

# Legal Obligation in International Law and International Finance

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In an era riddled with critiques of the relevance of classic international law, some have loudly given up on the subject, while others have placed their hopes in alternative mechanisms of global governance. One alternative is “soft law,” and nowhere is soft law more successful than in international financial regulation (IFR). Today, almost every bank of any size across the world has to keep similar amounts of money in its emergency reserve, cannot stake its future on complex derivatives or other forbidden trades, and faces oversight that, no matter where the bank is located, will be conducted in roughly similar ways, with roughly similar tools. And yet the promulgators of these rules consistently disavow their status as binding law.

These disavowals are disingenuous, and unpacking the reasons why has useful lessons for how international governance works, whether backed by treaty and custom or not. IFR works like traditional international law in three ways. It, like international law, depends on domestic institutions for implementation, although traditional international law has often sought to ignore the importance of any institution below the level of the state. IFR reminds us that the coordination of international interests comes with winners and losers, and therefore that the “mere coordination exercise” that international governance represents should not be dismissed, though traditional international law occasionally has been critiqued for that reason. And IFR emphasizes the necessarily messy way that fundamental legal principles are arrived at in international governance of any stripe—something I call the contestation principle. These features of both hard and soft law have been overlooked by both the traditionalists and critics of international law, but process-driven insights like them have much to tell us about both hard and soft law, which may not, in some ways, be so different after all.

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## Introduction

We have reached the 40th year of an experiment in international governance.<sup>1</sup> The experiment was to see if an architecture of global rules could be created if diplomats, treaties, and state custom were not used to build it. It was, in this way, a remarkable commitment to the concept of “soft law,” which, some have argued, is not law at all.<sup>2</sup>

What can this experiment, which has transformed the landscape of international financial regulation (IFR), and, in turn, changed the way international governance has been done, tell us about international law? This Article examines the similarities. IFR, in three distinctive ways—in its reliance on debate and negotiation for principles, in its purpose as a coordinative exercise, and in its reliance on domestic institutions for legal enforcement—can help us make sense of what turns out to be cognate phenomena in international law; these phenomena have subjected the discipline to criticism, even though, in IFR, they count as strengths.

Moreover, the forty-year long experiment in IFR can tell us how porous the boundaries between law and non-law are in the international system. This porousness is a signal of the strength of global governance, rather than its weakness. In a time when scholars such as Eric Posner question

1. See generally *History of the Basel Committee*, Bank for International Settlements (last updated Oct. 28, 2014), <http://www.bis.org/bcbs/history.htm> (discussing the establishment of the Basel Committee on Banking Supervision in 1974).

2. Prosper Weil, *Toward Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 417 n.7 (1983). See also Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010) (conceding that soft law is not law but also noting that “virtually all legal scholars would agree that [it is] not simply politics, either.”). Cf. Anthony D’Amato, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d’Aspremont* (Northwestern University Sch. of Law Faculty Working Paper, Paper No. 89, 2010), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1088&context=facultyworkingpapers> (“A soft law is like a head without a body. The head knows where it wants to go but it lacks the means to get there. Yet a disembodied norm is nevertheless a communication which, because of its normativity, may be classified under performative utterances”).

the very use of thinking about international law as any kind of law at all, and when critics like Jack Goldsmith and Curt Bradley would prefer that American courts confine it to its most formal contracts—duly executed treaties—some perspective about the way that international law resembles other strong versions of international governance is surely due.<sup>3</sup>

The innovations that have marked the critical, and yet highly vulnerable lynchpin of global prosperity are worth attention in their own right.<sup>4</sup> In IFR, domestic bureaucrats, rather than diplomats, have been used to interact with their foreign counterparts, and treaties have been rejected as a burdensome bother, likely only to slow the process of international collaboration.<sup>5</sup> The other principal source of international law in addition to treaties, the custom of countries,<sup>6</sup> has been beside the point, as the goal was to create a new, robust architecture of financial supervision, rather than to tease out the legal force of practices already in place.

IFR, in other words, has rejected custom, treaty, and diplomacy: the pillars and mechanisms of public international law.

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3. See Eric A. Posner, *Do States Have A Moral Obligation to Obey International Law?* 55 STAN. L. REV. 1901, 1917 (2003) (“International law is not law but politics. It reflects patterns of behavior that emerge in international relations. But if international law is just politics, understanding international law does not depend on any special legal expertise, and should be the province of the political scientist.”); Curtis A. Bradley et. al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 936 (2007) (arguing that customary international law covers a very small corpus of law, and should almost never be incorporated in the decisions of American courts). For more on this latter view, see A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995); see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

4. A well-known statement of the importance of banks may be found in the rumination of E. Gerald Corrigan, eminent former chair of the New York Fed. See E. GERALD CORRIGAN, *ARE BANKS SPECIAL?* FED. RESERVE BANK OF MINNEAPOLIS ANN. REP. (1982) for the argument that banking is central to economic health, because, among other things, “banks are the primary source of liquidity for all other classes and sizes of institutions, both financial and nonfinancial” and “are the transmission belt for monetary policy.” See also Mark Olson, Governor, Fed. Reserve Bd., *Speech at the Annual Washington Conference of the Institute of International Bankers: Are Banks Still Special?* (Mar. 13, 2006), <http://www.federalreserve.gov/newsevents/speech/olson20060313a.htm> (reflecting on Corrigan’s paper and concluding that indeed, a “strong case can be made that banks continue to be special”). The same thing goes for the financial markets more generally. See, e.g., John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 913 (1996) (“Global capital markets and trade are now acknowledged to be an indispensable source of prosperity.”); Hernando de Soto, *Left Out of the Game of Capitalism*, THE GLOBALIST, July 7, 2001, available at <http://www.theglobalist.com/DBWeb/StoryId.aspx?StoryId=2076> (“The lifeblood of capitalism is not the Internet or fast-food franchises. It is capital. Only capital provides the means to support specialization -and the production and exchange of assets in an expanded market. It is capital that is the source of increasing productivity and therefore the wealth of nations.”).

5. CHRISTOPHER BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULEMAKING IN THE 21ST CENTURY* (2012) (arguing that the mechanisms underlying IFR are coercive).

6. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. SOC’Y OF INT’L L. 757 (2001) (“Custom is generally considered to have two elements: state practice and *opinion juris*. State practice refers to general and consistent practice by states, while *opinion juris* means that the practice is followed out of a belief of legal obligation.”).

Moreover, IFR has, in large part, been an effective regulatory enterprise, one that addressed a problem posed by a productive but risky industry that had started to spread both its production, and its risk, across borders.<sup>7</sup> In 1974, scores of financial intermediaries operated all over the world.<sup>8</sup> They encountered bespoke, idiosyncratic, and inconsistent oversight, even on such fundamental questions as to how they should prepare for crises.<sup>9</sup> American banks, for example, held six percent of their capital in reserve to deal with emergencies, while others, such as Japanese banks, did not have to hold any.<sup>10</sup>

Today, almost every bank of any size across the world is required to hold much more capital in reserve—roughly 8-10 percent.<sup>11</sup> Banks are restricted from engaging in certain transactions the world over, and face oversight that, regardless of the jurisdiction, has been committed to approach the job of supervising financial institutions in roughly similar

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7. Perhaps alarmingly, “[t]he deregulation of capital markets, the attendant globalization of finance, and competition from the internal staff of their own corporate clients all seemed to contribute to the growth of entrepreneurial spirit within major financial institutions.” Henry T.C. Hu, *Swaps, the Modern Process of Financial Innovation and the Vulnerability of A Regulatory Paradigm*, 138 U. PA. L. REV. 333, 435 (1989). See also Anthony D. Taibi, *Racial Justice in the Age of Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928 (1995) (“The globalization of finance and production, new technologies in communications and information, new methods in the organization of work, and the decline of location-specific notions of community are producing vast changes in society.”).

