trading system."³⁰

Several other points should be noted in which Reisman's model is predictive of key features of the WTO machinery developed twenty-five years later. First, Reisman said that effective enforcement requires a time limit for compliance and that "[a] lag between judgment and enforcement tends to diminish th[e] expectation" that the system works and "to increase resistance to voluntary compliance."³¹ The DSU provides for arbitration to set a compliance timetable. Furthermore, the enforcement procedure is launched promptly because the DSU gives the complaining government only thirty days following the conclusion of the period of compliance to take advantage of the automatic SCOO approval.³² Second, Reisman recognized that after a violation of law is found, the losing party might "claim compliance" and the winning party could "reapply unilaterally for a declaration of non-compliance" by the court.³³ The DSU works in this suggestion for compliance review in Article 21.5 which states: "Where there is disagreement as to the existence or consistency with a [WTO] covered agreement of measures taken

26. In my view, the negotiators for the DSU did not understand themselves to be constructing an international trade court, and therefore they may not have reflected on how they were making improvements to the ICJ model.

27. DSU, *supra* note 23, arts. 22.2, 22.6, 22.7.

28. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

29. See, e.g., Panel Report, *U.S.—Continued Suspension*, paras. 7.234, 7.343 n.480, WT/DS320/R (Mar. 31, 2008) [hereinafter *U.S.—Continued Suspension Panel Report*] (terming as "sanctions" the use of the SCOO); Arbitration Decision, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 3.71, WT/DS285/ARB (Dec. 21, 2007) (recourse to Arbitration by the United States under DSU Article 22.6) ("[T]he very reason for the existence of countermeasures under the DSU is to induce compliance with the covered agreement that has not taken place within the period foreseen in the DSU.").

30. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, para. 381.

31. Reisman, *supra* note 1, at 22.

32. DSU, *supra* note 23, art. 22.6.

33. Reisman, *supra* note 1, at 24.

to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.”³⁴ Third, Reisman suggested that international commerce would enable the adjudicator to utilize a scale of equivalence in fashioning a sanction and that a substitute sanction “should be sought insofar as it reflects the subjective valuation of the litigants.”³⁵ The DSU implements this suggestion by providing a principle that the level of SCOOP should be equivalent to the “nullification or impairment” and in providing for the possibility of so-called cross-retaliation, where the complaining country can choose to seek a SCOOP through an unrelated WTO agreement (e.g., requesting a SCOOP on intellectual property even though the underlying litigation was not about intellectual property).³⁶ Fourth, Reisman called on the ICJ to specify “general principles of compliance or any other directive which the Court may deem appropriate.”³⁷ The DSU authorizes the Appellate Body and panels to “suggest ways in which the Member concerned could implement the recommendations.”³⁸

The concern that Reisman expressed in the 1965 *International Organization* article about fragmentation in international economic law proved prescient.³⁹ During the first four decades of the postwar trading system, the GATT sometimes viewed itself as a self-contained system separate from the rest of international law. That narrow-mindedness was put to bed in the first decision handed down by the Appellate Body, which stated that the DSU reflects a recognition that the GATT “is not to be read in clinical isolation from public international law.”⁴⁰ This holding contributed enormously to assuring that the WTO is not “incapable of effective decision”⁴¹ by widening the law to be applied—for example, by intensively importing principles from international law.⁴²

Perhaps more so than the ICJ, the WTO dispute system has been effective because there is an expectation that decisions will ultimately be complied with. In Reisman’s words, effective law “depends upon predispositions among an effective majority of participants towards

34. DSU, *supra* note 23, art. 21.5.

35. Reisman, *supra* note 1, at 22.

36. DSU, *supra* note 23, arts. 22.3 to -4.

37. Reisman, *supra* note 1, at 26.

38. DSU, *supra* note 23, art. 19.1.

39. See Reisman, *supra* note 21 and accompanying text.

40. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* 16, WT/DS2/AB/R (Apr. 29, 1996). The presiding member of the Appellate Body division in the *Gasoline* case was Florentino Feliciano. See W. Michael Reisman, *A Judge’s Judge: Justice Florentino P. Feliciano’s Philosophy of the Judicial Function*, in *LAW IN THE SERVICE OF HUMAN DIGNITY* 3, 8-9 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005) (discussing the role of judicial choice and noting that “the judge may be obliged to consult more general community values”).

41. Reisman, *supra* note 1, at 26.

42. See Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421 (2008).

compliance with authority.”⁴³ A recent empirical study of compliance in the WTO found a generally positive record of compliance.⁴⁴

A full appreciation of Reisman’s article requires that one mention, if only briefly, a few of his proposals that remain too visionary for incorporation into the WTO system. As noted above, he calls for anticipatory judgment funding, community participation of sanction senders, and the use of domestic courts to enforce international judgments. Of those three, the idea of collective enforcement of WTO judgments is the only one that has been discussed by WTO negotiators.⁴⁵

The recent Appellate Body decision provides new confirmation of Reisman’s model and his thesis that law requires an “expectation of effectiveness” and that “[c]reating and sustaining that expectation is a basic legal function.”⁴⁶ The *U.S.—Continued Suspension* decision was a constitutional decision wherein the Appellate Body filled in gaps in DSU law that threatened to undermine WTO enforcement. The constitutional dimension in *Continued Suspension* was who would decide whether to lift a WTO-authorized SCOO against a defendant country when that country claimed that it had finally taken measures to correct its earlier violation. Although the DSU has rules for how to seek and approve a SCOO, there are no explicit rules for how to get a SCOO removed. This lacuna in WTO law has been long recognized, and there have been several proposals by governments for an amendment to the DSU to create such procedures.⁴⁷ Because they are tethered to the failing Doha Round, these DSU reform negotiations have not generated any legislative change.

The *Continued Suspension* case is complicated, and the Appellate Body decision was over three hundred pages long. Given space limitation, I can provide only a brief summary. In the original case, the United States brought a complaint to the WTO about a European Community (EC) directive in 1996 banning the importation of meat produced with growth-promoting hormones.⁴⁸ The panel found numerous violations. In 1998, the Appellate Body, while narrowing the lower panel’s decision, ruled that the import ban violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁴⁹ because the European measure

43. Reisman, *supra* note 1, at 26.

44. Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Dispute Settlement Decisions*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 771, 772 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008) (finding rates of 67% for compliance, 24% for partial compliance, and 9% for unabashed noncompliance).

45. See, e.g., Sayera J. Iqbal Qasim, *Collective Action in the WTO: A “Developing” Movement Toward Free Trade*, 39 U. MEM. L. REV. 153 (2008).

46. Reisman, *supra* note 1, at 26.

47. Negotiations on Improvements and Clarification of the Dispute Settlement Understanding, Proposal by Japan, at 9, TN/DS/W/22 (Oct. 28, 2002); see also Suzanne Bermann, *EC-Hormones and the Case for an Express WTO Postretaliation Procedure*, 107 COLUM. L. REV. 131, 154 (2007) (arguing that no DSU article is capable of resolving postretaliation complaints).

48. Appellate Body Report, *EC Measures Concerning Meat and Meat Products*, paras. 1, 5, WT/DS26/AB/R (adopted Feb. 13, 1998) [hereinafter *EC-Hormones* Appellate Body Report].

49. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

was not based on a risk assessment.⁵⁰ After arbitration to determine the appropriate level of SCOO, the DSU in 1999 authorized the U.S. government to impose a SCOO against the EC of \$116.8 million a year, and the U.S. government immediately did so.⁵¹ In 2003, the EC withdrew its 1996 directive and replaced it with a new directive seeking to strengthen the justification for its continuing ban.⁵² At the same time, the EC asserted to the DSB that the EC had come into compliance and that the continuing suspension of concessions by the United States was no longer justified. After the U.S. government refused to acknowledge the claimed compliance or to lift the SCOO, the EC brought a complaint against the United States and obtained a new panel in 2005. This panel issued an odd, split ruling. On the one hand, it found that the EC had not established that it had removed the measure violating the SPS Agreement.⁵³ On the other hand, the panel found that the United States was violating DSU Articles 23.1 and 23.2(a) by making a determination that an EC violation had occurred without recourse to DSU procedures.⁵⁴ In addition, the panel suggested that an action by the EC to withdraw the measure would supersede the DSU authorization for the SCOO obtained by the United States.⁵⁵ The EC appealed and the United States cross-appealed. In October 2008, the Appellate Body reversed the panel on numerous holdings. On the SPS matter, the Appellate Body reversed the panel's holding and made no finding as to whether the EC was now in compliance with the SPS Agreement.⁵⁶ On the DSU matter, the Appellate Body reversed the holding against the United States.⁵⁷ As of March 2009, settlement talks are ongoing.

Although the Appellate Body did not settle the *Hormones* dispute, it did clarify some disputed DSU provisions. Given the limited progress in the ongoing Doha Round negotiations on improvements and clarifications of the DSU, the Appellate Body exercised the full extent of its authority to interpret the DSU, and thus to improve its effectiveness. The Appellate Body's activist stance leads me to recall Reisman's suggestion that the ICJ take a more active role in the postadjudicative phase, and that such action was "permitted by general judicial practice and not prohibited by the language of the Statute."⁵⁸

A key legal development in the case is that the Appellate Body put the kibosh on the EC's scheme to feign compliance with the SPS agreement and then to demand that the United States remove the SCOO. The EC argued that even though its longtime import ban remained intact, the United States had an obligation to eliminate its SCOO merely because the EC had withdrawn the 1996 directive and replaced it with a new directive in 2003.⁵⁹ In response, the Appellate Body ruled that a DSB-authorized SCOO "may continue until the

50. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, para. 253.

51. *Id.* paras. 8-9.

52. *Id.* paras. 11-12.

53. U.S.—*Continued Suspension* Panel Report, *supra* note 29, para. 7.847.

54. *Id.* para. 7.251.

55. *Id.* para. 7.343.

56. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, paras. 619-20, 734-35.

57. *Id.* para. 408.

58. Reisman, *supra* note 1, at 24 (footnote omitted).

59. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, para. 286.

removal of the measure found by the DSB to be inconsistent results in substantive compliance.”⁶⁰ The term “substantive compliance” does not exist in the text of the DSU. Rather, it was invented by the Appellate Body in this case to distinguish true compliance with only “formal removal of the inconsistent measure.”⁶¹ The Appellators further explained that “[r]equiring termination of the suspension of concessions simply because a Member declares that it has removed the inconsistent measure, without a multilateral determination that substantive compliance has been achieved, would undermine the important function of the suspension of concessions in inducing compliance.”⁶²

Another key Appellate Body holding is that both complaining and defending parties may use the Article 21.5 procedure to determine whether a new measure achieves compliance.⁶³ Indeed, the Appellate Body went even further and held that both parties *must* invoke Article 21.5 in the case of a disagreement about the reality of substantive compliance.⁶⁴ The EC had made an end-run around the Article 21.5 process because it wanted to avoid the judges on the original 1998 panel. The justification the EC put forward was that the DSU did not allow it to invoke Article 21.5 to verify its own compliance.⁶⁵ Its supposed inability to ask for an Article 21.5 panel was the EC’s excuse for invoking a new panel against the United States for continuing the SCOO. The Appellate Body saw the end-run and recognized the threat to the effectiveness of compliance review if a defendant could go around Article 21.5 by bringing a new cause of action against the SCOO. The Appellate Body buttressed its holding that the Article 21.5 procedure was “the proper course of action” by noting that a return to the original panel would bring expertise and prompt resolution.⁶⁶

The last exercise of gap-filling power is the Appellate Body’s holding that once an Article 21.5 panel finds compliance and its report is adopted by the DSB, such DSB action serves to repeal the previous action that authorized the SCOO. In the words of the Appellate Body, the SCOO “lapses by operation of law (*ipso jure*).”⁶⁷ This is one of the most remarkable holdings of the Appellate Body during its thirteen-year history. Faced with a deficient legal text, a flailing Doha negotiation, and a possible ruling by a future Article 21.5 panel that the EC has complied in *Hormones*, the Appellate Body

60. *Id.* para. 306.

61. *Id.* para. 308. The Appellate Body apparently liked its phrase and used it over 50 times. The term is employed again in the recent DSU Article 21.5 decision in the *EC—Bananas* litigation. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, paras. 272-73, 322-23, WT/DS27/AB/RW/USA (Nov. 26, 2008).

62. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, para. 381.

63. *Id.* paras. 345, 348, 358, 368. This conclusion was anticipated in Jason E. Kearns & Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, 5 J. INT’L ECON. L. 331, 341-43 (2002).

64. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, paras. 336, 340, 354-55, 737.

65. *Id.* para. 349.

66. *Id.* paras. 344-45.

67. *Id.* para. 310; *see also id.* paras. 321, 367 (seeing an obligation to cease the SCOO); *id.* para. 355 (saying that this situation renders the SCOO without legal basis); *id.* para. 384 (seeing a cause of action if the SCOO is not immediately terminated).

clarified that WTO adjudicators will decide when governments are in compliance with WTO rules and when a SCOO may be used to enforce a WTO judgment.

In conclusion, Reisman's vision of a more effective world court has been realized sooner in the arena of world trade than it has in the ICJ. No one in 1969 would have predicted the DSU, and I am unaware of anyone today predicting a much stronger ICJ by 2019. Yet some day that will eventuate, and those who design it will be inspired by the model put forward by Reisman.

Essay

The Domestic Decisionmaking Process and Its Implications for International Commitments: American Beef in Korea

Hi-Taek Shin[†]

I. INTRODUCTION

As the global economic crisis deepens, even the governments of major market economies are susceptible to domestic political pressures to adopt protectionist trade policies. In a speech given at the University of California, Berkeley in October 2008, Pascal Lamy, the Director-General of the World Trade Organization (WTO), stated that restoring citizens' confidence in international trade requires governments to ensure that sound domestic policies are in place. The domestic decisionmaking process must be capable of synthesizing diverse and occasionally conflicting points of view into solid domestic policies. Issues related to free trade are no longer centered on the loss of jobs and the undermining of domestic industries. Contemporary issues include public health and safety concerns that affect the broader community, not merely a subset of the population. Now that ordinary citizens and civil society groups are able to disseminate and receive information instantly through the internet, they are increasingly capable of shaping international trade issues and influencing public opinions and government policy. A sound domestic decisionmaking process relating to international trade must consider all of these factors, adding to the complexity of the balancing process.

Balancing interests among domestic constituents through an orderly political or administrative process is a challenge for both mature democratic societies and rapidly democratizing countries like Korea. If the domestic decisionmaking process relating to international treaties does not produce policies that are substantively and procedurally sound, the rule of law may be undermined. This could, as a result, undercut the ability of the government to negotiate, conclude, and execute international agreements.

The controversy surrounding the resumption of importation of American beef into Korea in 2008 exemplifies the complexity of balancing competing

[†] Professor of Law, Seoul National University School of Law. The author first encountered the New Haven School when he attended Professor Reisman's class in 1982 as an LL.M. student at the Yale Law School. As a law student educated in a continental civil law system in Korea, where military elites and technocrats dominated the decisionmaking process from the early 1960s until 1987, the significance of the New Haven jurisprudence was difficult to appreciate at the time. As Korea progressed into a democratic society, however, the necessity of improving the sociopolitical process of authoritative decisionmaking became apparent and, in this context, the relevance of the New Haven School to Korea became clear. This Essay endeavors to apply the policy-oriented perspective of the New Haven School to one episode involving the importation of U.S. beef into Korea. The author thanks Julie A. Kim and Yun Bak Chung for their invaluable assistance in developing this Essay.

interests in a country that is in transition to full democratic maturity. While an elaborate domestic decisionmaking framework is detailed in the Korean Constitution and national laws, in practice, the decisionmaking process is not always orderly when it involves economically, socially, and politically sensitive issues. But when the domestic balancing process fails, it has serious repercussions for international law. In light of the current global economic crisis and countries' growing inclinations towards protectionist trade policies, Korea's experience with the U.S. beef import issue may be repeated in other parts of the world.¹ Particularly under these conditions, a sound domestic decisionmaking process becomes all the more critical to the viability of our international trading system.