8. See John C. Coffee, Jr., *The Future As History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 657 (1999) (describing some implications of the globalization of finance); Michael Bordo, Barry Eichengreen & Douglas A. Irwin, IS GLOBALIZATION TODAY REALLY DIFFERENT THAN GLOBALIZATION A HUNDRED YEARS AGO? Susan M. Collins & Robert Z. Lawrence (eds. 2008) (observing that there was a substantial degree of globalization in finance as early as the late 19th century).

9. E.g., Lawrence L. C. Lee, *The Basle Accords As Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT’L L. 1, 16 (1998) (“Until the Herstatt crisis of 1974, the global international financial sector had no formal machinery for coordinating national regulatory arrangements.”); G. Boyd Tarin, *The Bank for International Settlements: Keeping A Law Profile?*, 5 TRANSNAT’L L., 839, 853 (1992) (“Before December 1974, there was no international organization to coordinate international banking regulation.”).

10. DAVID SINGER, *REGULATING CAPITAL* (2008) (concluding that to the extent there were formal capital adequacy rules for Japanese banks, those banks often failed to comply with them, and enjoyed a strong degree of regulatory forbearance). Some Japanese policymakers would object to this point, of course. See Heather Montgomery, *The Effect of the Basel Accord on Bank Portfolios in Japan*, 19 JAPANESE INT. ECON. 24, 25 n.1 (2005), available at <http://www.personeel.unimaas.nl/A.Hecq/montgomery.pdf> (positing that Japanese banks had to hold four percent of their assets back as a reserve).

11. The standard is approximate because the capital that must be held depends on the size of the bank, the nature of its activities, and other factors. Traditionally, the global rule is supposed to require at least 8.5% as a ratio between very safe capital and other assets; the FDIC has indicated that the reserve ratio for large, well-capitalized banks will be 10%. See FDIC, Letter, *Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, and Transition Provisions*, available at <https://www.fdic.gov/news/news/financial/2012/fil12025.html> (2012); see generally, Edward C. Skelton, *Mexican Banks Get Ahead of New Global Capital Standards*, Federal Reserve Bank of Dallas, <https://www.dallasfed.org/assets/documents/research/swe/2012/swe1203g.pdf>.

ways, with roughly similar tools.<sup>12</sup>

The burdens of this global regulatory enterprise have not fallen equally. The developing world has had little say in the formulation of IFR.<sup>13</sup> Unequal treatment has also fallen on banks of some developed economies. Japanese banks were left with substantially larger burdens because of this process than were American or European banks.<sup>14</sup> And the international effort to harmonize and improve the regulation of the important conduits of global finance has hardly banished financial crises from the globe (in fact, some argue that the new financial regulation has *contributed* to them).<sup>15</sup> But there can be no doubt that those standards changed the way that banks, brokers, insurers, and publicly traded companies finance their operations.<sup>16</sup>

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12. These agreements are reflected in the work of networks like the Basel Committee on Banking Supervision, which has created the capital adequacy rules that have been unified and revised periodically since 1988 as the Basel Capital Accord. The capital accord's latest iteration is given in Basel III. See *International Regulatory Framework for Banks (Basel III)*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/basel3.htm> (last visited Jan. 22, 2013).

13. Aldo Caliari, *Assessing Global Regulatory Impacts of the U.S. Subprime Mortgage Meltdown: International Banking Supervision and the Regulation of Credit Rating Agencies*, 19 *TRANSNAT'L L. & CONTEMP. PROBS.* 145, 195 (2010) (observing that the emerging financial regulatory standard have been devised with "little representation from developing countries").

14. A study by the European Central Bank observed that "The original Basel Capital Accord has been discussed extensively in Japan and some observers saw it as a conspiracy of certain Western banks in order to halt the international expansion of the relatively undercapitalized Japanese banks." Adrian van Rixtel, Ioanna Alexopoulou & Kimie Harada, *The New Basel Capital Accord and Its Impact on Japanese Banking: A Qualitative Analysis*, in *THE NEW BASEL CAPITAL ACCORD* 371-429 (Benton E. Gup ed., 2004). The Bank for International Settlements tried to quantify the disparity of the impact of the Basel Capital Accord for global banks; the institution had particular sympathy for Japanese banks. See Patricia Jackson, et al., Bank for Int'l Settlements, *Capital Requirements and Bank Behavior: The Impact of the Basle Accord* (Basle Comm. on Banking Supervision, Working Paper No. 1, 2000), available at [http://www.bis.org/publ/bcbs\\_wp1.pdf](http://www.bis.org/publ/bcbs_wp1.pdf). But the losers of the financial regulatory globalization process were not only located in East Asia. Belgian banks, for example, had to increase the amount of capital in their reserves by 1.7%; international financial regulatory efforts and other countries were affected even more. *Id.*

15. See, e.g., Robert P. Bartlett, III, *Making Banks Transparent*, 65 *VAND. L. REV.* 293, 322 (2012) ("Even before the Financial Crisis, the Basel Committee's decision to allow certain banks to use their internal credit risk models to determine their regulatory capital was met with significant opposition in part because of concerns about uncertainties surrounding quantitative modeling of credit risk. That these same credit risk models were also used for pricing the credit derivatives at the heart of the Financial Crisis only served to accentuate this criticism.").

16. 1974 is often identified as the starting point for the IFR system. That year, a small German bank—Bank Herstatt—and a small American one—the Franklin National Bank—failed, throwing the world's capital markets into completely unexpected turmoil. See Hu, *supra* note 7 (discussing the crises); Ethan Kapstein, *Resolving the Regulator's Dilemma: International Coordination of Banking Regulations*, 43 *INT'L ORG.* 323, 328-29 (1989) (citing the bank failures as "crucial in bringing about a 'paradigmatic change' in the attitudes of banking officials" around the world). The turmoil was caused by weaknesses in the global payments system; it turned out the counterparties to these banks did not know exactly what recourse they had, or that they were supposed to be monitoring the safety and soundness of their counterparties. Kapstein, *supra*, at 328. In the after-

In doing so, the system of IFR has begun to adopt legal principles that look like those adopted by formal economic legal systems like the EU and WTO.<sup>17</sup> It receives organized attention from heads of state and finance ministers.<sup>18</sup> It has also started to offer regulated industry the courtesy of procedures familiar to students of domestic administrative law.<sup>19</sup>

All of this amounts to a form of soft law that nonetheless meets the standard definition of what international economic law is supposed to achieve. The Restatement (Third) of International Law provides that “the law of international economic relations in its broadest sense includes all the international law and international agreements governing economic transactions that cross state boundaries or that otherwise have implication for more than one state, such as those involving the movement of . . . funds.”<sup>20</sup> IFR, with no assistance from treaties, has provided the rules for the movement of funds that have implications for more than one state.<sup>21</sup> It is a crucial variant of the “law of international economic relations” of which the Restatement speaks.

But IFR makes no pretense to be traditional public international law. As one of the primary lawyers on the committee responsible for creating those burdensome capital rules has said, rather representatively, “[t]he Committee does not possess any formal supranational supervisory authority. Its conclusions do not have, and were never intended to have, legal

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math of the crisis, regulators from Germany, elsewhere in Europe, and the United States founded the Basel Committee on Banking Supervision and the International Organization of Securities Commissions in an effort to develop coordinated global responses to the potential for shocks and crises like those provided by Herstatt and Franklin National Bank. *Id.*

17. David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 685, 687 (2012) (“Six fundamentally legal principles organize the way that global financial regulation works: 1) a national treatment principle, 2) a most favored nation (MFN) principle, 3) a preference for rulemaking over adjudication, 4) a subsidiarity principle of enforcement, 5) a peer review model of enforcement, and 6) a network model of institutionalization.”).

18. As the heads of state of the G20 declared in 2009, “the success of our coordinated effort to respond to the recent crisis has increased the case for more sustained and systematic international cooperation,” while it was “[m]ajor failures of regulation and supervision” that helped to create “dangerous financial fragilities.” G-20, *Full G20 Communiqué*, THE PITTSBURGH SUMMIT (Sep. 25, 2009), available at <http://www.ft.com/intl/cms/s/0/5378959c-aa1d-11de-a3ce-00144feabdc0.html#axzz1nQal4ZhL>. In its 2011 Seoul meeting, the G20 announced its support for the work of the international financial regulatory bodies; “We endorsed the landmark . . . new bank capital and liquidity framework, which increases the resilience of the global banking system by raising the quality, quantity and international consistency of bank capital and liquidity, constrains the build-up of leverage and maturity mismatches, and introduces capital buffers above the minimum requirements that can be drawn upon in bad times.” BASEL COMMITTEE ON BANKING SUPERVISION, REPORT TO G20 LEADERS ON BASEL III IMPLEMENTATION I (June, 2012), available at <http://www.bis.org/publ/bcbs220.pdf>.

19. Zaring, *supra* note 17, at 687.

20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Part VIII, intro. (1987).

21. International Convergence of Accounting Standards-A Brief History, <http://www.fasb.org/jsp/FASB/Page/SectionPage%cid=1176156304264>.

force.”<sup>22</sup> A former chair of that committee has also assured everyone that “its conclusions do not have, and were never intended to have, legal force.”<sup>23</sup> The sort of governance embodied by IFR is, instead, an alternative to public international law.<sup>24</sup>

In one sense, it is a very different alternative. Kal Raustiala has observed that the sort of network-based, soft law governance offered by IFR might present international lawmakers with a choice to regulate informally or to pursue a legal regime governed by the formal strictures.<sup>25</sup> Raustiala predicted that this alternative might present a challenge to public international law that could “reduce the relative importance or ‘share’ of cooperative activity governed by treaties.”<sup>26</sup> Others have agreed.<sup>27</sup>

But sometimes alternatives, at least in legal regulation, are not as different as they otherwise seem.<sup>28</sup> For, as it turns out, public international law creates a great deal of its necessarily fuzzy content through contestation, though international lawyers are often loath to admit it, just like IFR. Public international law could and should embrace its role as a coordinator of interests, as IFR has done. Moreover, public international law depends on domestic enforcement of cross-border rules just as IFR does, a dependence that is often obscured in classic international legal doctrine.<sup>29</sup> The basic structure of IFR, in short, can help us understand what we can expect from international law, and also suggests what it is unlikely to offer those interested in effective international governance.

Reflecting on these points of comparison also offers some insights about IFR as well. Much scholarship on IFR, and the networks like it, have

22. Daniel Lefort, *The International Encyclopedia of Laws: The Bank for International Settlements (BIS): Basel, Switzerland* ¶ 171 (2009). Lefort is the General Counsel of the BIS, which houses the Basel Committee on Banking Supervision.

23. Peter Cooke, former Chair of the Basel Committee on Banking Supervision, quoted in JOSEPH JUDE NORTON, *DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS* 177 (1995).

24. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 3 (2002).

25. See, e.g., Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 612 (2005) (noting that “the choice of form (i.e., treaty v. soft law) can be traded off against the substance of an agreement”).

26. Raustiala, *supra* note 26, at 88.

27. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434-50 (2000) (offering examples of the phenomenon); Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 63 (2003) (focusing on an arms control case study). For a further discussion, see Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, 12 COLUM. SCI. & TECH. L. REV. 272, 315 (2011).

28. Franco Modigliani and Merton Miller won a Nobel Prize in part for their insight that the choice between creating a business financed by debt or equity, absent tax considerations, should not matter. See Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958). For a discussion on this subject, see John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 109 (1986).

29. Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 808 (2006).

correctly focused on the differences posed by the phenomenon. Chris Brummer characterizes it as a return to, and even a triumph of, soft law.<sup>30</sup> Raustiala, as we have observed, thought the network style governance epitomized by finance would pose an alternative to traditional legal doctrine.<sup>31</sup> It is these differences, in many ways, which make the subject worth studying.

But the distinctions should not obscure the ways that IFR works like the governance system perceived to be its alternative. Instead, IFR shows that international governance, because of its horizontality, its tastes for consensus and decentralization, and other reasons, can look similar whether conducted through treaty, custom, or some other, less formal, mechanism.

This Article explores these lessons, beginning in Part I with a section on the importance of domestic institutions in IFR and international law, continuing in Part II with a section on coordination, and, in Part III, considering the role of contestation in setting international legal principles, a contestation that is paradoxically furthered by the preference for consensus in both IFR and international law. The section on domestic institutions will compare international financial regulation to a variety of international legal projects, while the section on cooperation will feature a case study on the development of international accounting standards. The section on contestation will focus on a comparison of the achievements of IFR with some selected achievements in international criminal law.

The Article then concludes with a brief observation about the place of process in international law—for it is in process that IFR is surprisingly comparable to public international law. Since the New Haven School has faded from view, international legal scholars have ignored process and instead focused on doctrine. We would be wise to resurrect some of the interests of that school of thought, if not necessarily its methodology, in thinking about the future of international governance.

## I. Legitimation Though Domestic Institutions

In this section, I argue that international law's traditional focus on international interaction between states ignores many of the ways that transnational legal obligations actually get made. This is exclusively the case for IFR, but is more commonly the case than one might expect in traditional public international law. Understanding the way that IFR achieves its legitimacy—through a series of domestic processes, rather than through an international one gleaned from state practice and treaty commitment—offers a perspective on public international law that can draw attention away from the old problematic categorization of sources, and towards the way that real obligation of international commitments is felt by states.

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30. BRUMMER, *supra* note 5.

31. RAUSTIALA, *supra* note 26.



### A. The Traditional International Law View

The defining “lawness” of international law is supposed to come through its recognition as such by states.<sup>32</sup> This rather magical nature of this elevation to legal obligation has often mystified observers, and made the communicants of the old time international law religion firm believers in transubstantiation—the change of discretionary acts to evidence of legal compliance, and therefore of the existence of law itself.<sup>33</sup>

Particularly in the case of custom—where states comply with their legal obligations not because of some explicit treaty or contractual commitment, but rather because of a more diffuse sense that they, through their actions, recognize the commitment to be a legally binding one—the moment at which inclination turns into legal obligation is awfully difficult to discern.<sup>34</sup>

Consider the Supreme Court’s view on customary international law in *The Paquete Habana*.<sup>35</sup> As the court famously observed: Like all of the laws of nations, it rests upon the common consent of civilized communities . . . [I]t is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation.<sup>36</sup>

The language is famous but quite difficult to pin down. The search is for state-level “common consent,” although it is not always easy to know how that consent, evidenced by the conduct of the amalgam of actors known as the state, would be expressed. Understanding that consent exists because of a sense—again, by the state itself—of “general obligation” is just as tricky to pin down.

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32. Statute of the International Court of Justice art. 32(1). The statute is generally thought to be the best statement of the traditional sources of international law. As Jenny Martinez has explained,

Article 38 of the ICJ’s statute (which provides the canonical list of sources of international law, and is generally followed by other courts as well) directs the court to apply treaties, “international custom, as evidence of a general practice accepted as law,” and “the general principles of law recognized by civilized nations.” It lists judicial decisions—along with “teachings of the most qualified publicists of the various nations”—as a “subsidiary” means for determining the content of international law.