This Essay reviews the Korean Administrative Procedure Act (KAPA)² and its implications for the Korea-U.S. Beef Import Agreement as set forth in the Agreed Minutes (Agreement)³ to analyze the legal status of the Agreement under international law and to understand whether Korea's commitment to implement the Agreement is unconditional or subject to KAPA's domestic procedural requirement for public notice and comment. I conclude that the Agreement is valid under international law, but that its implementation is subject to KAPA based on the Agreement's explicit recognition of the KAPA requirement. Consequently, the implementation of the Agreement and the domestic balancing process required by KAPA are bridged by the recognition of KAPA in the Agreement itself.

II. FACTUAL BACKGROUND

Korea was the third largest export market for American beef until the Korean government banned U.S. beef imports when mad cow disease was first reported in the United States in December 2003. Resumption of the importation of U.S. beef has since emerged as a delicate trade issue. When Korea expressed its intent to negotiate a free trade agreement with the United States in 2005, certain members of the U.S. government made clear that their support of the free trade agreement depended on whether Korea reopens the market to imported U.S. beef.⁴ However, trade officials in Korea cautiously maintained that the importation of American beef was not a prerequisite to beginning the two countries' free trade agreement negotiation⁵ out of concern

1. *E.g.*, *Malaysians Protest Against Free Trade Talks with U.S.*, THIRD WORLD NETWORK, June 13, 2006, <http://www.twinside.org.sg/title2/FTAs/info.service/fta.info.service013.htm>. Other examples include Thailand and Malaysia's free trade agreements with the United States. Both countries' citizens emphasized health concerns by protesting against the banning of generic medicines.

2. Heng Jung Jul Cha Bup [Administrative Procedure Act (KAPA)], Act No. 5241, Dec. 31, 1996, *amended by* Act. No. 8852, Feb. 29, 2008 (S. Korea) [hereinafter Korean Administrative Procedure Act].

3. Agreed Minutes of the Korea-United States Consultation on Beef, U.S.-S. Korea, Apr. 18, 2008 (on file with author) [hereinafter Agreed Minutes].

4. *See, e.g.*, Press Release, Rob Portman, U.S. Trade Representative, Press Conference at Closing of APEC Trade Minister's Meeting (June 3, 2005), http://www.ustr.gov/Document_Library/Transcripts/2005/June/USTR_Portman_Press_Conference_at_Closing_of_APEC_Trade_Ministers_Meeting.html.

5. Press Release, Ministry for Food, Agric., Forestry, and Fisheries, Korea, U.S. May Compromise over Beef Trade Row, Seoul's Ambassador Says (Feb. 11, 2007), <http://english.mifaff>

that the Korean public would misunderstand the government's action as exchanging the people's health for the free trade agreement.

Shortly before both governments announced their intention to negotiate a free trade agreement in February 2006, the Korean government agreed to a partial lifting of the import ban on U.S. beef; Korea would allow the importation of boneless U.S. beef derived from cattle less than thirty months old (believed to be at less risk of mad cow disease). Pursuant to relevant Korean law,⁶ the terms and conditions of the partial import agreement were implemented by the Ministry of Agriculture in the form of a ministry "notification" (*gosi* in Korean). KAPA requires that before any ministry introduces and implements a notification, it must publish the highlights of the notification to the general public and solicit public comments.⁷ The Ministry of Agriculture followed the procedure under KAPA and the notification took effect in March 2006 (2006 Notification).⁸ Importation of American beef resumed, but shortly afterwards the Korean government again prohibited the importation of U.S. beef when pieces of bones were found in it. The Agriculture Ministry held that the inclusion of bone chips in the imported beef was a violation of the 2006 Notification. While U.S. exporters requested reasonable bone chip tolerance for future shipments, the Korean government maintained a strict stance. The Trade Minister stated that "the beef issue should not be viewed as [a] market access issue, but a national health issue."⁹ When bone chips were again found in a shipment to Korea, Korean government placed a total ban on the importation of U.S. beef in October 2007 in response to mounting public concerns over the repeated violations of the 2006 Notification by some U.S. beef exporters.

Meanwhile, two important developments occurred. First, following ten months of intense negotiations, Korea and the United States signed the Korea-U.S. Free Trade Agreement (KORUS FTA) in June 2007.¹⁰ For the United States, KORUS FTA is the first free trade agreement with a major Asian economy. For Korea, it is the country's largest free trade agreement. As a next step, both governments must seek approval of the KORUS FTA from their respective legislatures.

Second, in May 2007, the World Organization for Animal Health (OIE) identified the United States as a "controlled risk" country for Bovine Spongiform Encephalopathy.¹¹ Based on the WTO Agreement on Sanitary and

.go.kr/USR/BORD0201/m_380/DTL.jsp?id=B20201000&mode=view&idx=10903.

6. Act on the Prevention of Contagious Animal Diseases, *amended* by Act. No. 7434, Mar. 31, 2005 (S. Korea).

7. Korean Administrative Procedure Act, *supra* note 2, arts. 41-42.

8. Nong Rim Bu Go Si [Ministry of Agriculture and Forestry Notification], Mi Kook San Swe Go Gi Soo Ip Wie Seng Jo Gun [Health Conditions for Importing U.S. Beef], No. 2006-15 (Mar. 6, 2006) (on file with author).

9. KOREA INST. FOR INT'L ECON. POLICY, FEASIBILITY AND ECONOMIC EFFECTS OF KOREA-U.S. FTA 62 n.72 (Dec. 30, 2005) (internal quotation marks omitted), *available at* http://www.kiep.go.kr/common/board_file_down.asp?131932.

10. Press Release, Office of the U.S. Trade Representative, United States and the Republic of Korea Sign Landmark Free Trade Agreement (June 30, 2007), http://ustr.gov/Document_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Lmark_Free_Trade_Agreement.html.

11. Press Release, U.S. Dep't of Agric., Statement by Secretary Mike Johanns Regarding

Phytosanitary Measures,¹² the U.S. government demanded that Korea conform to the WTO rules by eliminating the import ban. In particular, the United States stipulated that Korea should expand the age limit of the cattle, allow boned meat, and relax the inspection standard so that minute issues like small bone chips do not trigger a suspension of imported U.S. beef. Influential American politicians strongly signaled that they would not support the KORUS FTA in Congress unless and until Korea resolves the U.S. beef import issue. One day before the newly elected President Lee was scheduled to meet President Bush in April 2008, the Korean Agriculture Ministry announced that it had agreed with the United States to lift the import ban on U.S. beef. As the implementation of the Agreement required an amendment to the 2006 Notification, the Ministry published the major contents of the new Beef Import Agreement and sought public opinion pursuant to KAPA.

When the contents of the Agreement became known to the Korean public, journalists, and civil society groups, they requested to know the basis for this seemingly sudden shift in policy and whether the government had taken due consideration of the citizens' health and safety when it agreed to expand the scope of U.S. beef shipped to Korea and to relax inspection standards.¹³ In response, the government explained that the U.S. beef to be imported was the same safe beef that Americans consumed daily and that Korea had to accept the OIE international standard unless objective scientific grounds justified deviation from the OIE guidelines. Special hearings were held at the National Assembly, but failed to ease the public's concerns. Soon mass demonstrations took place in the streets of Seoul. Protestors demanded renegotiation of the Agreement to reduce the scope of imported U.S. beef and to restore Korea's full right to inspection. Opposition party politicians and leaders of NGOs critical of the administration joined the crowds.

The government maintained that renegotiation was not legally possible and that it would hurt Korea's international credibility. In light of the domestic reaction, however, the Minister of Agriculture postponed finalization of the amended notification. The Minister explained that the delay was due to the fact that the public submitted more than three hundred opinions that the Ministry needed time to review. When it became evident that the Korean government was no longer in a position to ignore public opinion, it asked the United States for additional consultations. On June 25, 2008, the Korean government succeeded in securing additional safeguards in the form of a "private sector initiative." The letter, which was jointly signed by then-U.S. Trade Representative Susan Schwab and Secretary of Agriculture Edward Schafer, confirms that Korea will import U.S. beef from cattle less than thirty

U.S. Classification by OIE (May 22, 2007), <http://www.usda.gov/wps/portal?contentidonly=true&contentid=2007/05/0149.xml>.

12. Agreement on the Application of Sanitary and Phytosanitary Measures art. 2, para. 2, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Legal Instruments—Results of the Uruguay Round, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

13. *E.g., Thousands Protest U.S. Beef in S. Korea*, CBS NEWS, May 31, 2008, <http://www.cbsnews.com/stories/2008/05/31/world/main4142669.shtml>.

months of age until Korean consumer confidence improves.¹⁴ The Agriculture Ministry published the amended notification that went into effect from June 26, 2008.¹⁵

III. LEGAL ANALYSIS OF THE AGREEMENT WITH THE UNITED STATES

In responding to the demands for renegotiation of the Korea-U.S. Beef Import Agreement, the options available to the Korean government depend on (1) what the legal status of the Agreement is under international law, and (2) whether Korea's commitment to implement the Agreement is unconditional or subject to KAPA's procedures for public notice and comment.

Let us briefly review the details of the Agreement. On April 18, 2008, the Deputy Minister of the Korean Ministry of Food, Agriculture, Forestry and Fisheries and the Deputy Under Secretary of the U.S. Department of Agriculture signed a five-page document entitled the *Agreed Minutes of the Korea-United States Consultation on Beef*.¹⁶ The Agreement states that the two delegations reached agreement on a new protocol for the importation of beef and beef products from the United States into Korea, and a copy of the agreed protocol is attached to the Agreement (Import Protocol).

With respect to the first question, opinions are split among Korean legal scholars. Some legal scholars and jurists critical of the current Korean government argue that the Agreement is not a valid international agreement because it is simply a record of a "consultation," not a binding agreement.¹⁷ Others argue that the substantive issues dealt with in the Agreement significantly affect the health and safety of Korean citizens, and therefore should not have been delegated to the ministry notification level.¹⁸ The argument follows that because the Agreement was signed by the Deputy Minister without approval from the National Assembly or, at least by the state cabinet, the Agreement has no legal status in Korea.¹⁹

However, the Korean government has rejected these arguments, designating the Agreement to be a binding international agreement duly signed by representatives of both countries. The Minister of Trade stated that seeking renegotiation of a binding international agreement was not legally possible, but proposed that the government would seek additional

14. Letter from Susan Schwab, U.S. Trade Representative & Edward Schafer, U.S. Sec'y of Agric., to Jong Hoon Kim, S. Korea Minister for Trade & Woon Chun Chung, Minister for Food, Agric., Forestry and Fisheries (June 25, 2008), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file470_14958.pdf.

15. Nong Rim Soo San Sik Poom Bu Go Si [Ministry of Food, Agriculture, Forestry & Fisheries Notification], Mi Kook San Swe Go Gi Soo Ip Wie Seng Jo Gun [Health Conditions for Importing U.S. Beef], No. 2008-15 (June 26, 2008) (on file with author).

16. Agreed Minutes, *supra* note 3.

17. Yang Gu Kang, *Gook Ga Hyup Sang? Jong Hyun Kim Yi Dae Tong Ryung Gwa Kook Min Eul Sok Yi Ko It Da* [Additional Negotiation? Jong Hyun Kim Is Deceiving the President and the People], PRESSIAN, June 17, 2008, http://www.pressian.com/article/article.asp?article_num=60080616213647 (interviewing the former Korean Minister of Agriculture).

18. Young Sok Kim, *Han Mi Swe Go Gi Soo Ip Hab Eui Eui Kook Je Bub Juk Gum To* [A Review of the Korea-U.S. Beef Agreement from an International Law Perspective], 15 SEOUL KOOK JE BUB YUN GOO [SEOUL INT'L L.J.] 29, 38-42 (2008) (S. Korea).

19. *Id.* at 41-44.

consultations to address the public health and safety concerns with the U.S. government.

Considering the parties' intentions as expressed in the wording of the Agreement, and the signatures affixed to the Agreement, as well as the parties' history of dealing with the same issue in 2006 (which led to the 2006 Notification), it is hardly convincing to argue that the Agreement is not a binding agreement governed by international law.

With respect to the second question, it is important to point out that the Agreement makes explicit references to both the Korean and the U.S. administrative procedure laws. The reference to the administrative procedure laws of both countries indicates that the representatives of each delegation were fully cognizant of the fact that the implementation of the Agreement would be subject to each state party's domestic processes as required by their respective administrative procedure laws. This explicit reference to a domestic rulemaking procedure raises the complex issue of how the internal procedural requirement of KAPA (that public opinions be taken into consideration in the government's decisionmaking process) can be integrated at the international decisionmaking level.

Under Korean law, in order to implement the Agreement, the Agriculture Ministry has to amend the 2006 Notification to reflect the terms and conditions set forth in the Import Protocol. The amendment of the 2006 Notification is subject to the KAPA procedure.²⁰ The purpose of the public comment process under KAPA is to guarantee public access to and participation in the administrative rulemaking process, thus giving the people the right to be publicly critical of a particular administrative regulation before it becomes effective. KAPA states that the public comment period shall be for at least twenty days. It also provides that any person has the right to offer his or her opinion on the regulation and the government must treat such opinion respectfully. If the regulation in question raises a diverse group of issues, then the government may hold public hearings to facilitate the democratic process. However, KAPA does not contain detailed guidelines on the standard of treatment for the submitted public opinion.

Without clarifying the extent of Korea's obligations, that is, whether Korea's promise to implement the Agreement is unconditional or contingent upon KAPA's procedural requirements, the Korean government maintained that the public opinions opposing the Import Protocol failed to present an objective scientific basis to support their position.

According to Articles 26 and 27 of the Vienna Convention on the Law of Treaties, a treaty must be performed in good faith and a party's internal law cannot be invoked as an excuse for nonperformance of a treaty.²¹ If KAPA were not specifically mentioned in the Agreement, then invoking KAPA would not be justifiable under Article 27 of the Vienna Convention. However, in this case, the Agreement states the following:

20. Korean Administrative Procedure Act, *supra* note 2, arts. 41-45.

21. Vienna Convention on the Law of Treaties arts. 26-27, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

Korea stated that no later than April 22, 2008, the Ministry for Food, Agriculture, Forestry and Fisheries will publish for public comment the import health requirements for beef and beef products contained in the protocol. As soon as the public comment period required by Korea's Administrative Procedures Act closes (20 days after publication), the protocol will be published as a final regulation.²²

While the language is somewhat vague, a strong argument can be made that Korea's agreement to implement is qualified by the reference to KAPA, which requires a public notice and opinion-seeking procedure. The Korean government must "in good faith"²³ perform what it has agreed to, but it reserved the right to subject the Agreement to KAPA's requirement.

Several important considerations support this argument. First, when Korea agreed to partially resume importation of U.S. beef in 2006, the Ministry of Agriculture abided by the same KAPA procedure. The U.S. delegations were therefore aware of the KAPA requirement. Second, the chief Korean negotiator was a deputy-minister-level officer who is required by law to act in accordance with KAPA, and he did not have the authority to waive the KAPA requirements during the negotiation process with the United States. Furthermore, the Agreement explicitly states that the U.S. government will conduct its obligations "within the parameters of the U.S. Administrative Procedures [sic] Act."²⁴ Thus, it is logical that the Korean government is similarly obligated to implement the Agreement subject to the requirements of KAPA.

Certainly, Korea must perform the Agreement in good faith and refrain from taking any action that defeats its object and purpose. If the Ministry finds, however, in the course of complying with KAPA, that the public raised substantial health concerns relating to the Agreement, the Minister must take appropriate measures to address the concerns, for instance, holding public hearings or organizing a special task force to examine the scientific basis of the issues. If, through this process, scientific evidence that supports public objection to the implementation of the Agreement arises, then Korea may decide not to implement the Agreement as originally agreed and may demand renegotiation to the extent justified by the objective scientific evidence. Whether the United States accepts such demand for renegotiation or not is a decision to be made by the U.S. government. What is important is that Korea's failure to implement the Agreement should not be viewed as a breach of the Agreement as long as Korea acted in good faith.

Although the Korean government deliberately created the appearance that it would not seek renegotiation, in reality, the additional consultations preceding the finalization of the amended notification on the American beef Import Protocol were in substance supportive of the interpretation that Korea's commitment under the Agreement was subject to the KAPA requirement. In hindsight, if the Korean government had taken the position from the outset that the Agreement was subject to the KAPA procedure, thus faithfully following the KAPA procedure and giving more respect to public

22. Agreed Minutes, *supra* note 3, at 5.

23. Vienna Convention on the Law of Treaties, *supra* note 21, art. 26.

24. Agreed Minutes, *supra* note 3, at 2, 3; *see also id.* at 4 (using similar language).

opinion in the consensus-building process, it might have been more successful in having the Beef Import Agreement implemented in an orderly manner. The public debate would have been focused on verifying whether there was an objective scientific basis for the health and safety concerns raised over American beef rather than being a highly politicized spectacle filled with polarizing rhetoric and physical confrontation between the so-called conservatives and progressives.