Jenny S. Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 482–83 (2003).

33. Cf. Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT’L L.* 705, 740 (1988) (“The excommunicate priest who elevates the host before the altar in a fraudulent Eucharist is left holding only bread and wine because his invalid orders cannot effect the miracle of transubstantiation.”).

34. There is some debate on the question, however. As Catherine Powell has observed, “In response to revisionist critics who claim federal courts are restricted from interpreting customary international law on federalism grounds, scholars who follow the traditional approach have defended the authority of federal courts in interpreting customary international law.” Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 *U. PA. L. REV.* 245, 283–84 (2001). What is clear is that the boundary between custom and obligation is awfully hard to discern, and Powell’s positive account of it is so carefully done as to amount to some evidence about the countervailing case.

35. *The Paquete Habana*, 175 U.S. 677 (1900).

36. *Id.* at 711.

It is accordingly unsurprising that the evidence resorted to in *The Paquette Habana* to discern *opinio juris* by the states looks quite selectively done. To discern evidence of custom, the Court examined orders issued by English King Henry IV in the early 15th century during a war with France, a treaty made between the Holy Roman Empire and France in the 16th century, treaties between the United States, Prussia, and Mexico, a British case concerning a Dutch fishing vessels, and Japanese state practice in relation to Chinese vessels.<sup>37</sup>

It all appears to be quite *ad hoc*, and hardly comprehensive. As with any kind of precedent selection, suspicions of selection bias and aggressive interpretation rear their heads.<sup>38</sup>

For these reasons, customary international law, with its uncomfortably pliable methods of discerning state practice, has become the sort of international law most likely to be assaulted by critics of the enterprise.<sup>39</sup> While few international lawyers doubt that custom is something on which nations rely in some cases—if the United States was not able to rely on customary international law as a mechanism to give it some consistent approach to treaty interpretation consistent with that set forth in the Vienna Convention on the Law of Treaties, then it would have a difficult time concluding treaties of any sort<sup>40</sup>—custom is international law at its most mysterious.

But even treaties, though more straightforward to limn, turn on difficult contract-like questions as to whether there has been a meeting of the minds between the states—as if states had minds.<sup>41</sup> It is just as difficult to attribute a purpose to a state, though treaties are regularly interpreted to give effect to those purposes.<sup>42</sup> Article 31 of the Vienna Convention of the Law of Treaties, the canonical statement of how international lawyers are

37. *Id.*

38. Indeed, it is fair to say that, given the broad array of data sources that can reveal the state practice so critical for interpreting *opinio juris*, some of the discomfort with the doctrine is attributable to the hard-to-pin-down evidence of it.

39. See Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. INT'L L. 191, 200 (2001) (citing that “[b]oth the theory and the case studies [suggest] that the behaviors associated with [customary international law] evinced little real multilateral cooperation”); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 641 (2000) (lamenting international law’s lack of “independent normative force”); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (emphasizing the role of state self-interest in the formation and development of customary international law).

40. While the United States is not a signatory to the VCLT, its diplomats have said that much of the treaty’s provisions “constitute customary international law on the law of treaties.” *Vienna Convention on the Law of Treaties*, U.S. DEPT. OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 27, 2013).

41. See Curtis J. Mahoney, *Treaties As Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 857 (2007) (admitting that “the notion of overlapping consent or a “meeting of the minds” may be as much a legal fiction in the treaty context”).

42. For a critique of the effort to try to discern the object and purpose of the treaty by looking to state practice, see George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 512 (2010).

supposed to approach the task of treaty interpretation, provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>43</sup> But the purpose behind Russia or Brazil’s decision to enter into an international compact is always unlikely to be clear. Even the object of a treaty, assuming it is derived from the meeting of the “minds” of two duly recognized polities, is always unlikely to be anything other than difficult to discern.

Interpreting the regard states have for *jus cogens* is an even more fraught exercise.<sup>44</sup> These preemptory norms are essentially supercharged customary norms from which derogation is not permitted;<sup>45</sup> they are also principles of international law accepted by the international community, and, as such, are subject to all of the interpretive difficulties of custom, albeit with even fiercer debates as to which norms, precisely, have arisen to the exalted status of preemptory. The Restatement (Third) of Foreign Relations Law mentions prohibitions on genocide, slavery, and torture, but hard-headed lawyers might wonder how often at least two of those norms are honored in the breach.<sup>46</sup> The International Law Committee admitted in 1963 that “there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*.”<sup>47</sup>

In each of these cases, much of the interpretive difficulty involves trying to think about what a state is thinking. Of course, states don’t think; the people serving them think, negotiate treaties, take actions that they believe to be legally required, and so on. As Peter Malanczuk observes, “[t]here is clearly something artificial about trying to analyze the psychology of collective entities such as states.”<sup>48</sup>

But the bind would appear to be a difficult one to escape. Classical international law doctrine is based on a recognition of the modern sovereign state as the only subject of international law.<sup>49</sup> That system has, of course, changed with the advent of human rights and investor protections of individual claims, which make substate actors worthy of the attention of public international law.<sup>50</sup> But still the state remains central in interna-

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43. Vienna Convention on the Law of Treaties art. 31-1, May 23, 1969 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

44. *Jus cogens* is the Latin term for non-derogable principles of international law.

45. Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 237 (2010) (surveying this field).

46. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cmt n. (noting that “[n]ot all human rights norms are preemptory norms”).

47. *Second Report on the Law of Treaties*, [1963] 2 Y.B. INT’L L. COMM’N 16, U.N. Doc. A/CN.4/107. For a discussion, and an effort to move towards more specificity in *jus cogens*, see Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 337 (2009).

48. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 44 (7th ed. 1997).

49. *Id.* at 10.

50. *Id.*

tional legal efforts, or at least so it has long been argued by traditionalists.<sup>51</sup>

## B. The Approach in IFR

Observers of international financial regulation do not spend their time wondering what France “believes” or what the United States “wants” from a capital adequacy arrangement. In IFR, legitimation does not happen mysteriously on the international level, where the difference between “legal” and “not legal” is often reflected by descending into the subconscious of a state and the reasons for its compliance with or disregard of a particular principle of international relations. IFR is never legal once agreed to in Basel, Switzerland, or by a resolution of the International Organization of Securities Commissioners. As Daniel Lefort, the General Counsel of the Bank for International Settlements has observed, “IFR formulates broad supervisory standards and guidelines and recommends statements of best practices in the expectation that individual authorities will take steps to implement them through detailed arrangements—statutory or otherwise—which are best suited to their own national systems.”<sup>52</sup> In other words, it obtains its legitimation through domestic institutions—through the agencies that, once they agree on an international standard, go home and implement the standard.<sup>53</sup>

If anything, IFR has taken the domestic legalization component of what it does to an extreme. While international financial policymakers tend to disclaim what they do as legally binding as loudly as Lefort does across the spectrum of market regulation, the domestic component has been elevated in the very way that IFR is celebrated.

It relies, for example, upon peer review to ensure compliance with its mandates—a policy that itself suggests the importance of the domestic role in the peers that are being reviewed.<sup>54</sup>

Peer review as practiced by the financial regulatory networks is review of agencies by other agencies. It involves some invited visitation, the perusal of reports prepared by countries that have joined the organization, and some free-riding on the Financial Sector Assessment Program (FSAP) analyses conducted by the International Monetary Fund.<sup>55</sup> But the way it

51. *Id.*

52. See Lefort, *supra* note 22 at ¶ 172.

53. *Id.*

54. For a discussion of peer review, see Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369 (1999).

55. For evaluations of peer review in other contexts, see, e.g., Lars Noah, *Peer Review and Regulatory Reform*, 30 ENVTL. L. REP. 10,606, 10,606 (2000) (“[E]ssentially everyone applauds the idea of using independent peer review in the regulatory process.”); Convention on the Civil Aspects of International Child Abduction, Hague Convention on Private International Law, Oct. 25, 1980; see also Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 322 (2013). For a discussion of the FSAP, Richard Gordon has a comprehensive overview:

The purpose of the FSAP was to identify strengths and vulnerabilities of a country’s financial sector, in part by assessing its compliance with key international

works—domestic regulators reviewing other domestic regulators to see whether they are meeting their international commitments—underscores that even the international interactions of financial regulators are premised on their taking domestic acts.

The attachment in IFR to the principle of subsidiarity, with its attendant preference for action by smaller units of government where possible, also illustrates the importance of domestic institutions.<sup>56</sup> Subsidiarity is an essential feature of the soft law institutions of IFR.<sup>57</sup> Because the financial regulators who participate in IFR cannot hope to mandate global standards—an occupational hazard of entities unwilling to go through the formal process of institutionalization through a treaty and accordingly ever willing to claim that they are not lawmakers—they can only agree on them, and rely on their members to do the hard work of enforcement and implementation.

The reliance on municipal law is clear, but it does not make IFR a global governance outlier. A great deal of formal, public international law turns on legitimation through domestic institutions. Consider the following implications posed by the way that hard and soft law look alike in their embrace of domestic institutions.

### 1. *Subsidiarity*

By relying on domestic agencies to implement international agreements—and by constantly reiterating that it is through domestic implementation alone in which legal legitimacy lies—international financial regulation has made a particularly strong commitment to a particular kind of delegation.<sup>58</sup> While the European Union is famous for institutionalizing “subsidiarity,” or the delegation of decision-making away from Brussels and to the states and provinces, IFR practices it particularly eagerly when it comes to the implementation of its rules.<sup>59</sup>

In Europe, the principle of subsidiarity is part of the treaty establish-

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financial standards, such as the Basel Core Principles and related standards on insurance and securities regulations. The IMF and World Bank agreed that they should divide assessment work between them based on their areas of competence, with some being exclusively IMF, others exclusively World Bank, and others being of joint responsibility. Basel Core Principle assessments were to be the responsibility of the IMF.

Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 553 (2010).

56. For an early treatment of EU subsidiarity, see Kees Van Kersbergen & Bertjan Verbeek, *The Politics of Subsidiarity in the European Union*, 32 J. COMMON MARKET STUD. 2, 215 (1994) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.1994.tb00494.x/abstract>.

57. For a discussion of subsidiarity’s implications in a regulatory context, see Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911, 912 (2003) (arguing that horizontal networks can work with the WTO to create a system of internationally harmonized antitrust in a way that honors subsidiarity).

58. Edward Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L.J. 1, 5 (2000).

59. The principle of subsidiarity, EUROPA, [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0017\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm).

ing the European Community in Amsterdam.<sup>60</sup> No less a Europeanist than Sir Leon Britton suggested that the principle, while in theory designed to reduce the power of Europe writ large, was “one of the most important modifications to the Community’s constitution since 1957.”<sup>61</sup> Subsidiarity is meant to push the source of regulation to the most local level possible, and, in particular, keep it out of Brussels, unless, “by reason of the scale or effects of the proposed action, [can] be better achieved at Union level.”<sup>62</sup>

Moreover, like subsidiarity in IFR, the EU variant is meant to leave the work of policy implementation to the agencies within each member country when Brussels does act; in those cases, EU Directives are to provide a “legislative template;” once issued, they vest broad discretion in Member States to implement the basic tenets in whatever forms and by whatever methods the Member States deem fit.<sup>63</sup>

But there is quite a bit of this sort of subsidiarity in traditional international law, too, and it is not only found in Europe. In the *Medellin* case, the Supreme Court found that local preferences on domestic criminal law could even trump that of the International Court of Justice, which the federal government chose, mildly, to heed, but which lawyers in the state of Texas entirely ignored.<sup>64</sup> Despite no particularly ideological leanings in the practice, some conservative legal commentators have identified succor in some transnational, but particularly federalist principles to international policies adopted by states and localities.<sup>65</sup> The tolerance of the

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60. See Bjørn Møller, *The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa* 31 (Danish Inst. for Int’l Studies Working Paper No. 2005/4, 2005), available at [http://mercury.ethz.ch/serviceengine/Files/ISN/18629/ipublicationdocument\\_singledocument/d2bffd0-cb33-425e-be5c-4a63a607a468/en/pros\\_and\\_cons\\_subsidarity.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/18629/ipublicationdocument_singledocument/d2bffd0-cb33-425e-be5c-4a63a607a468/en/pros_and_cons_subsidarity.pdf).

61. Speech by Sir Leon Brittan, Vice-Pres. of the European Communities, Subsidiarity in the Constitution of the European Community, Robert Schuman Lecture, European University Institute (June 11, 1992), in Europe Doc. No. 1786.

62. *Understanding the WTO: The Organization - Whose WTO is it anyway?*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (Last visited Nov. 17, 2015) (“The WTO is ‘member-driven’, with decisions taken by consensus among all member governments.”); *Groups in the Negotiations*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm) (Last visited Nov. 17, 2014) (Listing member coalitions within the WTO).

63. Swaine, *supra* note 62, at 10–11.

64. For a news story on the Texas perspective in the *Medellin* case, see Mark Whittington, *Ted Cruz Touts Role in Medellin Supreme Court Case*, YAHOO NEWS, (Mar. 21, 2012), [http://article.wn.com/view/2012/03/21/Ted\\_Cruz\\_Touts\\_Role\\_in\\_Medellin\\_Supreme\\_Court\\_Case/](http://article.wn.com/view/2012/03/21/Ted_Cruz_Touts_Role_in_Medellin_Supreme_Court_Case/).

65. See, e.g., Nancy Alexander, *Saved by the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon’s Rescue*, 15 LEWIS & CLARK L. REV. 819, 841–42 (2011) (discussing the federal government’s inability to control state compliance with U.S. consular notification obligations in the wake of the *Medellin* holding and noting that, despite this deficiency, state legislatures such as Oregon’s have taken measures to ensure regulatory bodies are aware of their obligations under applicable treaties); Hathaway, *supra* note 55, at 322 (discussing state-level application of treaty obligations and positing that the implementation takes three general forms: voluntary enactment where the U.S. has not enforced a treaty against the states; concurrent enactment where state legislation works in tandem with federal implementing laws, or inde-

engagement of these states and localities with international conventions and the like is another way that subsidiarity plays an important role in international law implementation in the United States, as is the reliance on local institutions—family courts, for example—for the observance of international treaties like the Convention on the Civil Aspects of International Child Abduction.<sup>66</sup>

The European Union, as we have noted, is deeply committed to subsidiarity, as the delegation of European law to enforcement and implementation by national courts and agencies is a hallmark of the international economic arrangement.<sup>67</sup> But it is not the only international organization that has made this sort of commitment. Subsidiarity is a principle implicitly adopted by the Association of Southeast Asian Nations (ASEAN),<sup>68</sup> the

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pendently of the United States where it is not a party to the treaty at all); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 *YALE L.J.* 2380, 2383 (2006) (“For a variety of reasons, both legal and political, state governors will retain some measure of independent discretion to exercise their powers in ways that might affect and indeed determine aspects of U.S. foreign policy.”); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 *N.C. L. REV.* 457, 461 (2004) (“the states already control how and whether the United States will comply with certain obligations under international law”); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 *NOTRE DAME L. REV.* 341, 369 (1999) (taking an originalist approach to the role of states in foreign affairs). The Supreme Court has tended to be relatively hostile to such exercises by the states, though the executive branch has been more passive. See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.”).