IV. CONCLUSION

Korea faces the critical challenge of upgrading its domestic decisionmaking processes relating to international treaty-making. Until the late 1980s, policymaking in Korea was monopolized by a few political elites. Yet with rapid democratization and an increasingly active civil society, demands for meaningful public participation in Korea's decisionmaking process are growing stronger. Ordinary citizens want their voices to be reflected in the country's treaty decisionmaking process, especially on issues that affect their health, safety, and living environments. Paradoxically, the position the Korean government took in the U.S. beef controversy in order to maintain its international credibility ultimately hurt the government's domestic credibility, which in turn weakened its ability to perform its international commitments.

The U.S. beef controversy highlights the need for trade negotiators to carefully consider the domestic decisionmaking process of their counterparties when negotiating international agreements. It also teaches us the increasingly important role that domestic policymaking processes play, especially in our currently charged global economic environment, in maintaining the viability of our international legal system.

Essay

China's Practice in International Investment Law: From Participation to Leadership in the World Economy

Guiguo Wang[†]

I. INTRODUCTION

This Essay is in honor of Professor Michael Reisman. I had the privilege of studying for a J.S.D. degree at Yale under his supervision. Professor Reisman is a great scholar of extreme modesty. He listens well, responds promptly to students' needs, and patiently explains his and others' viewpoints. Professor Reisman led me to the Yale Law School twenty-seven years ago, and ever since I have benefited from his great scholarship, and in particular his New Haven School jurisprudence—law “as a process of decision that is both authoritative and controlling.”¹ It is difficult to measure the extent to which my study of the law has benefited from Professor Reisman's scholarship. Yet I can safely say that his theory of, and approach to, the law have had a profound influence on my scholarship. This piece is a case in point. In fact, as with many of my earlier projects, I have again had the benefit of his advice in writing this Essay.

This brief Essay reviews the policies and laws adopted by China in the last three decades relating to foreign investment, in particular the recent development of China's policies regarding bilateral investment treaties (BITs) and free trade agreements (FTAs). China started its long march toward modernization in 1978 by encouraging the inflow of foreign capital and technology and reforming the domestic economy.² Within thirty years, it has become the most active and largest developing host country for foreign direct investment³ and has entered into more than 120 BITs⁴ and several FTAs, most

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1. See W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, Commentary, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007).

2. After the death of Chairman Mao Zedong in 1976, Deng Xiaoping came to power. The Chinese Communist Party held a meeting at which it declared an end to both the notorious Cultural Revolution and the Party's large-scale political movement. It also announced that the country would embark on domestic economic reforms and open itself to the outside world. For more detailed discussion, see GUIGUO WANG, WANG'S BUSINESS LAW OF CHINA 5-11 (Kelleigh Poon ed., 4th ed. 2003).

3. According to statistics issued by the Ministry of Commerce, China had taken in \$747.1 billion in foreign investment by the end of November 2007. See China's Foreign-Capital Utilization in 2007, http://www.fdi.gov.cn/pub/FDI_EN/News/Focus/Subject/Utilization2007/default.html (last visited Apr. 1, 2009) [hereinafter China's Foreign-Capital Utilization].

4. See U.N. Conference on Trade and Dev. [UNCTAD], *Recent Developments in International Investment Agreements: 2007-June 2008*, at 3, fig.2, Doc. No. UNCTAD/WEB/DIAE/IA/2008/1 (2008), available at http://www.unctad.org/en/docs/webdiaeia20081_en.pdf.

recently the China-New Zealand FTA concluded in April 2008.⁵ In appraising the gradual progress of the Chinese foreign investment legal regime, this Essay will emphasize the factors that have led to the changes in the system and the interactions between international and national norms. Although China has not been involved as a party to any dispute, Chinese practice in BITs and FTAs will have important consequences in shaping disputes and thus will also be reviewed.

In this Essay, four main areas will be examined: (1) treatment of investment; (2) qualified investments and investors; (3) expropriation; and (4) investor-state dispute settlement. The last Part will propose a policy alternative—namely, the development of a model BIT.

II. MECHANISMS FOR PROTECTING FOREIGN INVESTMENT

China adopted the Chinese-Foreign Equity Joint Ventures Law⁶ in 1979 for the purpose of attracting foreign investment. This law was followed, almost ten years later, by the Chinese-Foreign Contractual Joint Ventures Law⁷ and the Wholly Foreign-Owned Enterprises Law.⁸

These three laws have dictated the forms of foreign investment in China.⁹ In general, there is no upper limit on foreign equity holdings, while the minimum ownership of foreign investors is twenty-five percent of the total investment.¹⁰ After China joined the World Trade Organization (WTO), a number of additional economic sectors became open to foreign investments.¹¹

A very important issue in China's effort to attract foreign investment has been its treatment of foreign investors, in particular with respect to the issues of expropriation, compensation, and the standard of compensation.¹² China has tried to ease foreign investors' concerns about expropriation through both

5. Free Trade Agreement, P.R.C.-N.Z., art. 135, Apr. 7, 2008, *available at* <http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf> [hereinafter China-New Zealand 2008 FTA].

6. Law on Chinese-Foreign Equity Joint Ventures (promulgated by the Fifth Nat'l People's Cong., July 1, 1979, amended by the Standing Comm. Nat'l People's Cong., Mar. 15, 2001), *translated in* ISINOLAW (last visited Apr. 2, 2009) (P.R.C.).

7. Law on Chinese-Foreign Contractual Joint Ventures (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, amended by the Standing Comm. Nat'l People's Cong., Oct. 31, 2000), *translated in* ISINOLAW (last visited Apr. 2, 2009) (P.R.C.).

8. Law on Wholly Foreign-Owned Enterprises (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 1986, amended by the Standing Comm. Nat'l People's Cong., Oct. 31, 2000), *translated in* ISINOLAW (last visited Apr. 2, 2009) (P.R.C.). For discussion on these laws and their implementation, see WANG, *supra* note 2, at 193-247.

9. According to China's Ministry of Commerce, by the end of 2007, more than 630,000 foreign-invested enterprises had been established. See China's Foreign-Capital Utilization, *supra* note 3.

10. Article 4 of the Law on Chinese-Foreign Equity Joint Ventures provides in respect of the registered capital of a joint venture that "[t]he proportion of the foreign joint venture party's investment . . . shall be, in principle, not less than 25 percent of its registered capital." Law on Chinese-Foreign Equity Joint Ventures, *supra* note 6, art. 4.

11. For discussion on the matter, see GUIGUO WANG, *THE LAW OF THE WTO: CHINA AND THE FUTURE OF FREE TRADE* 51-55 (2005).

12. These questions arose because, after the establishment of the People's Republic in 1949, China expropriated all private enterprise, a process that ended in 1957 when the Anti-Rightists Movement began.

domestic laws¹³ and BITs. The first group of BITs that China entered into included treaties with Germany (1983), France (1984), and Norway (1984). They are brief in nature, outlining the desire of the parties to promote bilateral investment. They also emphasize the right of subrogation in case of expropriation and repatriation of investment. While most-favored-nation (MFN) treatment¹⁴ is provided in those treaties, national treatment¹⁵ was not granted to foreign investors and investments.

As China has gained more experience with foreign investment, further improvements have been made. For instance, the early BITs tended to define investments narrowly and would only grant foreign investors MFN treatment. In the current generation of BITs, however, elements such as national treatment, fair and equitable treatment, full security and protection according to international standards, as well as investor-state arbitration, are included as standard provisions. In addition, on February 6, 1993, China became a contracting party to the ICSID Convention;¹⁶ however, it made a reservation that it “would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization.”¹⁷

More recently, China renegotiated and signed BITs with Germany (December 2003), Finland (November 2004), Spain (November 2005), and Portugal (December 2005). These newly revised BITs reflect the Chinese government's current position on international investment law. They constitute a new generation of Chinese BITs.

The FTAs to which China is a party are also important factors for foreign investment. The first FTA negotiated by China was with the Association of Southeast Asian Nations (ASEAN) in November 2002,¹⁸ followed by the China-Chile FTA,¹⁹ both of which concentrate essentially on

13. For instance, Article 2 of the Law on Chinese-Foreign Equity Joint Ventures provides: “The State shall not nationalize or requisition any equity joint ventures. Under special circumstances, when public interest requires, equity joint ventures may be requisitioned by following legal procedures and appropriate compensation shall be made.” Law on Chinese-Foreign Equity Joint Ventures, *supra* note 6, art. 2.

14. According to the International Law Commission, “[m]ost-favored-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.” Int’l Law Comm’n, *Draft Articles on Most-Favored-Nation Clauses*, [1978] 2 Y.B. Int’l L. Comm’n pt. 2, at 21, U.N. Doc. A/CN.4/SER.A/1978/Add.1. In practice, MFN treatment may cover any advantage, favor, privilege, or immunity in relation to investment, trade in goods and services, intellectual property protection, etc.

15. Like MFN treatment, national treatment is also a treaty obligation whereby the granting State undertakes to accord treatment “of persons or things in a determined relationship with the beneficiary State, not less favorable than the treatment of persons or things in the same relationship with itself.” See Int’l Law Comm’n, *Fifth Report on the Most-Favored-Nation Clause by Mr. Endre Ustor, Special Rapporteur—Draft Articles with Commentaries (Continued)*, [1974] 2 Y.B. Int’l L. Comm’n pt. 1, at 124, U.N. Doc. No. A/CN.4/280.

16. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

17. The reservation made by China was considered by some to reflect its reluctance to submit disputes to international arbitration. See Mark A. Cymrot, *Investment Disputes with China*, DISP. RESOL. J., Aug.-Oct. 2006, at 80.

18. Framework Agreement on Comprehensive Economic Co-operation, P.R.C.-ASEAN, Nov. 5, 2002, available at <http://www.aseansec.org/13196.htm>.

19. Free Trade Agreement, P.R.C.-Chile, Nov. 18, 2005, available at http://www.direcon.cl/documentos/China2/tlc_chile_china_ing_junio_2006.pdf.

trade issues. The most comprehensive FTA that China has entered into is with New Zealand,²⁰ which was signed following the China-Pakistan FTA.²¹

III. QUALIFIED INVESTMENTS AND INVESTORS

Qualified investments and investors are essential for the enjoyment of protection under BITs and FTAs. In this regard, the China-Norway BIT, one of the earliest Chinese BITs, provides that “[t]he term ‘investing’ means assets permitted by either contracting party in accordance with its laws and regulations, including” movable and immovable properties, shares, stocks and debentures, claims to money, copyrights, and concessions conferred by law.²²

The definition of investment has broadened with the development of Chinese law and China’s increased experience with investment treaties. For instance, the 2003 China-Germany BIT defines investment as “every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party.”²³ By including the word “indirectly,” the China-Germany BIT covers a broader set of investments than those covered by China’s previous BITs. The China-New Zealand FTA specifically includes in the definition of investment “bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom,” and “any right conferred by law or under contract and any licenses and permits pursuant to law.”²⁴

Following international practice, the BITs and FTAs that China has entered into identify many different areas and activities as “investment.” As a consequence, what constitutes an investment may be subject to interpretation in practice. Indeed, the ambiguity of this term is often the source of investment disputes in the international arena. In this regard, China would welcome the “*Salini* test,” according to which any foreign direct investment should contribute to the economic development of the host country.²⁵

Chinese law also requires foreign investors to contribute advanced technology that will, in China’s view, contribute to economic development.²⁶ Suppose the Chinese government, after examining the documents and business plans of foreign investors, approves a project, but later determines

20. China-New Zealand 2008 FTA, *supra* note 5.

21. Free Trade Agreement, P.R.C.-Pak., Nov. 24, 2006, *available at* <http://gjs.mofcom.gov.cn/accessory/200611/1164349025774.doc> [hereinafter China-Pakistan 2006 FTA].

22. Agreement on Mutual Protection of Investments, P.R.C.-Nor., art. 1, Mar. 1, 1987, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/china_norway.pdf [hereinafter China-Norway 1987 BIT].

23. Agreement on the Encouragement and Reciprocal Protection of Investments, P.R.C.-F.R.G., art. 1, Dec. 1, 2003, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/china_germany.pdf [hereinafter China-Germany 2003 BIT].

24. China-New Zealand 2008 FTA, *supra* note 5, art. 135.

25. *See* *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 42 I.L.M. 609 (2003). *But see* *L.E.S.I., S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction para. 72 (July 12, 2006), *available at* <http://ita.law.uvic.ca/documents/LESIAAlgeria.pdf> (emphasizing that *Salini* is one in a group of cases that have weighed in on the issue).

26. Law on Chinese-Foreign Equity Joint Ventures, *supra* note 6, art. 5 (“The technology and equipment contributed by a foreign joint venture party as its investment must be . . . advanced technology and equipment that suit China’s needs.”).

that the investment is not qualified to enjoy preferential treatment because the technology invested is insufficiently advanced. In this case, the tribunals seized of the case would need to decide the qualification of the investment,²⁷ and the relevant BIT may play a crucial role.

The BITs China entered into before the mid-1990s all require investments to be made “in accordance with the laws and regulations” of the host country. The recently concluded BITs, however, do not include such a requirement. For example, the new China-Germany BIT simply defines investment as “every kind of asset invested directly or indirectly.”²⁸ In practice, this omission may prevent China from claiming that an investment is unqualified and therefore lacks the protection of the treaty, as the Philippine government did in the *Fraport* case.²⁹

The approval processes in relation to foreign investment may work for China as a recipient of foreign capital where a foreign investor fails to fully disclose the information required by law. The case in point is *Plama v. Bulgaria*,³⁰ in which the foreign investor failed to make a full disclosure of its shareholding. The tribunal held the concealment as “amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required.”³¹

With regard to defining the category of “investors,” which is another fundamental question in international investment law, the China-New Zealand FTA contains a typical statement affording protection to enterprise investors “constituted or organized under the law of a Party, and a subsidiary located in the territory of a Party and engaged in substantive business operations there.”³² A plain reading of the above provision would mean that where an entity from one party sets up an enterprise (subsidiary) in the territory of the other party, the subsidiary may not be entitled to the treaty protection unless it engages in substantive business activities. This provision may not cover natural persons, notwithstanding Article 149(b), which permits a Contracting Party to deny the benefits to “investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.”³³ Without a doubt, the word “persons” covers both legal and natural persons.³⁴ The essence of these

27. In *Saipem*, the ICSID tribunal reiterated the investor's claim that because “Saipem invested substantial technical, financial and human resources in the project, which gave a substantial contribution to Bangladesh's economic development, and it assumed risks for a significant duration,” the related contract was an investment. *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, para. 100 (Mar. 21, 2007), available at <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>.

28. China-Germany 2003 BIT, *supra* note 23, art. 1(1).

29. *Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007), available at <http://ita.law.uvic.ca/documents/FraportAward.pdf>.

30. *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), available at <http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf>.

31. *Id.* para. 135.

32. China-New Zealand 2008 FTA, *supra* note 5, art. 135. “Natural person” investors covered by the treaty include nationals and permanent residents of either state party to the agreement. *Id.*

33. *Id.* art. 149(b).

34. *Id.* art. 4.

provisions is to prevent a *Tokios Tokeles* situation,³⁵ wherein the control test was held not to apply in determining the nationality of foreign investors.

IV. TREATMENT OF INVESTMENT

To hold the host government responsible under a BIT, the body that acts or fails to act must be part of the government. BITs, however, seldom explicitly identify the agencies whose actions can or cannot be attributed to the state. In practice, such issues are determined in accordance with international law—in particular, customary international law. The Draft Articles on Responsibilities of States for Internationally Wrongful Acts³⁶ adopted in 2001 by the International Law Commission are often referred to.

Insofar as a treatment standard is concerned, around twenty percent of the BITs that China has entered into provide for national treatment.³⁷ Most of its recently concluded BITs contain relative standards—national and MFN treatment, as well as the fair and equitable standard. The China-Germany BIT provides that such standards should apply to “investments and activities associated with such investments,”³⁸ but it is far from clear as to what may constitute an activity associated with or relating to an investment. The Protocol to the China-Germany BIT further sets out that “the following shall more particularly, though not exclusively, be deemed ‘activity’ within the meaning of Article 3(2): the management, maintenance, use, enjoyment and disposal of an investment.”³⁹ In any event, the phrase, “though not exclusively,” should be read to imply the inclusion of any activity that may be reasonably justified as related to an investment. Of course, a question that may immediately arise is whether the national and MFN treatment under the BIT could be applied to preinvestment activities.⁴⁰

Concerning the treatment standards, the China-Portugal BIT, like several other BITs, makes a reference to international law. Article 10(1) states:

35. *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (June 29, 2007), available at <http://icsid.worldbank.org/ICSID> (follow “Cases”).

36. See Int’l L. Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n pt. 2 at 20, 47-49, 52-54, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

37. Among the 117 BITs China has entered into so far, only seventeen provide for national treatment, whilst the others stipulate fair and equitable treatment as the standard. See Zhang Caixia, *Shenshi yu chonggou zhongwai shuangbian touzi xiedingzhong de guomin daiyu zhidu [Review and Reestablish the National Treatment System in Sino-Foreign BITs]*, 5 FALUN LUNTAN [RULE OF LAW TRIB.] 240 (2007).

38. China-Germany 2003 BIT, *supra* note 23, art. 3(2).

39. Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investments, P.R.C.-F.R.G., para. 4, Dec. 1, 2003, available at http://www.unctad.org/sections/dite/iaa/docs/bits/china_germany.pdf.

40. Chinese law contains no provisions for affording pre-investment national treatment to foreign investors. China is now an observer of the Energy Charter Treaty, which stipulates national treatment to pre-investment activities. See Energy Charter Treaty pmb. & art. 10, Dec. 17, 1994, 34 I.L.M. 381 (1995), reprinted in ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS: A LEGAL FRAMEWORK FOR INTERNATIONAL ENERGY COOPERATION (2004), available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. It is therefore foreseeable that China may come to accept pre-investment national treatment in its BITs.

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain regulations entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the present Agreement, such regulations shall, to the extent that they are more favorable, prevail over the present Agreement.⁴¹

These provisions may raise more questions than they resolve, as what may constitute the appropriate international standard is, to say the least, very uncertain.⁴²

As discussed earlier, in China's practice, the protection and treatment offered to investors, both national and MFN, are without qualification. This is in contrast to the "prudential reasons" exception under Article 1410(1) of the North American Free Trade Agreement⁴³ (NAFTA), which is limited to measures directed at protecting the integrity of the financial system.⁴⁴ A similar provision was included in China's specific commitments relating to the service sector that were made for purposes of joining the WTO. As it is very difficult, if not impossible, to draw a line between investment and trade in services in most cases, this may cause difficulties in practice. For instance, where a measure is introduced by the Chinese government pursuant to the prudential principle under the General Agreement on Trade in Services (GATS), it may be judged against the provisions of BITs relating to fair and equitable treatment and national treatment. As the WTO dispute resolution mechanisms only permit WTO members to initiate complaints, private investors are likely to choose international arbitration for resolving their disputes with China. In such a case, may the Chinese government use GATS compliance as a defense for not providing fair and equitable treatment or national treatment to foreign investors?

"Fair and equitable treatment" has become a common treatment standard in China's recent BITs. The China-New Zealand FTA, as a matter of principle, does not apply to trade in services. Yet it extends to government measures that affect the supply of services through commercial presence in respect to transfer of funds, fair and equitable treatment, compensation, expropriation, and subrogation. In such matters, a service supplier may invoke the investor-state dispute settlement mechanism to resolve its differences with the host government.⁴⁵ Constant protection and security are also commonly provided

41. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, P.R.C.-Port. art. 10(1), Feb. 3, 1992, available at http://www.chinahotelsreservation.com/china_law/Agreement_between_china_law_the_Government526.html [hereinafter China-Portugal 1992 BIT].

42. The *Neer* case is generally regarded as the historical baseline standard for the treatment for foreigners. See *Neer v. Mexico*, 4 R. Int'l Arb. Awards 60 (U.S.-Mex Gen. Claims Comm'n 1926). However, some tribunals have since departed from the *Neer* standard and held that the minimum standard has evolved over time. See, e.g., *ADF Group, Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, para. 179 (Jan. 9, 2003), available at <http://www.state.gov/documents/organization/16586.pdf>.

43. *Fireman's Fund Ins. Co. v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, paras. 156-68 (July 17, 2006), available at <http://icsid.worldbank.org/ICSID> (follow "Cases").

44. See OLIN L. WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK 74-75 (1994).

45. China-New Zealand 2008 FTA, *supra* note 5, art. 137. The measures affecting services do not include subsidies provided by a party or "laws, regulations, policies or procedures of general application governing the procurement by government agencies of goods and services purchased for

in China's BITs and therefore they have become standard treatments that China offers to foreign investors.

There are also restraints on the application of national treatment provisions. They include (1) the existing nonconforming measures, (2) continuation and amendments of nonconforming measures provided that such amendments do not increase the degree of nonconformity, and (3) a measure that would not fall into the national treatment obligations under an existing bilateral investment treaty that a party has concluded.⁴⁶ This having been stipulated, the parties are under an obligation to progressively remove the nonconforming measures.⁴⁷

The China-New Zealand FTA also stipulates that the FTA's condition regarding most favored nation treatment "does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out" in the FTA,⁴⁸ nor does the FTA prevent the parties from "accord[ing] differential treatment to third countries under any free trade agreement or multilateral international agreement."⁴⁹ Differential treatment involving fisheries and maritime matters under international agreements may also be considered an exception to the MFN treatment.⁵⁰

V. EXPROPRIATION AND COMPENSATION

Large-scale expropriation is no longer a major threat to contemporary international investment. However, indirect and creeping expropriation often triggers disputes. As one of the host countries that has attracted the largest amount of foreign capital, China has always paid particular attention to the issue of expropriation. For instance, the China-Norway BIT stipulates that expropriations of foreign direct investments must serve a public purpose⁵¹ and be carried out in a nondiscriminatory manner.⁵² The China-New Zealand FTA also provides that expropriation must "not [be] contrary to any undertaking which the Party may have given."⁵³

With regard to compensation for expropriation, most recent BITs to which China is a party allow expropriation only upon the satisfaction of certain conditions. Nearly all of these BITs contain some form of the following provision:

governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale." *Id.*

46. *Id.* art. 141.

47. *Id.* The China-New Zealand FTA does not provide specifically what may constitute a nonconforming measure. It instead incorporates the provisions of the WTO Agreement on Trade-Related Investment Measures (TRIMs) *mutatis mutandis*. See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

48. China-New Zealand 2008 FTA, *supra* note 5, art. 139(2).

49. *Id.* art. 139(3). This exception also includes, "in respect of agreements on the liberalisation of trade in goods or services or investment, any measures taken as part of a wider process of economic integration or trade liberalisation between the parties to such agreements." *Id.* art. 139(4).

50. *Id.* art. 139(5).

51. China-Norway 1987 BIT, *supra* note 22, art. 5(1).

52. *Id.*

53. China-New Zealand 2008 FTA, *supra* note 5, art. 145(1)(d).

Neither Contracting Party shall expropriate, nationalise or take other measures having similar effects . . . against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met. The expropriation is done:

- (a) in the public interest;
- (b) under domestic legal procedure;
- (c) without discrimination, and
- (d) against compensation.⁵⁴

Without exception, all of the above-mentioned BITs contain clauses stipulating that compensation must be paid without undue delay, including interest, in a form that is effective and freely transferable. These provisions are in essence a reflection of the “Hull Rule”: the host state is required to pay prompt, adequate, and effective compensation in case of expropriation.⁵⁵ These provisions of the recent Chinese BITs confirm that China has accepted the standard. None of these BITs, however, contain detailed rules regarding how the market value should be ascertained, whether the discounted cash flow method could be employed, whether the expected profits should be compensated, and what may constitute expected profits.⁵⁶ Such issues will have to be addressed by arbitral tribunals or the courts. It will be interesting to observe how international investment arbitration and treaty practice may affect interpretation of these BITs with China.

All of the recent Chinese BITs contain rules on indirect expropriation through their reference to “other measures having similar effects,”⁵⁷ which resembles language in NAFTA.⁵⁸ However, this language offers little guidance as to which specific measures constitute indirect or creeping expropriation.

China now accepts fair market value as the standard for compensation, although the wording may differ from treaty to treaty.⁵⁹ For example, the China-New Zealand FTA contains detailed provisions on the calculation of compensation by stating that where “the fair market value is denominated in a freely usable currency,”⁶⁰ the compensation must be ascertained in accordance

54. Agreement on the Encouragement and Reciprocal Protection of Investments, P.R.C.-Fin., art. 4(1), Mar. 10, 2006, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/china_finland.pdf [hereinafter China-Finland 2006 BIT]; *see, e.g.*, China-Portugal 1992 BIT, *supra* note 41, art. 4(1); Acuerdo para la Promoción y Fomento Recíprocos de Inversiones [Agreement on the Encouragement and Reciprocal Protection of Investments], P.R.C.-Spain, art. 4(1), Feb. 6, 1992, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/spain_china_sp.pdf.

55. The Hull Rule was articulated in 1938 by U.S. Secretary of State Cordell Hull in response to Mexican expropriation of U.S. agricultural and oil interests. It became the cardinal principle of U.S. custom in this sphere. *See* M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 128 (1994).

56. On the issue of expected profits, *see* CME Czech Rep. B.V. v. Czech Republic, Award, Separate Opinion on the Issues at the Quantum Phase, para. 32 (Mar. 14, 2003) (Brownlie, Arb.), *available at* http://ita.law.uvic.ca/documents/CME2003-SeparateOpinion_000.pdf.

57. China-Finland 2006 BIT, *supra* note 54, art. 4(1); *see also* China-Germany 2003 BIT, *supra* note 23, art. 4(2); China-Portugal 1992 BIT, *supra* note 41, art. 4(1).

58. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1110, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289.

59. For instance, the China-Pakistan FTA requires compensation to be equivalent to the value of the expropriated investments immediately before the expropriation or before the impending expropriation becomes public knowledge, whichever occurs earlier. China-Pakistan 2006 FTA, *supra* note 21, art. 49.

60. According to the International Monetary Fund, U.S. dollars, Japanese yen, British pounds sterling, and the Euro are freely usable currencies. Selected Decisions and Selected Documents of the IMF, Thirtieth Issue—Freely Usable Currencies, Decision No. 11857-(98/130) (June 30, 2006), *available at* [http://www.imf.org/external/pubs/ft/sd/index.asp?decision=11857-\(98/130\)](http://www.imf.org/external/pubs/ft/sd/index.asp?decision=11857-(98/130)).

with the “fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”⁶¹ In case the fair market value is denominated in a nonfreely usable currency, the compensation should be calculated at the prevailing market exchange rate for a freely usable currency on the date of payment.⁶²

VI. INVESTOR-STATE DISPUTE SETTLEMENT

The dispute settlement mechanism specified in China’s earlier BITs usually excluded the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). BITs that permitted ICSID jurisdiction limited this jurisdiction to disputes over expropriation and compensation.

This practice has changed dramatically in recent years. In 1998, China entered into a BIT with Barbados whereby disputes between a foreign investor and the host state may be submitted to the ICSID for arbitration.⁶³ Similar provisions are found in other recent BITs to which China is a party. These BITs do not exclude the jurisdiction of the ICSID in relation to many important issues, including: denial of benefits to foreign investors; foreign investors with capital from the host country, or controlled or owned by domestic entities of the host country; prudent financial supervisory measures adopted by the host country; and significant safety exceptions. Such changes in Chinese treaty practice have much to do with the fact that an increasing number of Chinese entities are investing overseas. In order to protect Chinese nationals investing overseas, it is necessary for China to accept investor-state arbitration as a norm of international investment law.

The China-Pakistan FTA and the China-New Zealand FTA also provide for investor-state arbitration. Both FTAs make attempts at amicable settlement through negotiation a prerequisite for submission of a dispute for international arbitration. If the dispute cannot be settled within a period of six months, the investors concerned may decide to submit their dispute through other means.⁶⁴ Under the China-Pakistan FTA, the investor may instead choose either to submit its dispute to a competent domestic court of the host country, or to arbitration at the ICSID; once a local court is chosen, submitting the same dispute to the ICSID for arbitration is precluded.⁶⁵ The China-New Zealand FTA also authorizes investors to make use of ICSID conciliation or UNCITRAL arbitration procedures.⁶⁶ Before availing themselves of international arbitration, they must give three months advanced notice to the

61. China-New Zealand 2008 FTA, *supra* note 5, art. 145(3).

62. *Id.* art. 145(4). The same applies to interest payment but “does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.” *Id.* art. 145(5).

63. Agreement on the Encouragement and Reciprocal Protection of Investments, P.R.C.-Barbados, art. 8, July 20, 1998, available at <http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgobctearpoi1447>.

64. See China-New Zealand 2008 FTA, *supra* note 5, arts. 152-53; China-Pakistan 2006 FTA, *supra* note 21, art. 54(1)-(2).

65. China-Pakistan 2006 FTA, *supra* note 21, art. 54(2).

66. China-New Zealand 2008 FTA, *supra* note 5, art. 153(2).

state party.⁶⁷ The purpose of this provision is to allow the host country to require the use of administrative review procedures that already exist in the host country.⁶⁸ The administrative review process in any event may not exceed three months.

Host countries always encourage investors to submit their disputes to local courts, but investors in most cases prefer international arbitration. Under the China-New Zealand FTA, an investor that has submitted its dispute to a local court of the host country may later decide to resort to international arbitration, provided that it has withdrawn its case from the local court before a final judgment is reached.⁶⁹ This arrangement stands in contrast to that established under the China-Pakistan FTA.

The China-New Zealand FTA also has detailed rules on arbitration procedures that have the effect of modifying the domestic laws of the Parties as well as the normal procedures of the ICSID.⁷⁰ One such modification is that the statute of limitations for the submission of disputes must be within three years from “the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of obligation” by the host country, which has “caus[ed] loss or damage to the investor or its investments.”⁷¹

With growing recognition of the need for government accountability in arbitration proceedings, the China-New Zealand FTA permits a state party to make publicly available all documents relating to arbitration, except those specifically designated as confidential when submitted to the arbitral tribunal.⁷²

VII. ALTERNATIVES FOR POLICY CONSIDERATION

Over the last thirty years, China has gradually become the largest recipient of international investment among emerging market economies as well as a sizable capital-exporting country. It has come to accept the contemporary practices of the international community relating to international investment, and the Chinese legal system has become, in a relatively short period of time, much more conducive to the inflow of foreign capital.

Nevertheless, to play a role in world affairs commensurate to its size and economic importance, particularly in international investment, China still has much to do. In our highly globalized world, the line dividing national and international legal systems is becoming thinner; international norms are, by way of treaties like BITs and international organizations like the WTO, moving steadily and continuously into the legal system of sovereign states. States need to review and modify their laws and policies rapidly in order to cope with the ever-changing situation. After joining the WTO, China has been

67. *Id.* art. 153(1).

68. *Id.* art. 153(2).

69. *Id.* art. 153(3).

70. Article 153(4) of the China-New Zealand FTA clearly states that the provisions of the FTA on dispute settlement prevails over both ICSID and UNCITRAL arbitration and conciliation procedures. *Id.* art. 153(4).

71. *Id.* art. 154(1).

72. *Id.* art. 157.

particularly active in revising its laws. Yet it appears that equal attention has not been paid to BITs.

China is already an important country in terms of both investment inflow and outflow. As it wishes to be viewed as a responsible member of the international community, however, it must do more to meet the rest of the world's expectations. This was put well by Professor Reisman: "Major power differential responsibilities form the very structure of the international economic agencies, for those agencies are premised on the transfer of resources by the wealthiest States to the less endowed States. Power within the agencies is distributed on the basis of the size of contributions."⁷³ BITs and FTAs are integral parts of this international economic infrastructure, and China should do more to participate in their evolution and development.