66. Convention on the Civil Aspects of International Child Abduction, Hague Convention on Private International Law, Oct. 25, 1980; see also Hathaway et al., *supra* note 55, at 322 (noting that numerous states have adopted the Uniform Child Custody Enforcement Act, under which they are able to execute the terms of the Convention at the state level).

67. Consolidated Version of the Treaty Establishing the European Community art. 5, Dec. 29, 2006, 2006 O.J. (C 321) 46 [hereinafter EC Treaty] available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF> (“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”). For a discussion, see Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 *N.Y.U. L. REV.* 1612, 1678 (2002); see also Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 *VA. L. REV.* 731, 825 (2004) (“In the European Union, for example, the idea of subsidiarity, even when not judicially enforced, may provide a self-regulative political ideal that furthers liberal fidelity by fostering interaction between the Community and the member states about the needs of the system as a whole.”); Swaine, *supra* note 58, at 5.

68. See, e.g., Diane A. Desierto, *ASEAN’s Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*, 49 *COLUM. J. TRANSNAT’L L.* 268, 280 (2011) (describing the Association as “highly dependent on Member State governments for funding and operational implementation, nonetheless recognize[ing] subsidiarity in agenda setting, information dissemination, and performance monitoring with counterpart administrative agencies and civil society groups in the ASEAN Political, Economic and Socio-Cultural Communities”).

Economic Community of West African States (ECOWAS),<sup>69</sup> and other communities that seek to pursue economic integration while preserving domestic sovereignty.<sup>70</sup>

Not every international economic arrangement practices subsidiarity; it is not really a feature of the WTO, for instance, though that organization tolerates regional arrangements.<sup>71</sup> But the delegation down is a feature of IFR that is shared by regional organizations pursuing integration cautiously, but not without ambition.<sup>72</sup> For such institutions, subsidiarity can be a strategy of the formal legality possessed.

## 2. Extraterritoriality

Extraterritoriality has long been an interest of international lawyers, even though it, like IFR, is largely an example of the practice of domestic agencies and courts, rather than states.<sup>73</sup> Interest in the subject grew largely because in the wake of World War II, American agencies and courts rather aggressively applied their own rules to foreign companies, while in the wake of the Maastricht Treaty, the EU did something similar, as Anu Bradford has observed.<sup>74</sup> To define the phenomenon is to understand that its controversy lies in the ordinarily domestic focus of its practitioners.

Extraterritoriality is a particular obsession of United States regulators,

69. In ECOWAS, member states are charged with “establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts,” to the extent possible, with ECOWAS intervening through one of its organizational arms when local cooperation breaks down. See Bjørn Møller, *The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa* 31 (Danish Inst. for Int’l Studies Working Paper No. 2005/4, 2005), available at [http://mercury.ethz.ch/serviceengine/Files/ISN/18629/ipublicationondocument\\_singledocument/d2bffd0-cb33-425e-be5c-4a63a607a468/en/pros\\_and\\_cons\\_subsubsidiarity.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/18629/ipublicationondocument_singledocument/d2bffd0-cb33-425e-be5c-4a63a607a468/en/pros_and_cons_subsubsidiarity.pdf).

70. Even the UN has embraced the principle of subsidiarity, as evidenced by article 53.1 of its Charter, which provides “[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority” and goes on to say in article 52.2 that “[t]he Members of the United Nations . . . shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.” Sorpong Peou, *The Subsidiarity Model of Global Governance in the UN-ASEAN Context*, 4 GLOBAL GOV. 439, 440 (2008), available at <http://www.jstor.org/stable/pdf-pf/27800211.pdf>.

71. Understanding the WTO: The Organization - Whose WTO is it anyway?, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (Last visited Nov. 17, 2015) (“The WTO is ‘member-driven’, with decisions taken by consensus among all member governments.”); Groups in the Negotiations, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm) (Last visited Nov. 17, 2014) (Listing member coalitions within the WTO).

72. See, *supra*, notes 56 and accompanying text.

73. See Tony Putnam, *An \$8.9 billion fine shows that foreign banks evade U.S. laws at their peril*, WASHINGTON POST, (Jun. 30, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/30/an-8-9-billion-fine-shows-that-foreign-banks-evade-u-s-laws-at-their-peril/>.

74. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).



and their critics.<sup>75</sup> Justice Holmes in 1908 reminded his readers of “the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>76</sup> But everything changed for American courts and agencies in 1945, when, the Second Circuit, sitting for the Supreme Court, promulgated the famous—or infamous, depending on your point of view—“effects test” holding that U.S. legislation or regulation would apply in any case in which foreign conduct was intended to and did in point of fact affect American commerce.<sup>77</sup> Of late, courts and agencies have approached extraterritoriality with more caution.<sup>78</sup>

Although associated with American regulatory arrogance, the extraterritoriality of law is not an exclusively American phenomenon. The Permanent Court of International Justice declared in the *Lotus Case* that “the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty.”<sup>79</sup> And, as Bradford has reminded us, Europe has become an important practitioner of extraterritoriality, famously prohibiting a merger between two American companies—GE and Honeywell—that American regulators had approved in 1999, and playing an important role in sanctioning Microsoft for tying new products through its monopoly in computer operating systems.<sup>80</sup>

It is the work of antitrust regulators,<sup>81</sup> and the plaintiffs’ securities

75. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 12–13 (2002) (describing how “[i]n the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe”); Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=39380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380) (connecting the growth of extraterritoriality with the rise of the regulatory state). For a critique of the current practice, see Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673 (2013); see, e.g., Kal Raustiala, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009) (reviewing the history of extraterritoriality); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009) (critiquing the Supreme Court’s modern view of extraterritoriality); Chimene I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 114 (2011) (discussing the role of extraterritoriality in human rights).

76. *Am. Banana Co. v. United Fruit Corp.*, 213 U.S. 347, 356 (1909). Holmes was paraphrasing the holding in *The Apollon*, which provided that “the laws of no nations can be justly extended beyond its own territory.” 22 U.S. 362, 370 (1824).

77. *United States v. Alocia*, 148 F.2d 416, 443–44 (2d Cir. 1945).

78. While the United States is thought to be the foremost proponent of the extraterritorial application of its own economic laws, its Supreme Court has evinced some skepticism about the practice. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010) (requiring a clear statement from Congress before applying American laws with private rights of action extraterritorially); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT’L L. 683, 689 (2012) (noting the controversy of extending U.S. financial regulation beyond its borders).

79. *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

80. Anu Bradford, *The Brussels Effect*, 107 Nw. U. L. REV. 20–21, 61 (2012).

81. The Supreme Court has broadly permitted the extraterritorial application of American antitrust. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting) (opposing the assertion of extraterritorial jurisdiction by Con-

class action bar, that animates this question of such interest to international lawyers.<sup>82</sup> These domestic institutions simply illustrate that a traditionally fertile area of international legal scholarship is not simply a matter of the legal practice of states, as divorced from the regulatory predilections of the agencies within those states.

### 3. Broadly Observed Human Rights

The relevance of domestic institutions to realizing global values applies even to matters of international law that some would argue have risen to the level of *jus cogens*,<sup>83</sup> or something quite close to it. Perhaps the way to characterize them is as broadly observed rights, which may be implemented by treaty, but are often posited to reach those countries not party to the treaty.