One means through which China could exercise leadership would be to prepare a model BIT ("Chinese Model BIT"). To be sure, the Chinese government may already rely on internal draft models or precedents; what is currently lacking, however, is a publicly announced, and more detailed and comprehensive draft. The Chinese Model BIT would serve not only as a basis for future negotiations but also as a signal of the government's policy intentions that would in turn offer more predictability and transparency to state party counterparts and foreign investors alike. The Chinese Model BIT should address all the important issues, including:

- *Conditions on qualified investments and investors.* The Chinese Model BIT should stipulate clearly the Chinese position on this issue, in particular whether investments must be made in accordance with Chinese law.
- *The relationship between fair and equitable treatment and international minimum standards of treatment.* In practice, BITs and arbitral tribunals sometimes distinguish one from the other and sometimes treat these two standards as identical. It would be a significant contribution to international investment law if the Chinese Model BIT addressed this issue.
- *Contents and standards of fair and equitable treatment.* It is generally accepted that the fair and equitable treatment standard requires the host government to observe due process. The existence of a transparent body that is independent from the administrative authorities and empowered to handle disputes between the government and foreign investors may also be necessary in order to provide fair and equitable treatment to foreign investors. As this area of law is still developing, the more detailed the provisions are, the more impact they will have on the development of international investment law.
- *Indirect expropriation.* Most expropriation disputes involve indirect forms of expropriation, such as regulatory expropriation. These kind of disputes are the greatest source of trouble for host governments. The

73. W. Michael Reisman, *Towards a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers*, in JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 43, 55 (Nisuke Ando ed., 1999).

Chinese Model BIT should have well-thought-out provisions as to the exceptions to fair and equitable treatment, full protection and security, and international minimum standards in situations of emergency.

- *Acts attributable to the host government.* Where a BIT provides for the standard of treatment, etc., both acts and omissions must be attributable to the host government. In the Chinese context, despite the fact that China is gradually adopting a market-oriented economy, the government is still able to intervene in business transactions either directly or through quasi-governmental organizations. Professional and business associations may be closely connected with the government. To provide some clarity, the Chinese Model BIT may stipulate the parameters of acts and omissions attributable to the government, even though developing an exhaustive list may not be possible.
- *Investor-state dispute resolution.* The Chinese Model BIT should also deal with the effect of China's reservation to the ICSID Convention, and, in particular, address whether the principle of *lex posterior derogate priori* should apply. Another issue is whether the MFN principle applies to issues relating to dispute resolution.
- *Interpretation rules.* To negotiate a good treaty is only half the work; it must also be effectively implemented. The Chinese Model BIT should lay down some guiding principles and rules relating to interpretation.

Before drafting a Model BIT, the Chinese government should conduct systematic research on each of the issues involved. The Korean government has, for example, planned to mobilize scholars both within and outside the country to conduct research on investor-state arbitration. Research should also be undertaken into how to coordinate and harmonize present and future BITs and FTAs. China has entered into a framework agreement with ASEAN for the formation of a free trade area; negotiations on the detailed provisions are being conducted. At the same time, ASEAN countries are also interested in serving as the hub for the East Asian Community, which in their view is bound to take place. Good research will also help the Chinese government avoid the auto-parts type of problems that it has encountered in the WTO.⁷⁴ In the process, as this brief Essay indicates, it is important to adopt the New Haven School approach articulated by Professor Reisman, i.e., the “praxis of five intellectual tasks: goal formulation, trend description, factor analysis, projection of future decisions, and the invention of alternatives.”⁷⁵

74. In a nutshell, when joining the WTO, China committed to grant preferential treatment to auto-parts without fully understanding the contents of “auto-parts” and later was found to have violated WTO rules by revising the tariffs. For details of the case, see Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R & WT/DS342/AB/R (Dec. 15, 2008).

75. Reisman, Wiessner & Willard, *supra* note 1, at 576.

Essay

Nondiscrimination as a Universal Human Right

Aaron X. Fellmeth[†]

I. INTRODUCTION

An important undercurrent in Michael Reisman's work in international human rights law is the law's utilitarian nature. True to the New Haven School, he conceives of human rights not as self-evident and eternal metaphysical truths but as part of the international community's program of promoting shared, fundamental values in the face of fractious opposition by those uncommitted to humanitarianism. And these values center primarily on human life and happiness, or in his felicitous phrasing: "[T]he international human rights program, when stripped of its own more recent mystical overlay, is based on the notion that, in a crunch, human beings and not states matter."¹ The mystical overlay includes a certain reification of human rights that, while useful in advocacy, sometimes obscures the exceptionally mutable nature of many human rights.

One human right in particular—the right to freedom from arbitrary discrimination based on race, sex, or other status—presents special challenges to the integrity of the mystical overlay. All of the major international human rights instruments guarantee the right in some form, and some are specifically oriented toward preventing certain kinds of discrimination.² The uniqueness of the nondiscrimination right arises from two seemingly contradictory aspects of the right. On one hand, the right to equal treatment is a necessary and central component of any coherent ethical system based a priori on the value of human beings. On the other hand, it would be impossible and in any case undesirable for the law even to approach treating all human beings equally. This is the challenge of the nondiscrimination right in a nutshell.

There are several ways to approach discrimination as an expression of the right to equality under law. One approach identifies a limited number of grounds on which distinctions made, supported, or tolerated by a state government will be considered presumptively illegitimate—I'll refer to this as a "protected class approach" of nondiscrimination. Alternatively, distinctions on any ground may be considered in need of justification under some standard

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1. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

2. *E.g.*, Convention on the Elimination of All Forms of Discrimination Against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Annex, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195, 212; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, at 66, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/49 (Dec. 13, 2006).

of review if they result in the denial of a recognized human right—an “Article 14 ECHR approach” toward nondiscrimination.³ Finally, one might consider any governmental distinction between persons on any grounds to be presumptively in need of justification—a “universal equal rights approach” toward nondiscrimination.

II. PROTECTED CLASS APPROACH

Both Canada in its Charter of Rights and Freedoms⁴ and Human Rights Act 1985,⁵ and the United States through a collection of civil rights statutes, take a protected class approach to nondiscrimination rights. Unlike the Canadian Charter, the Fourteenth Amendment to the U.S. Constitution does not specify that certain classes of persons benefit from equal protection rights and others do not; it merely prohibits states from “deny[ing] to any person within [their] jurisdiction the equal protection of the laws.”⁶ Congress has, however, adopted legislation to protect specific classes of persons from public and some kinds of private discrimination, most prominently in Title VII of the 1964 Civil Rights Act,⁷ the Age Discrimination in Employment Act,⁸ and the Americans with Disabilities Act.⁹ The protection afforded to these classes is not, however, uniform. The Supreme Court has interpreted the Constitution to require that some grounds of discrimination, such as race, benefit from a strong presumption of illegitimacy under the “strict scrutiny” standard.¹⁰ Sex discrimination benefits from a heightened or “intermediate” level of scrutiny.¹¹

But the grounds of discrimination omitted from these laws are as important as—indeed, greatly outnumber—the grounds listed. Neither the

3. European Convention on Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

4. Section 15 of the Canadian Charter of Rights and Freedoms provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 15.

5. Human Rights Act, R.S.C., ch. H-6 pt. I, § 3 (1985) (“(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.”).

6. U.S. CONST., amend. XIV, § 1. This language is reflected in several human rights conventions, but the conventions often include additional language clarifying prohibited grounds for discrimination.

7. 42 U.S.C. §§ 2000a, 2000d, 2000e-2, 2000bb to -4, 3604-3606 (2000).

8. 29 U.S.C. §§ 623, 631 (2000).

9. 29 U.S.C. §§ 706, 794 (2000); 42 U.S.C. §§ 12103-12213 (2000).

10. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

11. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976).

statutes nor the Supreme Court's interpretation of the Constitution requires that the government justify with special persuasiveness discrimination based on sexual orientation, political affiliation, marital status, parental status, birth out of wedlock, wealth and economic status, youth, and many other grounds. Distinctions on these grounds merely receive "rational basis" review,¹² which is applied with such deference to the political branches as to defy qualification as a meaningful human right.¹³ In general, the U.S. government is free under its domestic law to discriminate against many classes of persons on virtually any ground other than a malicious desire to persecute some disfavored minority group. In one rational review case, the Court's deference to the political branches was sufficiently extreme to provoke Justice Stevens to characterize it, with only the slightest exaggeration, as "tantamount to no review at all."¹⁴

The justification for limiting equal rights under law to certain protected classes is not entirely clear or consistent. In some cases, the greater sensitivity to race has been explained by the "history of purposeful unequal treatment"¹⁵ or "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."¹⁶ The Court has also held that greater protection is justified for the classes of persons who belong to a "discrete and insular" group or who need "extraordinary protection from the majoritarian political process."¹⁷ While these rationales are appealing, they are also inadequate to explain the Court's jurisprudence; many other classifications, such as sexual orientation, religion, socioeconomic class, and political affiliation (e.g., membership in the Communist Party), should qualify for heightened protection under these tests but do not in fact benefit from strict scrutiny review. The Court has rarely offered any kind of cogent explanation or cited any evidence to support its denial of meaningful scrutiny to discrimination against these groups. For example, in denying heightened scrutiny to discrimination against children born out of wedlock, the Court acknowledged the history of purposeful, unequal treatment against such children, the fact that the status was involuntary, and the fact that they are similarly situated to so-called "legitimate" children.¹⁸ Nonetheless, the Court majority did not consider such discrimination inherently suspect, because, in its opinion, "this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women

12. E.g., *Mathews*, 427 U.S. 495; cf., e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (holding that equal protection analysis is satisfied when a classification "has relation to the purpose for which it made and does not contain the kind of discrimination against which the Equal Protection clause afford protection").

13. One rare exception is *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court struck down a state constitutional amendment that would have banned antidiscrimination laws and ordinances benefiting homosexuals or bisexuals. The Court did not hold that sexual minorities belong to a protected class; instead, it found the measure failed rational basis review.

14. *Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

15. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

16. *Id.*

17. *Id.* (citing *Rodriguez*, 411 U.S. at 28).

18. *Mathews v. Lucas*, 427 U.S. 495, 504-05 (1975).

and Negroes.”¹⁹ The majority cited literally no evidence in support of this naked assertion, nor did it offer any guidance as to what the standard justifying heightened scrutiny would be. Similarly, the Court has never explained why the benefits of heightened scrutiny are withheld from homosexuals, who fulfill par excellence the criteria of a suspect class—all this while proclaiming, with apparent sincerity, that the Equal Protection Clause “neither knows nor tolerates classes among citizens.”²⁰

The protected class approach offers the advantages of relative clarity about prohibited grounds of discrimination and limitations on judicial review of well-meaning legislation. But whatever the theoretical merits of the approach, in practice it apparently poses difficulties of consistent application. The limitation of rights to specific, identified classes invites favoritism in the worst case and, in the best, susceptibility to the decisionmaker’s cultural, social, or other biases against the unprotected group. Ironically, these are among the very biases that an equal protection standard should neutralize.

The effect of a denial of serious balancing of state and private interests for most groups is to legitimize political discrimination when human rights authorities such as the U.S. Supreme Court defer to the political branches of government instead of justifying protection of a class rigorously and applying the same rationale consistently to other classes laboring under similar disadvantages. If, from social and political biases, the judicial authorities refuse to recognize a vulnerable class as entitled to special protection—for example, sexual minorities,²¹ or childless men and women²²—the class may receive no real protection. The Supreme Court’s application of heightened scrutiny to some classes and not others without evident justification does not merely leave unprotected groups in no worse a situation; it positively validates the state’s discrimination against them by denying the relevance of the very class characteristics that may have provoked the discrimination in the first place.

III. ARTICLE 14 ECHR APPROACH

At first glance, Article 14 of the European Convention seems to take a protected class approach, albeit with a much-expanded list of prohibited grounds of discrimination. The appearance is merely superficial; the inclusion of “or other status” leaves the list of prohibited grounds open-ended.²³ This was no accident; the *travaux préparatoires* of Protocol No. 12 to the

19. *Id.* at 506.

20. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

21. See, e.g., Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 25, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 832 (2008).

22. See generally LAURIE LISLE, *WITHOUT CHILD: CHALLENGING THE STIGMA OF CHILDLESSNESS* (1999) (describing the social and economic disadvantages suffered by women who choose to remain childless); CAROLYN M. MORELL, *UNWOMANLY CONDUCT: THE CHALLENGES OF INTENTIONAL CHILDLESSNESS* (1994) (same).

23. ECHR, *supra* note 3, art. 14.

Convention make clear that the list was never intended to be exhaustive.²⁴ The European Convention does not, then, agree with the U.S. practice of identifying only a limited class of persons who benefit from the equal protection of the laws. In that sense, the Article 14 approach reaches a much broader class of discrimination because a legal distinction operating to the detriment of any person on the ground of some quality or characteristic of that person could—at least theoretically—be grounds for condemnation of the distinction as prohibited discrimination. This moves the European approach to discrimination into the category of a universal right in the sense that all persons have a right to equal treatment under law, in a more meaningful sense than in U.S. practice, under which the great majority of individuals—not belonging to a protected class—have no significant right to protection against arbitrary discrimination.

The language of Article 14 does, however, contain a very consequential limitation on this universal right. It applies only to discrimination impairing “the rights and freedoms set forth in this Convention.”²⁵ The Strasbourg Court realizes the injustices that the limitation, if read literally, would sanction. A limitless variety of arbitrary or oppressive state actions or omissions based entirely on maliciously discriminatory motives could theoretically fall outside of the protections of Article 14 so long as the unequal treatment did not deprive the applicant of a right specifically enumerated in the Convention. If the Convention specifies no right to parental leave in the case of childbirth (and it does not), and a party to the Convention provides in its law for paternal but not maternal leave, then there is no prohibited discrimination under the literal terms of Article 14, because the discrimination impairs no right or freedom set forth in the Convention. Clearly, this is not a sufficient minimum guarantee of equal rights.

The Strasbourg Court has indirectly addressed this problem, but it has done so inconsistently. It has taken the position that the “application of Art. 14, does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more” articles of the Convention.²⁶ The court has sometimes accordingly interpreted the ECHR to provide a guarantee against arbitrary discrimination to the detriment of, not a right specifically guaranteed by the Convention, but an interest that falls within the same general subject matter as the human right.²⁷ A state that grants a benefit or imposes some burden “within the ambit” of a protected right may not discriminate arbitrarily. Of course, the court has never defined clearly just what kinds of treatment fall “within the ambit” of a Convention

24. See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177, available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

25. ECHR, *supra* note 3, art 14.

26. 26. E.B. v. France, App. No. 43456/02, para. 47 (Eur. Ct. Hum. Rts. Jan. 22, 2008) (footnote omitted), available at <http://www.echr.coe.int/>.

27. See, e.g., Petrovic v. Austria, 1998-II Eur. Ct. H.R. 579; Schmidt v. Germany, 291-B Eur. Ct. H.R. (ser. A) (1994); Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A), paras. 68, 71, 79-82 (1985).

right and which do not, which would seem to indicate a doctrine that is highly discretionary or flexible. But the blame for the ambiguity cannot be laid at the court's doorstep; when forced to choose between an unsatisfactory human rights jurisprudence and absolving the state parties of liability for very serious and arbitrary inequalities in treatment, the court has properly chosen the former in recognition that, to tweak Reisman's phrasing a little, "in a crunch, human beings and not perfectly consistent doctrines matter."²⁸

IV. THE UNIVERSAL EQUAL RIGHTS APPROACH

The European Union and Council of Europe are evidently aware of the challenge that Article 14 poses to a coherent human rights doctrine. The nonbinding European Charter prohibits in Article 21 "any discrimination" on the enumerated grounds, meaning discrimination with respect to any law.²⁹ Similarly, Optional Protocol No. 12 to the European Convention on Human Rights (ECHR) extends the nondiscrimination obligation beyond the rights enumerated to encompass unequal treatment under any law.³⁰ The fact that one of these instruments is nonbinding and the other optional (and not yet widely subscribed) does not create any special problem because all major international human rights conventions have similar prohibitions on discrimination in any law and on any grounds.³¹

Article 26 of the International Covenant on Civil and Political Rights prohibits "any discrimination"³² that is, according to the Human Rights Committee, "based on any ground."³³ Most state legislation discriminates against some people based on their status. Every state discriminates based on age in granting the right to vote. Progressive income taxes discriminate against the wealthy. As the Strasbourg Court recognized, if such an interpretation were accepted, "[o]ne would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment"³⁴ The court has accordingly defined discrimination to include only differences in treatment "without an objective and reasonable justification [of] persons *in relevantly similar situations*."³⁵ The Inter-

28. See Reisman, *supra* note 1 and accompanying text.

29. Charter of Fundamental Rights of the European Union art. 21, Dec. 7, 2000, 2000 O.J. (C 364) 1.

30. ECHR, *supra* note 3, art. 1.

31. See, e.g., CEDAW, *supra* note 2, art. 1; African Charter on Human and Peoples' Rights art. 19, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58; see also American Convention on Human Rights art. 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights art. 7, G.A. Res. 217A, at 71, U.N. GAOR, 3d. Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Office of the United Nations High Comm'r for Human Rights [OHCHR], Human Rights Comm'n, *General Comment No. 18: Non-Discrimination*, ¶ 12 (Nov. 10, 1989).

32. ICCPR, *supra* note 31, art. 26.

33. OHCHR, *supra* note 31, ¶ 7.

34. Belgian Linguistic Case No. 2, 6 Eur. Ct. H.R. (ser. A) para. 10 (1968).

35. D.H. v. Czech Rep., App. No. 57325/00, para. 175 (Eur. Ct. Hum. Rts. Nov. 13, 2007) (emphasis added) (citing *Willis v. United Kingdom*, 2002-IV Eur. Ct. H.R. 311, para. 48), available at <http://www.echr.coe.int/>.

American Court of Human Rights has qualified the nondiscrimination right in a similar way, although in different words.³⁶ In each case, an exception is necessarily implied to allow the state to discriminate to the extent necessary and proportional to protect the legitimate interests of a democratic society, notwithstanding the sometimes absolute language of the prohibition on discrimination.³⁷

The flexibility created by these qualifications allows human rights decisionmakers to demand more cogent justifications for discrimination adversely affecting vulnerable, disempowered, or politically or socially disfavored groups,³⁸ or where the right is especially personal and sensitive to infringement.³⁹ The protected class approach, in contrast, tends to rely on heuristics that may or may not reflect social reality. Some groups, for example, may suffer disproportionately from discrimination in some ways and benefit from discrimination in others. A class approach tends to discourage nuanced inquiry into the social, political, and economic consequences of individual membership in the protected class. Under a universal rights approach, decisionmakers are left free to evaluate government action or inaction in social context and to weigh the degree of threat to the group members against the benefit to other members of society. This does not mean that the universal equal rights approach merges with the protected class approach; far from it. The former is much more susceptible to fine tuning and subjective judgment in balancing the interests of the state and affected individuals. The universal rights approach accordingly invites greater judicial or other human rights supervision of governmental action than universal substantive rights, such as the right to free speech and conscience or the right against torture, do. The human rights authority necessarily assumes the role of ombudsman with respect to any governmental legislation and action that operates to the detriment of any specific segment of society. This is at once an empowering and perilous role for a decisionmaker such as a judge or Human Rights Committee member. It is also a role that, as Frederick Schauer would predict, tends to lead human rights decisionmakers to invent ways to circumscribe their own authority through the adoption of narrowing rules⁴⁰—a pertinent example being the Strasbourg Court's margin of appreciation doctrine.⁴¹ On the other hand, when the decisionmaker hyperextends nondiscrimination principles, as the Inter-American Court did when it proclaimed that international law prohibits states from discriminating against illegal immigrant workers by denying any benefit whatsoever granted to

36. See Juridical Condition and Human Rights of the Child, Advisory Opinion No. OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, at 56 (Aug. 28, 2002).

37. See, e.g., Framework Convention for the Protection of National Minorities art. 4, Feb. 1, 1995, 34 I.L.M. 351 (prohibiting "any discrimination" based on national minority group membership); CEDAW, *supra* note 2, art. 1 (defining discrimination to mean "any distinction" based on sex).

38. See, e.g., Schuler-Zraggen v. Switzerland, 263 Eur. Ct. H.R. (ser. A) paras. 64-67 (1993).

39. See, e.g., S.L. v. Austria, 2003-I Eur. Ct. H.R. 71, para. 37; L. & V. v. Austria, 2003-I Eur. Ct. H.R. 29, para. 45.

40. See Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 808 (2005).

41. See, e.g., Fretté v. France, 2002-I Eur. Ct. H.R. 345.

workers legitimately in the country—as a matter of *jus cogens*, no less⁴²—even avid human rights advocates cringe at the authority’s self-undermining potential.⁴³

V. CONCLUSION

Treating nondiscrimination rights as universal rights runs contrary to the U.S. approach and diverges from the European approach to date, but I hope the foregoing discussion has demonstrated some advantages and risks of the universal equal rights approach. A protected class approach is unavoidably rigid and underinclusive. Human rights, as core values insusceptible to simplistic definition, demand a certain flexibility in scope. The Article 14 ECHR approach offers more flexibility but also tends toward underinclusiveness. The Strasbourg Court has mitigated that problem somewhat through creative interpretation, but it remains improvisational.

This is not to characterize the universal equal protection approach as some kind of panacea. Michael Reisman once observed that extending the human rights program “into areas beyond enforcement capabilities” tends to bleed away “the anger at atrocities, the motive force we bring to the program, and the very scarce resources we have for its implementation.”⁴⁴ The same warning applies to the interjection into the process of balancing competing political interests of human rights law in general, and the potentially all-engulfing nondiscrimination right in particular. The Strasbourg Court,⁴⁵ Inter-American Court,⁴⁶ and other human rights authorities have wisely recognized that, although the right to equal protection of the laws must include guarantees against discrimination based on any grounds and in any kind of state action, the right must also be tempered by limiting doctrines and restraint to avoid undue interference in democratic politics.

42. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion No. OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 101, 149, 153, 155 (Sept. 17, 2003).

43. See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 823 (2008).

44. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 393 (1987).

45. See *supra* notes 26-27 and accompanying text.

46. See *supra* note 36 and accompanying text.

Essay

Secondary Human Rights Law

Monica Hakimi[†]

I. INTRODUCTION

In recent years, the United States has appeared before four different treaty bodies to defend its human rights record.¹ The process is part of the human rights enforcement structure: each of the major universal treaties has an expert body that reviews and comments on compliance reports that states must periodically submit.² What's striking about the treaty bodies' dialogues with the United States is not that they criticized it or disagreed with it on the content of certain substantive rules. (That was all expected.) It's the extent to which the two sides talked past each other. Each presumed a different set of secondary rules—rules governing how and by whom human rights law may be made, applied, and enforced³—so their arguments on substance appeared irresolvable.

Here is a fairly typical example: The committee that oversees the International Covenant on Civil and Political Rights (ICCPR) interprets that instrument to contain a rule on *refoulement*.⁴ The committee also understands its interpretations to be, in some way, authoritative.⁵ During the report-and-comment process, the United States contested both points. It argued, first, that the ICCPR has no rule on *refoulement*, and, second, that the ICCPR committee has no authority to establish one.⁶ Substance and process were intertwined. The disagreement on whether the ICCPR regulates *refoulement* could not be resolved without defining the nature of the lawmaking process—

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1. For related documents, see Office of the High Comm'r for Human Rights (Treaty Bodies Database), <http://tb.ohchr.org/default.aspx> (enter "United States of America" for Country) (last visited Mar. 31, 2009).

2. See, e.g., International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

3. On secondary rules, see H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (2d ed. 1994).

4. U.N. Human Rights Comm., *General Comment No. 20*, ¶ 9 (1992), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 30 (July 29, 1994) [hereinafter ICCPR General Comment No. 20].

5. See, e.g., U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); *infra* note 20 and accompanying text.

6. See U.N. Human Rights Comm., *Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, at 8-11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008).

and specifically what weight (if any) to give the ICCPR committee's prescriptive claims.

The U.S. approach might be dismissed as idiosyncratic. In fact, it reflects a deep tension in human rights law and illuminates the lack of consensus on many of the applicable secondary rules. The problem initially appears resolvable by reference to the secondary rules that govern other areas of international law.⁷ At its core, the human rights system is structured much like other international regimes. States are principal actors. They sometimes prescribe law by treaty. The treaties contain substantive rules of conduct and establish international monitoring bodies. Beyond that core, however, the structure of the human rights system has taken particular shape. States—the traditional prescribers and enforcers of international law—designed a system that is weak. Treaty-based rules of conduct are typically ambiguous⁸ and sometimes inoperative.⁹ And treaty monitoring bodies lack formal authority to “harden” those rules through conclusive interpretations or adjudications of wrongdoing. That framework—soft substantive rules with decisionmaking authority largely in state hands—discords with the system's operational norms. In practice, treaty bodies and other nonstate actors claim considerable authority to specify and enforce treaty-based rules. The breadth of that disconnect between the formal framework established by states and the informal, operative norms sows confusion on which secondary rules govern.

The lack of consensus on the applicable secondary rules strains the human rights system. First, it inhibits the system's capacity to specify substantive rules of conduct. Without defining the processes for making law and distinguishing it from mere aspirations, the system cannot resolve what the law requires. Second, the lack of consensus breeds dissidence within the system, as international actors regularly invoke and enforce their version of law without acknowledging conflicting versions and without resolution on which version is authoritative. This Essay calls attention to that problem and seeks to initiate a conversation on how best to mitigate it. Throughout, I draw on the jurisprudential insights of my mentor and friend, Professor Michael Reisman. For those and many other insights, I honor him with this Essay.

Two stage-setting notes: First, I focus in this Essay on the secondary rules in human rights law. Human rights law may not be the only international regime with specialized secondary rules,¹⁰ but it probably is unique in the degree to which those rules are contested. Second, the legal process on human rights is extraordinarily complex. In this Essay, I paint with a broad brush, erasing some nuance in order to address the system as a whole. Because I

7. On the difficulties of applying in human rights law the same secondary rules that govern other areas of international law, see Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in IV-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1993).

8. See *infra* Section II.A.

9. See *infra* Section II.B.

10. See, e.g., Daniel Bodansky, *Does One Need To Be an International Lawyer To Be an International Environmental Lawyer?*, 100 AM. SOC'Y INT'L L. PROC. 303 (2006) (arguing that international environmental law has specialized secondary rules).

focus on the universal human rights system, I exclude from discussion the various regional ones.¹¹

II. WHICH SECONDARY RULES?

A. *Rules for Lawmaking*

Professor Reisman has theorized that, to make law, decisionmakers must establish communal expectations along three axes: (1) on the policy content of a norm; (2) that those who prescribe it have the authority to do so; and (3) that it will be enforced.¹² States sometimes establish those expectations—and therefore make law—by treaty. Yet human rights treaties typically establish only *baseline* expectations on their policy content because they define their rules in amorphous or contextually variable terms. For example, the ICCPR prohibits “arbitrary” detentions without defining arbitrariness.¹³ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to take “appropriate” measures to suppress trafficking of women, but it does not specify what measures are appropriate.¹⁴

Because treaty-based rules are often open-ended, they require further prescription to obtain robust, shared meanings. States occasionally do that when they interpret, apply, or enforce the rules.¹⁵ In practice, however, those functions are largely performed by an amalgamation of nonstate actors that technically lack prescriptive authority. For ease of reference, I call these actors—treaty bodies, NGOs, scholars, and U.N. experts and officials—“human rights actors.” There are important differences among them, but, as a group, they are extraordinarily active in trying to harden the human rights system. That entails a prescriptive function because it requires giving content to otherwise amorphous treaty-based rules.

So might human rights actors have *some* prescriptive authority in the form of interpretation or specification?¹⁶ The answer at one extreme is that they do not, unless states expressly delegate it to them.¹⁷ (In the universal system, this means they do not.) According to this approach, human rights law is like other international law that is made by state consent. If states consent only to amorphous rules, so be it. Those rules must be specified through

11. The regional system in Europe is especially distinct. For an overview, see D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2006).

12. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 108 (1981).

13. ICCPR, *supra* note 2, art. 9.

14. Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

15. See, e.g., G.A. Res. 61/143, U.N. Doc. A/RES/61/143 (Jan. 30, 2007) (specifying state obligations on violence against women); U.S. Dep’t of State, Human Rights Country Reports, <http://www.state.gov/g/drl/rls/hrrpt> (applying treaty-based norms to assess other states’ human rights practices) (last visited Mar. 31, 2009).

16. This authority may appear insubstantial, but for amorphous treaty-based rules it is often the entire game.

17. See, e.g., U.N. Human Rights Comm., *Summary Record of the 2380th Meeting*, ¶ 8, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006) (“[O]nly the parties to a treaty were empowered to give a binding interpretation of its provisions unless the treaty provided otherwise.”); Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1706-07 (2008).

subsequent state action. As a practical matter, this approach frustrates efforts to establish robust rules of conduct because many states have not and will not consent to them. The “unpleasant implication,” in Martti Koskenniemi’s words, is that “people have human rights only so far as actually accepted by states.”¹⁸

At the opposite extreme, human rights actors claim considerable prescriptive authority, irrespective of state consent. Those who take this approach are usually more subtle. Human rights actors claim interpretive (rather than prescriptive) authority; they then adopt aggressive interpretations and treat those interpretations as dispositive.¹⁹ The ICCPR committee has claimed that states must accept its interpretive authority and that reservations incompatible with its interpretations could be severed.²⁰ Human rights actors adopt this same approach when citing each other’s interpretations as law.²¹ For instance, treaty texts are ambiguous on the extent to which they prohibit corporal punishment.²² Many states practice and accept certain forms of corporal punishment,²³ but various human rights actors assert that it is prohibited absolutely.²⁴ They cite each other’s assertions as evidence of law.²⁵

Those two approaches define the extremes, but they reveal a lack of consensus on the process for making human rights law. Each approach purports to shield lawmaking from large groups of relevant actors. The state-consent position sidelines human rights actors. Many of these actors are deeply committed to advancing human rights; they will not accept the law established by states unless they believe it satisfies their substantive interests.²⁶ The opposite position tries to circumvent recalcitrant states, and

18. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1951 (1990).

19. A prevalent but watered down variant of this approach asserts that treaty-body pronouncements are in some way authoritative. See, e.g., Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 32-37 (2006) (collecting views of high-profile human rights actors).

20. U.N. Human Rights Comm., *General Comment No. 24*, ¶¶ 11, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

21. For an early criticism of this “myopic and incestuous” trend in the human rights literature, see Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 8-11 (1988).

22. For relevant treaty texts, see ICCPR, *supra* note 2, art. 7; Convention on the Rights of the Child arts. 19, 37, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment arts. 1, 16, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. For a more detailed discussion, see NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 309-24 (2d ed. 1999).

23. See, e.g., Comm. on the Rights of the Child, *General Comment No. 8*, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter CRC Comment No. 8] (noting widespread practice and acceptance).

24. See ICCPR General Comment No. 20, *supra* note 4, ¶ 5; CRC Comment No. 8, *supra* note 23; see also Karima Bennouna, “A Practice Which Debases Everyone Involved”: *Corporal Punishment Under International Law*, in 20 ANS CONSACRÉS À LA RÉALISATION D’UNE IDÉE 203 (1997).

25. See, e.g., Amnesty Int’l, *Corporal Punishment*, in FAIR TRIALS MANUAL, available at http://www.amnestyusa.org/international_justice/fair_trials/manual/25.html (last visited Mar. 30, 2009); Letter from Alice Farmer, Aryeh Neier Fellow, Human Rights Watch, to Delmer C. Stamps, President, Jackson Pub. Sch. Dist. Bd. of Trs. (Mar. 26, 2008), available at <http://www.hrw.org/en/news/2008/03/26/do-not-reinstate-corporal-punishment-schools>.

26. See W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW* 33, 36-42 (Tomer Broude & Yuval Shany eds., 2008).

sometimes the reactionary groups that operate within them. This approach, too, is unsustainable. States are unlikely to treat as law the norms advanced by human rights actors if states believe the norms are illegitimate,²⁷ or face domestic pressure not to comply.²⁸

B. *Rules for Law-Finding*

Separately, there is confusion on the rules for finding human rights law. At first glance, these may appear the same as the rules for making law. Once the prescriptive process is defined, what comes out of it presumably is law. But in the human rights system, some of that output is decidedly not law. In other words, decisionmakers may choose *not* to establish operative prescriptions, even when they use the prescriptive process and communicate in legal form.²⁹ That is nothing new. Human rights treaties go through an accepted prescriptive process but are widely understood to be part aspirational.³⁰ The difficulty is identifying which provisions constitute law, and which reflect aspirations.