Consider human rights. The parties to the International Covenant on Economic, Social, and Cultural Rights, which includes rights to self-determination, to be treated “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” and to a panoply of other social rights, has been signed and ratified by the vast majority of the countries in the world.<sup>84</sup>

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gress over antitrust defendants’ foreign activity on the ground that “this and other courts have frequently recognized that . . . statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law”). For a further discussion, see Harold Hongju Koh, *International: Law As Part of Our Law*, 98 AM. J. INT’L L. 43, 57 (2004). See also *Developments in the Law: Comity and Extraterritoriality in Antitrust Enforcement*, 124 HARV. L. REV. 1269, 1269–70 (2011) (“The . . . extraterritorial application of U.S. antitrust law has drawn intense legal and political debate, culminating in its current status as a battleground in the fight over the proper extent of U.S. extraterritoriality.”).

82. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010) (requiring a clear statement from Congress before applying American laws with private rights of action extraterritorially).

83. *Jus cogens* is the Latin term for non-derogable principles of international law. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N.Doc. A/CONF.39/27, available at <http://www.hostelworld.com/hosteldetails.php/Minka-Hostel/Quito/80305?dateFrom=2014-12-28&dateTo=2014-12-30> (art. 53 defines “peremptory norm of general international law (*jus cogens*)” as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”). See also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 823 (1990) (“there is much scholarly support for the view that most international human rights norms constitute at least binding rules of customary law if not, indeed, nonderogable rules or *jus cogens*.”). Though beyond that, it is hard to know what, exactly, *jus cogens* includes. As Jules Lobel observed, “Some dispute exists over what norms are fundamental. The International Law Commission, in adopting the notion of *jus cogens* in the Vienna Convention on the Law of Treaties, did not elaborate on its content, in part because even the drafting commission could not agree on what norms constituted *jus cogens*.” Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1148 (1985).

84. International Covenant on Economic, Social, and Cultural Rights art. 2, G.A. Res. 2200A, U.N. Doc. A/RES/2200A (Dec. 16, 1966) available at <http://www.un-docu->

The states that have ratified the ICESCR Convention, however, have committed only to enforcing the tenets of the convention through monitoring via a body known as a committee on economic and cultural social rights established by a so-called Economic and Social Council.<sup>85</sup> The monitoring mechanism does not provide for state against state, or individual against state, complaints, and the council does not offer dispute resolution services. Instead, as part of the convention, the council provides opportunities for states to show that they have taken steps in their domestic set-ups to implement the commitments they have undertaken.<sup>86</sup>

Similarly, a state that ratifies the International Covenant on Civil and Political Rights, which includes rights against discrimination, freedom from torture and slavery, and the liberty and security of the person, is monitored by the UN's Human Rights Committee, rather than subjected to judicial review.<sup>87</sup> As the HRC has stated, "Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees."<sup>88</sup> But the committee is comprised of nothing more than "independent experts," and their chief task is dialogue.<sup>89</sup> The committee monitors implementation by receiving reports and, in light of the reports and the research of its members, measures the steps

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ments.net/icescr.htm. The United States has only signed, but not yet ratified, the convention.

85. Shortcomings of the council and challenges to its effectiveness have been apparent since its creation. For a general discussion of the obstacles confronted by the council, see Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987). As Barbara Stark has observed, "[a]s part of ICESCR compliance, ratifying nations prepare self-monitoring reports that document their efforts, successes, and failures to "progressively achieve" the goals set out in ICESCR. These "country reports" are reviewed by the Committee on Economic, Social and Cultural Rights (the "Committee")." Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy*, 44 HASTINGS L.J. 79, 89 (1992).

86. For a description of the council's current enforcement mechanism and suggestions for improvement, see Audrey R. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996); 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 (2004).

87. *International Covenant on Civil and Political Rights (ICCPR)*, INFORMATION PLATFORM HUMAN RIGHTS.CH, <http://www.humanrights.ch/en/standards/un-treaties/iccpr/>

88. Human Rights Committee, General Comment No. 31, ¶13, U.N. Doc. . CCPR/C/21/Rev. 1/Add 13 (May 26, 2004).

89. The membership of the committee is listed on the committee's website. *UN Human Rights Committee - Members*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/members.htm> (last visited Feb. 2, 2013). Its current American member, for example, is an international law professor at Harvard Law School. See U.N. Secretary General, *Election, in Accordance with Articles 28 to 32 of the International Covenant on Civil and Political Rights of Nine Members of the Human Rights Committee to Replace Those Whose Terms are Due to Expire on 31 December 2010*, 21, U.N. Doc. CCPR/SP/75 (Sept. 2, 2010) available at <http://www2.ohchr.org/english/bodies/hrc/membersCVs/neuman.htm> (last visited Feb. 2, 2013) (presenting the credentials of Professor Neuman to the 29th meeting of states parties to the International Covenant on Civil and Political Rights).

states have taken to implement the government's rights and commenting on those reports.<sup>90</sup> The committee then sends written comments to each state regarding their implementation of the ICCPR.<sup>91</sup>

The point is a straightforward one. Many of the mechanisms for the protection of fundamental human rights value domestic implementation, and make it (as scrutinized by monitors and critics) the mechanism used to do the actual work of realizing international commitments,—a process that students of IFR would find familiar—while leaving international oversight to a rather flexible sort of peer review and monitoring.

#### 4. Dualism

The experience of international financial regulation helps to underscore how likely soft law is to be dualist, rather than monist.<sup>92</sup> IFR is entirely dualist, which raises the question as to whether traditional international law can be so committed to its purportedly monist roots.

The dualism/monism distinction is one of the traditional battlegrounds of international law.<sup>93</sup> The question is whether international law is the governing domestic law of a country party to it, or whether international law only binds domestic actors like courts when duly enacted through domestic legislation or some other domestically cognizable legal

90. As the HRC puts it on its website;

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations."

UN Human Rights Committee, *Monitoring Civil and Political Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

91. *See id.*

92. Curt Bradley has explained the difference between monism and dualism as follows:

Traditionally, the debate regarding the relationship between international law and domestic law has been described as a debate between "monism" and "dualism." *See generally* J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936) (describing this debate). In essence, the monist view is that international law and domestic law are "component parts of a 'universal legal order' in which international law has a certain supremacy." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 84 (3d ed. 1999). Thus, in its most extreme form, monism would require, among other things, that domestic courts "give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character." LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64 (1995). The dualist view, by contrast, is that international law and domestic law are "two separate, mutually independent legal orders that regulate quite different matters and have quite different sources." HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553 (2d ed. 1966). Under this view, international law is to be applied by domestic courts only when it has been transformed into domestic law pursuant to the rules of the domestic system. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 537 n.102 (1998).

93. *See* HENKIN, *supra* note 96, at 64.

act.<sup>94</sup> A dualist view “assumes that international law and municipal law are two separate legal systems which exist independently of each other.”<sup>95</sup> Monists understand international law and domestic law as components of a single legal institution, with international law occupying a position of supremacy over the local variant.<sup>96</sup>

But in IFR, although international agreements provide the contents for domestic regulation, thinking of their role as supreme misses the point. The international arena is where policy is formulated.<sup>97</sup> But it is the local arena where legal obligation is maintained.<sup>98</sup> The radically dualist nature of IFR differs from some traditional accounts of public international law, but it is consistent with the emerging American consensus as to how that law works.

Consider the *Free Zones* case, thought to be a stalwart of the monist vision, in which the Permanent Court of International Justice held that “it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.”<sup>99</sup> IFR works the opposite way. France depends on its own legislation to give any force whatsoever to the scope of its international obligations.

Similarly the rule found in Article 27 of the Vienna Convention of the Law of Treaties providing that “a party may not invoke the provisions of its internal law as justifications for its failure to perform a treaty” is subject to a similar revision when the question is one of financial regulation.<sup>100</sup>

The powerful dualist tendency underscored by financial regulation reaches into areas long claimed by monists, such as the implementation of treaties. America is a traditionally dualist system,<sup>101</sup> but in recent years it has particularly insisted on distinguishing between the ratification of an international commitment and its relevance as a source of legal obligation

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94. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864–66 (1987) (discussing monism and dualism); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348–49 (1991) (categorizing transnational public law as some combination of the monist and dualist views of international law). J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936) (describing and contrasting the arguments of each theory's leading proponents).