Returning to Professor Reisman's framework, law is accompanied by expectations of authority and control—that those who prescribed the norms had authority to do so, and that the norms will be enforced.³¹ Law thus is distinguishable from aspirations by the signals of authority and control that attach to it. Those signals are muddled in the human rights system. First, authority signals sometimes attach to mere aspirations. To use the example from above, treaties contain aspirations that appear authoritative because expressed in the form of law. Second, control signals are often weak or inconsistent. The system has long tolerated high levels of noncompliance, which means that legally operative norms are poorly enforced. The kicker is that aspirations are sometimes also enforced. (One *modus operandi* among human rights actors is to enforce aspirations as if they were law.) I elaborate on the enforcement process in the next Section. At this point, I underscore that, because authority and control signals are muddled, norms that are intended to be aspirational may appear authoritative or controlling, and legally operative norms may appear noncontrolling. That complicates efforts to distinguish between the two. Some interpret the muddled signals to mean that most human-rights-related declarations are law; others draw the opposite conclusion.³² No shared rules exist to resolve the issue.

27. *Id.* On the importance on perceived legitimacy in inducing compliance, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161-78 (1990).

28. *See* Simma, *supra* note 7, at 167.

29. *See* Reisman, *supra* note 26, at 43.

30. *See, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 457 (2000); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 89 (2005).

31. *See* Reisman, *supra* note 26, at 34-35 (“Legal communications are distinguished from the daily bombardment of ‘you-shoulds’ and ‘you-oughts’ by the symbols of authority and commitments of control that attend to them.”); Reisman, *supra* note 12 and accompanying text.

32. This has long been a problem for the International Covenant on Economic, Social and Cultural Rights. *See* International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3. Some actors assert that the Covenant's provisions constitute law, but others

C. Rules for Law-Enforcing

Finally, there is disagreement on the rules governing enforcement—on the appropriate processes for adjudicating and then sanctioning instances of wrongdoing. Many of the classic international mechanisms for enforcement (e.g., treaty suspension and tit-for-tat countermeasures) are premised on reciprocity.³³ But human rights law is not structured around a reciprocal exchange of rights and obligations. States have only erratic incentive to police each other's conduct. And even when they do, the proper remedy for a violation is not to allow other states to also violate rights.

The human rights system has responded by developing its own enforcement mechanisms. The mechanisms under the universal treaties are the report-and-comment process and, for some parties to some treaties, the consideration of individual petitions. Neither is binding. Treaty bodies review state conduct but lack authority to decide conclusively that a state has violated the law or to penalize it if it has. Yet here again treaty bodies claim authority—this time, enforcement authority—beyond what is specifically delegated to them.³⁴ For example, most have made the report-and-comment process more robust by inviting NGOs to submit shadow reports on state practices,³⁵ and by developing follow-up procedures that pressure states to comply with their comments.³⁶

Outside the treaty process, international actors have developed more informal enforcement tools: fact-finding and naming-and-shaming devices, the suspension of assistance programs, support for local activist groups, suits in domestic courts, and so on. These tools often sting more than the ones envisioned in the treaty texts, but they are disjointedly employed.

The question is whether all of those tools are legitimate. Even if they are, might they become illegitimate because applied inconsistently or by particular actors? Some may find these questions curious. They expect human rights rules to be enforced whenever possible and through whatever means available. Yet international law has long regulated enforcement jurisdiction. Many states assert that enforcement in the human rights system has become

understand them to be mostly aspirational. See, e.g., Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism To Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 465 (2004).

33. See Vienna Convention on the Law of Treaties art. 60, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (on suspension); Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n pt. 2, at 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (on countermeasures).

34. See Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 229-35 (2008); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 343-45 (1997).

35. See, e.g., OFFICE OF UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES (2005), available at <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>.

36. See, e.g., U.N. Human Rights Comm., *Rules of Procedure of the Human Rights Committee*, R. 101, U.N. Doc. CCPR/C/3/Rev.8 (Sept. 22, 2005).

overly “confrontational” or “politicized.”³⁷ They argue for a more “cooperative” enforcement model.³⁸ Moreover, some try to channel enforcement to formal bodies that specialize in human rights but are relatively ineffective.³⁹ My point is not that these efforts are right or wrong, but that they reflect discontent on the operative enforcement process in human rights law.

III. ASSESSING THE DISCORDANCE

On some level, the discordance on the applicable secondary rules is inevitable. International actors have different visions for and levels of commitment to the human rights system, and they seek secondary rules that satisfy their policy preferences. Many states desire only a weak human rights system so reject secondary rules that make it more robust.⁴⁰ By contrast, human rights actors typically demand meaningful substantive standards with enforcement teeth. They insist on secondary rules that satisfy that demand. Because substance and process are intertwined, each actor has a short-term interest in assuming secondary rules that bolster its immediate policy preferences.

But the discordance also takes a toll. First, it cultivates uncertainty on the content of many substantive rules. Such uncertainty is fairly common. For example, is corporal punishment prohibited absolutely?⁴¹ What, if anything, must states do to displace religious practices that undermine women’s rights?⁴² These questions will continue to yield inconsistent answers, so long as the governing secondary rules themselves are indeterminate. Without resolving how law may be made or distinguished from surrounding aspirations, the system cannot resolve what the law requires.⁴³

37. See, e.g., World Conference on Human Rights, Apr. 19-May 7, 1993, *The Cairo Declaration on Human Rights in Islam*, at 3, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993) [hereinafter *Cairo Declaration*]; Comm. Against Torture, *Comments by China*, at 2, U.N. Doc. CAT/C/CHN/CO/4/Add.1 (Dec. 17, 2008); see also Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUMAN RIGHTS L. REV. 109, 128-33 (2007) (reviewing impetus for cooperative approach in U.N. Human Rights Council).

38. See sources cited *supra* note 37.

39. See, e.g., U.N. SCOR, 62d Sess., 5619th mtg., U.N. Doc. S/PV.5619 (Jan. 12, 2007) (debate and vote rejecting draft resolution on human rights in Myanmar).

40. For example, proposals to establish a “World Court of Human Rights” have circulated for decades, but states have not pursued them. See Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT’L L. 903, 921 (2008).

41. See *supra* notes 22-25 and accompanying text.

42. Compare CEDAW, *supra* note 14, arts. 2(f), 5(a) (requiring states to address such practices), and U.N. Human Rights Comm., *General Comment No. 28*, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (reiterating that obligation), with Comm. on the Elimination of Discrimination Against Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/SP/2006/2 (Apr. 10, 2006) (collecting reservations designed to preserve such practices), and Org. of the Islamic Conference, *Final Communiqué of the Eleventh Session of the Islamic Summit Conference*, ¶¶ 105, 112, Doc. No. OIC/SUMMIT-11/2008/FC/Final (Mar. 13-14, 2008) [hereinafter *OIC 2008 Communiqué*] (reaffirming “the right of States to adhere to their religious, social, and cultural specificities,” and calling for a “Covenant on Women’s Right in Islam”).

43. See HART, *supra* note 3, at 92-93.

Uncertainty on the substantive content of law is undesirable, but it is inherent in any system in which law is fuzzy or unsettled. The second and more troubling problem in the human rights system is that international actors often fail to acknowledge the extent to which the law is, in fact, indeterminate. Once they presume an applicable set of secondary rules, they apply those rules to derive what they consider to be law. Conflicting versions of law—those derived by applying different secondary rules—are not acknowledged and engaged, but rather dismissed as mere posturing. That problem is then exacerbated at the stage of application and enforcement. Decisionmakers inevitably invoke only one version of law.⁴⁴ To actors that believe in conflicting versions, the one invoked appears wrong or illegitimate. This is especially likely where the decisionmaker lacks formal enforcement authority or uses enforcement tools that themselves are considered illegitimate.

In the long term, that dynamic is likely to breed dissidence within the human rights system. States are unlikely to comply with new standards that they reject outright.⁴⁵ Actors and audiences that believe those standards constitute law may find that reality unsettling and eventually may lose faith in the efficacy of law to advance human rights.⁴⁶ Over and over again, they observe states disregard (without repercussion) what they understand to be law. Paradoxically, some may respond by engaging in the very conduct that caused their disillusionment in the first place. If states disregard law, then it is of little consequence, so they may as well invoke and enforce norms irrespective of whether the norms have legal footing.

For a variety of reasons, states may also become dissatisfied. Anecdotal evidence indicates that some states believe the system has become overly politicized or illegitimate—that the norms being invoked and enforced are not legal norms and improperly reflect interest-group capture.⁴⁷ Other states may perceive the system to be unbalanced because insufficiently accommodating of competing interests.⁴⁸ Still others may contest the apparent double standard in application and enforcement.⁴⁹ Regardless of their reason, states that believe the system no longer fulfills their interests will have little reason to maintain it and may agitate against it.⁵⁰

44. On the problem of international fora applying different versions of law, see W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 24-29 (Rüdiger Wolfrum & Volker Röben eds., 2005).

45. See Simma, *supra* note 7, at 167.

46. See Reisman, *supra* note 44, at 29.

47. For example, the Organization of the Islamic Conference has signaled that, in its view, many human rights norms have been captured by Western interests and inadequately reflect Islamic interests. See, e.g., OIC 2008 Communiqué, *supra* note 42, ¶¶ 105-13; Cairo Declaration, *supra* note 37.

48. For example, several Western democracies have recently challenged or evaded interpretations advanced by human rights actors in order to satisfy counterterrorism interests. See Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 395-407 (2008).

49. On the problem of inconsistent enforcement, see Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 488-89 (2001).

50. Reisman, *supra* note 26, at 36.

IV. CONCLUSION

The discordance on the applicable secondary rules strains the human rights system. This Essay calls attention to that problem and urges international actors and law scholars to respond. That requires different things in different contexts. At the very least, it requires taking the communicative process seriously—acknowledging opposing views, having meaningful dialogues to establish shared expectations, and at times compromising one's immediate policy preferences in favor of systemic coherence. That will not be easy, and it will not resolve all human-rights-related disputes. But if the processes for making, finding, and enforcing human rights law degenerate, so too may the human rights system itself.

Closing Remarks at the Conference To Honor the Work of Professor Michael Reisman

Rosalyn Higgins[†]

I am enormously appreciative to be asked to make these closing remarks.

In the first panel it was rightly stated that Michael the lawyer cannot be separated out from Michael the man. I shall use these concluding remarks to speak of Michael's sense of commitment and duty. I shall mention what I see as coming out of Michael's self-description this morning of a growing internationalization and detribalization on his part. And then I'll try to bring things back to where they started—Yale.

Michael has always been—as all international lawyers must surely be—committed to human rights. Nor could it be otherwise for one so involved with the promotion of the role of human dignity as a value to shape legal decisionmaking. But at the same time, I believe that Michael would have seen himself as a generalist international lawyer, much interested in human dignity, rather than as a specialised human rights lawyer.

So it was perhaps with a certain reserve that he found himself stepping in to be elected to a part-term seat at the Inter-American Commission on Human Rights in August 1990. He attended his first session from September 24 to October 5, 1990, but was then re-elected to serve a full four-year term until the end of 1995. As a member of the Commission he participated in missions to Peru, Guatemala, and Colombia.

In 1994 he was elected as Chairman, traditionally a one-year post. And he entered upon this year with his customary commitment and quiet vigour. I know from what he has said to me in the past that he found it, at the personal level, initially difficult work and then a very important year. During his chairmanship he led missions to Haiti, Ecuador, the Bahamas, and Jamaica, each requiring much effort in preparation and execution.

Those close to the Commission's work regard as having very particular importance the pioneering decisions that the Commission took under Michael's chairmanship, which held the amnesty laws of Argentina and Uruguay to be incompatible with those states' obligations under the American Convention.¹ These decisions generated, as you may imagine, much heat and

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1. *Consuelo v. Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309 & 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L/V/II.83 doc. 14, at 41 (1993); *Mendoza v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 & 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83 doc. 14, at 154 (1993).

controversy at the time. But these findings were to provide the foundations for later action, which consolidated the positions taken in Michael's amnesty cases.

Thus, in 2001, the question of Peru's amnesty was taken by the Commission to the Inter-American Court. This was the *Barrios Altos* case, and in its judgment of March 14, 2001, the Court held on the same grounds that had been articulated in the earlier Commission decisions regarding Argentina and Uruguay during Michael's chairmanship, that Peru's amnesty laws were incompatible with the American Convention, and that they lacked legal effect.² President Fujimori had already fled the country, and the judgment was not opposed by the new interim government.

Chile, as is generally known, had also introduced what we may term a "self amnesty law." This, too, was taken by the Commission to the Court, and on September 26, 2006, the Court issued a comparable judgment in the *Almonacid* case.³ That law remains unrepealed, though it seems within the country no longer to be regarded as an impediment to prosecutions for the massive human rights violations of the Pinochet era.

And Argentina has, through a Supreme Court judgment in 2005, actually repealed its amnesty laws, specifically relying on the Inter-American Court's holding in the *Barrios Altos* case.⁴

The story is, of course, still an ongoing one, but Michael is entitled to look back on this Inter-American human rights interlude in his professional life, and feel that significant things were done and judicial seeds of real importance to those who had suffered were sown.

It is clear that all of us here regard Michael Reisman as a phenomenon. But he is also an extraordinarily decent human being. This is manifested in myriad ways: in the care he takes of his students; in the support he continues to give them (even after they have left Yale, just as did Myres McDougal before him); and in so many other ways.

And if he undertakes something, he makes a commitment to that undertaking that is more than wholehearted. This is nowhere more exemplified than in his relationship with the American Society of International Law.

His services to the American Society of International Law are simply outstanding. It is to be hoped that a member of the Editorial Board of the *American Journal of International Law (AJIL)* will find time each year to write a short comment or to make some other written contribution. And I have certainly had the impression over the years that Michael has more than honored this expectation. Indeed I have been the fortunate recipient of many offprints of his *AJIL* contributions. So I thought I would run a check on what he has published in the Journal.

2. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

3. *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

4. Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad," Fallos (2005-328-2056) (Arg.).

The result has proved simply staggering. Ever since 1967, Michael has written a steady stream of pieces, some short and pithy, others long scholarly articles. But the sheer volume of his *AJIL* contributions and their quality *and* interest is really astonishing. On my count, between 1967 and present time we are looking at nearly *sixty* pieces—and this is in *AJIL* alone. I am not speaking of his contributions to other journals, or chapters in books, or indeed entire books. And there are some ten further papers prepared for annual meetings of the American Society of International Law.

Michael's writings in *AJIL* have focused on the great themes of the day—on use of force problems, such as the question of preemptive self-defence—on regime change, on U.N. constitutional issues, on claims for the need to revise the laws of war, on the International Criminal Court, on Kosovo, and on Afghanistan. He has also shown an interest in indigenous rights, in the role of the media in the realm of human rights, and in purported unilateral treaty terminations.

For me, several points come clearly through. The first is that there is a clear sense of “assumed responsibility”: such contributions are what a member of the Journal *should* do, and that is all there is to it. The second is that the ground covered is impressively broad, even while the analysis is deep. The third is that one of many reasons why it is always interesting to read Michael's pieces is that you do not know in advance what his conclusions will be. With some writers—as with some Judges, I may say—one always knows in advance the points they will be making, the position they will be taking. That is not the case with Michael. The research is always scholarly, the mind is open, and the conclusions invariably interesting—and often contrary to the stereotypes envisaged by those who do not understand the Yale School. I think of his *AJIL* article with Myres McDougal supporting sanctions in Ian Smith's Rhodesia,⁵ and of his 1989 article, *The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion*.⁶

Michael has done much else within the American Society. There have been honors, of course—the Certificate by Merit in 1994 for *Systems of Control in International Adjudication and Arbitration* (1993)⁷ and the Manley Hudson Medal in 2004. But he has characteristically taken on the burdens, too—chairing the Honors Committee and the Awards Committee (I sat on the latter and remember very clearly the thoughtful multiparty phone conversations he conducted, full of respect for committee members and for candidates alike). He has been a member of the Society's Executive Council and is today a Counsellor. Above all, he was in the years 1998 to 2003 the Editor-in-Chief of *AJIL*. This is not a job for the fainthearted. It entails an extraordinary amount of reading and a prodigious amount of related work. All

5. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

6. W. Michael Reisman, Editorial Comment, *The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion*, 83 AM. J. INT'L L. 519 (1989).

7. W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* (1992).

Journal editors are heroes in my eyes. Michael was a much-respected editor, doing all his work quietly, with meticulous care, and with significant success.

One has to remember that all this writing and editing for the American Society was going on in parallel with an extraordinary output of high-quality writing elsewhere. He has written on international commercial arbitration, as well as being in action as a practitioner. He has been immensely generous in his contributions to *Festschriften*, and has so thoughtfully tailored his writings to the person being honored. The piece he and Mahnoush contributed on artisanal fishing to Tom Mensah's *liber amicorum* is a case in point.⁸ He has been ready to honor Cherif Bassiouni, Luzius Wildhaber, Yoram Dinstein, Lucius Caflisch, Christian Tomuschat, and Toy Feliciano, among others.

There is a considerable body of writing done jointly with Mahnoush, who surely knows that today honors her, too. And there have been occasional pieces co-authored with others.

I have not had the experience of co-authoring with Michael—perhaps it was geographical separation or perhaps he would have been appalled by the idea! But I am very proud that in 1998, Michael and I, together with Dick Falk and Burns Weston, *jointly* paid our tribute in *AJIL* upon the passing of Myres McDougal.⁹

I want to say some words about Michael Reisman's contribution to international law as a practitioner.

Michael has for long, long years been engaged in practice. When he was so much at the right hand of Myres McDougal, and Mac was in his prime and sought after, *inter alia*, for his opinions in cases under litigation or in pending arbitrations, that legal work was often done with Michael as co-counsel.

In due course, and in the natural way of things, Michael himself was sought after for written advice or also as counsel. The sheer size of his written practice is very impressive. He was involved as counsel in the *Guinea v. Guinea Bissau* maritime boundary delimitation (1985);¹⁰ in the Advisory Opinion No. 14 in the Inter-American Court of Human Rights;¹¹ in the *Genie Lacayo case*¹² in that same Court; in the International Tribunal for the Law of the Sea case of *Malaysia v. Singapore* in 2003;¹³ and in the *Barbados/Trinidad and Tobago*¹⁴ arbitration of 2004-05 at the Permanent

8. W. Michael Reisman & Mahnoush H. Arsanjani, *Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation*, in *LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH* 629 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

9. Richard A. Falk, Rosalyn C. Higgins, W. Michael Reisman & Burns H. Weston, Comment, *Myres Smith McDougal (1906—1998)*, 92 AM. J. INT'L L. 729 (1998).

10. *Affaire de la Délimitation de la Frontière Maritime* [Delimitation of the Mar. Boundary] (*Guinea v. Guinea-Bissau*), 19 R. Int'l Arb. Awards 149 (1985).

11. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14 (Dec. 9, 1994).

12. *Genie Lacayo Case*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 21 (Jan. 27, 1995).

13. Land Reclamation by Singapore in and Around the Straits of Johor (*Malay. v. Sing.*), Request for Provisional Measures, in 7 INTERNATIONAL TRIBUNAL OF THE LAW OF THE SEA, REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS 10 (2003), available at http://www.itlos.org/case_documents/2003/document_en_230.pdf.

14. Delimitation of the Exclusive Economic Zone and the Continental Shelf (*Barb. v. Trin. & Tobago*), 27 R. Int'l Arb. Awards 147 (Perm. Ct. Arb. 2006).

Court of Arbitration. He advised in many more cases, and was an expert witness in yet others.

I had the pleasure of listening to Michael in the International Court of Justice, both in the *Qatar v. Bahrain* case at the merits phase (2001)¹⁵ and in his application on behalf of the Philippines for permission to intervene in the *Pulau Ligitan and Pulau Sipadan* case.¹⁶ I remember the latter particularly clearly, admiring the low-key, unshowy, conversational style of pleading—impressively learned and analytical.

But it has really above all been as an arbitrator that Michael has made his most important contributions. A handful of these started in the 1980s and 1990s. But the sheer quantum of his service as arbitrator since the turn of the century has been huge any standards.

Everyone knows—not least because his fellow arbitrators have made it clear—of his massive contribution in the recent *Eritrea v. Ethiopia* boundary arbitration,¹⁷ so valiantly chaired by Eli Lauterpacht, who with his colleagues made every effort to secure the outcomes determined by the Tribunal. And for the past week he has been in The Hague hearing the oral pleadings in *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei) Arbitration*.¹⁸ He shortly returns there.

Michael Reisman seems able to turn his hand to anything and everything. I am absolutely sure that the phrase “not my field, I am afraid” has never passed Michael’s lips because whatever legal requests are made of him, these are already, or in very short order will have been made, “his field.” Thus it is that he is equally at ease in highly commercial and financial fields of law, perhaps more usually the domain of private international lawyers, as in areas more familiar to the general public international lawyers.

Many have written—Michael Reisman among them—about the complex, curious, and sometimes unsatisfactory world of international arbitration that exists today. For today’s purposes, it suffices to say that it is widely agreed that on a range of important themes—themes which arise again and again—divergent answers have been given by different tribunals. And it is thought that a contributory factor to this has been that commercial and private law experts, whose practice has certainly led them to know some public international law, have been important players in the rendering of these (often divergent) pronouncements. The parties to disputes where such points will inevitably again arise are increasingly looking to the possibility of some of these matters being now authoritatively settled—and that, they think, means by leading international lawyers.

For this, and other reasons, he is today not only a heavily sought-after arbitrator, but indeed a “chairman of choice” for arbitrators who have already been appointed by state parties, who are looking for a chairman who has high

15. Delimitation and Territorial Questions (*Qatar v. Bahr.*), 2001 I.C.J. 40 (Mar. 16).

16. Sovereignty over Pulau Ligitan & Pulau Sipadan (*Indon. v. Malay.*), 2002 I.C.J. 625 (Dec. 17) (Application to Intervene by Phil. of Mar. 13, 2001).

17. Delimitation of the Border Between Eritrea and Ethiopia (*Eri. v. Eth.*), 25 R. Int’l Arb. Awards 83 (*Eri.-Eth. Boundary Comm’n* 2002).

18. See Permanent Court of Arbitration, *Sudan v. Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, http://www.pca-cpa.org/showpage.asp?pag_id=1306 (last visited Apr. 29, 2009).

competence in *all* the various themes that so often arise in international arbitrations, and whose personality and skills will guide the work at hand.

While this certainly is not the place to dissect the *Bank for International Settlement* and *OSPAR Awards*,¹⁹ both of which he presided over, some brief mention is warranted to illustrate the particular points I have been making. The unanimous *Bank for International Settlement (BIS) Awards*—the so-called Partial Award on procedural and substantive matters, and the Final Award on valuation—contain a multitude of important findings and determinations important for our field. The *BIS* Partial Award of 2002 is perhaps the most significant since the *International Tin Council* litigation and the *Westland Helicopters* arbitration and litigation,²⁰ on matters relating to the law applicable to acts of international persons, both generally and very specifically; and on the concomitant issues relating to their powers, particularly as regards their own constituent instruments. This Award is also widely welcomed for bringing clarification (which should indeed be regarded as authoritative clarification) on the freestanding character of state-private claimant arbitrations. Claims that were made relating to the need for state intervention or diplomatic protection, so far as private claimants are concerned, are very clearly responded to, in the negative.

Considerable technical competence was needed to advance the resolution of issues relating to valuation. And the international law on the matter—which is already very rich—has been developed further in certain important regards. I may add that the procedural determinations made in these cases have attracted appreciation in the profession, being important beyond the confines of this case.

Michael was chosen by the two state appointed arbitrators to preside over the *OSPAR 2003 Award*. This, of course, was the “first leg” in the Ireland-U.K. litigation (*MOX*). This was decided by majorities of 2-1, with the composition of those majorities changing on particular issues, though on what we may call the central issue, Gavan Griffith, appointed by Ireland, dissented.²¹ That central issue was whether Article 9 of the *OSPAR Convention* (which contained certain obligations, and which carried its own exceptions) required the United Kingdom to have provided certain information requested by Ireland, or rather required by the United Kingdom to have established a certain domestic regime.

19. *Reineccius v. Bank for Int'l Settlements*, Final Award (Perm. Ct. Arb. Sept. 19, 2003), available at http://www.pca-cpa.org/showpage.asp?pag_id=1157; *Reineccius v. Bank for Int'l Settlements*, Partial Award (Perm. Ct. Arb. Nov. 22, 2002), available at http://www.pca-cpa.org/showpage.asp?pag_id=1157; Access to Information Under Article 9 of the *OSPAR Convention* (*Ir. v. U.K.*), Final Award (Perm. Ct. Arb. July 2, 2003), available at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf>.

20. *Westland Helicopters Ltd. v. Arab Org. for Industrialisation*, [1995] Q.B. 282 (U.K.); *J.H. Rayner Ltd. (Mincing Lane) v. Dep't of Trade & Indus.*, (1990) 2 A.C. 418 (H.L.) (U.K.).

21. In his declaration, Michael Reisman explained that he “did not concur” with “the majority’s interpretation of Article 9(1)” of the *OSPAR Convention* and that “Ireland’s proposed interpretation . . . should have been rejected.” Access to Information Under Article 9 of the *OSPAR Convention*, *supra* note 19, at 60 (declaration of Professor W. Michael Reisman).

I find this Award interesting for reasons that are perhaps different from the usual ones. It is clear the Tribunal held that its jurisdiction *ratione materiae* extended only to parties' obligations under the OSPAR Convention, and not under other Conventions. But it did *not* say—contrary to the belief of some commentators—that OSPAR was a “self-contained” regime, an idea that I believe would be anathema to Michael. It is still firmly located within customary international law.

The Award is of interest especially as regards the question of what other than the law to be applied *ratione materiae* may still be “looked at” for illumination—a frequent problem. It also held that the requirement in Article 32(6)(a) of the OSPAR Convention, which states that disputes be settled in accordance with international law, does not thereby create a comprehensive legal regime that essentially “overrides” specific law applicable *ratione materiae*. As one who opposed the Court's finding in the *Oil Platforms* case²² that the reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties did exactly that, introducing the very matters that had already been rejected at an earlier phase as falling within the Court's jurisdiction *ratione materiae*, I am necessarily very supportive of this analysis.

I conclude this section of my remarks by saying that Michael—who is not a professional arbitrator, and who still thinks of himself as above all an academic—sits in an astonishing number of arbitrations and is in demand as chairman in particularly heavy and complex arbitrations. The parties and their appointed arbitrators are right in thinking that matters could not be in better hands.

I myself was at Yale from 1959 to 1961. It was not during those years that I met Michael, who was just a little bit my junior in age. But I had become very close to Mac and I heard very soon after about Michael and what a great future Mac saw for him. Myres McDougal was undoubtedly what brought Michael and me together as friends.

Myres McDougal died in 1998. Work brought me back very frequently to the States after I concluded my doctorate. And, during Mac's life, I was never, ever, in the States without going up to Yale to see Mac. Because work—usually at the United Nations—would be keeping me busy midweek, my visit to Yale was very usually scheduled for on Sunday. Mac would invite me to lunch at the Lawn Club. In the event, it was always a *ménage à trois*. Michael would be there too—no doubt in the earlier years because Mac no doubt thought, quite rightly, that there would then be much interesting conversation between the three of us.

In the later years, it was not possible for Mac to engage in these social events without the assistance of Michael, who was always readily at hand. Our lunch conversations were always interesting, ranging over what we were each working on at that time, different personalities (Mac loved to gossip), and the great issues of the day. I could not but notice that as the years rolled on that Mac had less that he wanted to say and deferred increasingly to what Michael might think on this or that topic.

22. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6) (separate opinion of Judge Higgins).

Mac had seen early the potential and the character of this young scholar. And Michael had seen the intellectual greatness and the exceptional humanity of his benefactor. I was very touched by their relationship. Mac had undoubtedly done much in Michael's intellectual formation and career progression. And, right to the end, Michael was there for Mac every minute of every day, attending to his needs with that same intense, caring respect that I think so exemplifies his character.

I came to know Mahnoush a little later, but now long years ago. They have made an extraordinary pairing—each so admiring of, and supportive of, the work of the other. Each has had important, distinct careers, and intermittently, and increasingly, they have together turned their attention jointly to some writing or other project. I think of the marvellous visits Terry and I have made to their Connecticut home, with the conversation ringing in one's ears long after. And, in more recent years, I think of the special lunches and dinners together around Geneva, when work brought us all together there in summertime.

Mahnoush has now left the United Nations, after a career there of remarkable service. None of us doubt how important she has been—and is—in Michael's life, far beyond the periodic joint authorship of writings. So very much has happened since the early 1960s, and Michael's career has taken him in wonderfully diverse directions, with global recognition. But I think I should still say some words about where it all began, and Michael's place in the Yale School of International Law.

It will be good to go back to the beginnings.

By that I mean, of course, Michael's relationship with both Harold Lasswell and Myres McDougal. Because Harold Lasswell was a political scientist, and because he did not live the very long life that was given to McDougal, it is easy to let drop from sight the pivotal role he played in formulating with McDougal the ideas and jurisprudential methodology that have become renowned as the Yale Law School policy science approach to international law.

Michael's first contacts with Lasswell and McDougal were exactly during those years when they were bringing their joint venture towards fruition. He was very early identified by Mac as someone of exceptional ability, who would become very important in the world of international law. Michael was indeed marked forever by his exposure to these intellectual giants. And that is true of many of us here today, myself included.

Michael said this morning, with characteristic modesty, "I was the legatee and not the founder of the New Haven School."

But it is also the case that the work that Michael did in those early years, contributed significantly to the articulation, across a range of publications in the early 1960s of the policy science approach. He came to be much relied on by Mac and Lasswell not only as a researcher during these critical formative years, but as a contributor to their great enterprise.

A number of persons have had the exceptional experience of writing books during this period with Myres McDougal—Toy Feliciano, Bill Burke, Lung-chu Chen, James C. Miller, and Ivan A. Vlasic. But it is Michael who

was constantly at McDougal's side through these years. He wrote with McDougal the obituary for Harold Lasswell in the 1979 *AJIL*.²³ It was he who organised in 1976 the book in honor of McDougal: *Toward World Order and Human Dignity*.²⁴ In 1981 he published with McDougal their casebook *International Law in Contemporary Perspective: The Public Order of the World Community*,²⁵ and in 1987 their partnership continued with the publication of *Jurisprudence: Understanding and Shaping Law: Cases, Readings, Commentary*.²⁶ These are among the visible contributions to this school of legal philosophy. There will be *so* very much more, day in and day out, that cannot be counted by the evidence of publications.

If Michael was an important contributor to the Lasswell-McDougal jurisprudence, he has also been its clearest articulator. Michael has provided the bridge to the world of international law at large, successfully there translating and applying the concepts and ideas of the Yale School.

It should not be thought—and I want to say this plainly—that exposure to the policy science approach to law is something that happens in one's youth, and then is left behind as one climbs up the greasy pole of a successful career in the “real world” of international law. I can give you two small pieces of evidence. The first is Michael's interesting publication just last year in the *Maine Law Review of Development and Nation-Building: A Framework for Policy-Oriented Inquiry*.²⁷ It is, of course, the essence of the policy-oriented approach that it is applicable to *any* type of law and to any type of issue, and here Michael shows that the issues surrounding sustainable development are not a random set of factors, but can be analysed systemically if one has the tools. And a few weeks ago I found myself participating in a conference on “The United Nations and Global Values.” It was clear to me that the term “values” was being thrown around like confetti. As I prepared my conference paper—as usual, up against time deadlines—I e-mailed to Michael: “What is the difference between ‘shared values’ in the policy science sense and ‘desired outcomes’ used more generally”? Michael prudently did not assay an answer, but immediately e-mailed back a reference to a particular passage in a particular article by McDougal.

He remains the keeper of the flame, the one among us with probably the most profound understanding of what had instinctively attracted us as our ideas were being shaped.

I shared with everyone the sense of privilege in being able to listen to the statements honoring him and to say these things directly to him.

23. Myres S. McDougal & W. Michael Reisman, Editorial Comment, *Harold Dwight Lasswell (1902-1978)*, 73 AM. J. INT'L L. 655 (1979).

24. TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL (W. Michael Reisman & Burns H. Weston eds., 1976).

25. MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981).

26. See W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1987) (containing numerous writings by McDougal).

27. W. Michael Reisman, *Development and Nation-Building: A Framework for Policy-Oriented Inquiry*, 60 ME. L. REV. 309 (2008).