95. MALANCZUK, *supra* note 48, at 63.

96. For a discussion of dualists and monists, see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 633 (2007). Waters argues that “creeping monism describes a phenomenon in which common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to the treaties.” *Id.* at 633.

97. Viral Acharya & T Sabri Öncü, *A better way to design global financial regulation*, VOX, <http://www.voxeu.org/article/better-way-design-global-financial-regulation>.

98. See *id.*

99. *Free zones of Upper Savoy and District of Gex (Fr. V. Switz.)*, 1932 P.C.I.J. (Series A/B) No. 46, at 167 (June 7).

100. Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 1155 U.N.T.S. 331. Per discussion, see MALANCZUK, *supra* note 48, at 64.

101. See HENKIN, *supra* note 92, at 71.

in domestic governance.<sup>102</sup>

Under traditional international law, treaties do not bind states until ratified by the relevant domestic actor, at which point they become fully realized legal obligations.<sup>103</sup> However, this broad language has been interpreted by American courts as not making American treaty commitments actionable before the judiciary unless; in ratifying the treaty, there has been a clear statement suggesting that the treaty is “self-executing.”<sup>104</sup> Congress has found this doctrine to its liking as well. In recent years, the Senate has frequently stipulated that the President *could not* consider a treaty ratified until Congress has passed implementing legislation.<sup>105</sup>

This practice by Congress is aggressively dualist—but, of course, it parallels the entirely dualist nature of IFR, which does not involve Congress (or public international law). The dualist nature of the IFR regime is part and parcel of its reliance for legitimation from the domestic agencies that are the members of the international policy-making networks. And it is consistent with the American view of how other forms of international legal obligation work—but not really with the monist view of public international law.

This is not to say that monism does not exist, or is a sham, but it does show how important dualism is to the broader picture of international governance, and how it may perhaps be an underappreciated component in public international law.

## 5. Conclusion

The reliance on domestic institutions in international governance is reflective of the relatively disaggregated way that the state has been changing.<sup>106</sup> Rather than one billiard ball of state-level interests, states contain multitudes; looking inside the state is necessary for international law

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102. *US Citizens and International Law*, AMERICAN CITIZENS ABROAD, <https://american-sabroad.org/issues/citizenship/us-citizens-and-international-law/>.

103. Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2066 (2003) (“The history of the law of treaties, greatly simplified, supports a shift in gravity from signature to ratification.”). The United States requires Senate ratification before any treaty can become part of domestic law. Other states have similar requirements; the United Kingdom requires an act of Parliament before a treaty can become domestic law. VALERIE EPPS & LORIE GRAHAM, *EXAMPLES AND EXPLANATION: INTERNATIONAL LAW*, (3rd ed. 2009). Moreover, the Constitution provides that “this constitution, and the laws of the United States which shall be made and pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.” U.S. CONST. art. 6, cl. 2.

104. See *Medellin v. Texas*, 552 U.S. 491, 491 (2008) (ruling that “[w]hile a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treat itself conveys an intention that it be ‘self-executing’ and is ratified on that basis.”).

105. EPPS & GRAHAM, *supra* note 109, § 3.13.1.

106. For example, “[w]hen articulating domestic policies, mayors, governors, and members of state and city legislatures often look beyond their own borders for guidance and sometimes choose to affiliate their localities with transnational initiatives.” Judith Resnik, *Foreign As Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007).

scholars interested in IFR.<sup>107</sup>

In doing so, they are drawing on insights made by distinguished observers of an earlier era. Phillip Jessup, for example, defined “transnational law” in 1956 as “all law which regulates actions or events that transcend national frontiers” and including “[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories” to deal with the type of sub-treaty regulation that crosses borders, among other things.<sup>108</sup>

By the same token, applying to international law the legal process approaches developed in domestic law in the 1950s produced articles and casebooks that went beyond the state to consider, such as constituents within states that pursued trade conflicts and decisions to abrogate sovereign contracts.<sup>109</sup> By the 1970s, the legal focus shifted more to the private side of international legal relationships, with a particular emphasis on the role of multinational corporations. Steiner and Vagts’ *Transnational Legal Problems* casebook essentially invented the field of international business transactions and has echoes in the below-the-state level coordination that characterizes network analysis from the legal perspective.<sup>110</sup> Since then Slaughter’s network view has taken hold and has scholars appearing a little in, but mostly out, of international financial regulation.<sup>111</sup>

This is not to suggest that international law in its classical variant is the same thing as IFR, but rather that the IFR, in appearing somewhat similar to way international law really works, underscores the importance of domestic institutions and making international commitments real commitments on which domestic actors can less rely. It is a lesson that many legal scholars have taken to heart.

107. E.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 1, 191 (2003) (examining the participation of different courts in the international litigation process and the impact such a development has on international politics); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 285 (2004) (describing a “new sovereignty” in which nations need to possess “the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish” under the traditional Westphalian conception of sovereignty).

108. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (Yale University Press ed., 1956).

109. ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *THE INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE*, 249-306, 805-77 (Little Brown & Co ed., 1967).

110. HENRY J. STEINER & DETLEV VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (Foundation Press ed., 2nd ed. 1976).

111. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton University Press ed., 2004). See also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002) (using the examples of international securities, competition, and environmental law to argue for an agency-level perspective on international law); David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT’L L. 547 (2005) (discussing the importance of informal international regulatory cooperation as exemplified in the financial context). See also David Zaring, *Network and Treaty Performance During the Financial Crisis*, 103 AM. SOC’Y INT’L L. PROC. 63, 65 (2009) (discussing these works).

## II. Coordination

### A. Coordination as a Legal Value

One of the points of legal systems is to permit parties to coordinate their interests—contracts, for example, are premised on such interest confluence—but coordination is often viewed derisively by some critics in international law.<sup>112</sup> These critics complain: why call it law if the parties to the project would have done it anyway?<sup>113</sup> The idea is that if an arrangement can only exist if both parties benefit from it, then the arrangement must be unstable, and will be negated if either party concludes that its benefit is wanting. Can such win-win (as long as both parties are winning) arrangements really be called law?

The experience of IFR reminds that coordination games create *comparative* winners and losers, just as do contract claims.<sup>114</sup> IFR also depends upon lawyers, and governs the practices of public agencies and private parties.<sup>115</sup> Moreover, its implementation creates consequences, good and less good, for those who embrace it. How should we think about the legality of international law if it shares these consequences with IFR?

International law often comes in for a great deal of criticism based on its coordinative function.<sup>116</sup> Posner and Goldsmith have raised questions about its customary variant in particular.<sup>117</sup> They argue that “international law does not pull states toward compliance contrary to their interests. International law emerges from states pursuing their interests to achieve mutually beneficial outcomes, and it is sustained [only] to the degree to which it continues to serve those interests.”<sup>118</sup> Posner and

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112. Moreover, aspects of international law are analogized to contracts. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 585 (2005) (noting that the “analogy to contracts is useful because it offers a good starting point for the study of international agreements”).

113. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1831-32 (2002).

114. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 585-86 (2005).

115. See Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTRAL. J. CORP. L. 214, 218-224 (2010); see also Stefano Pagliari, *Who Governs Finance? The Shifting Public-Private Divide in Regulation of Derivatives, Rating Agencies and Hedge Funds*, 18 EUR. L. J. 44, 45 (2011).

116. See Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 175 (2008) (describing, though not adopting, the realist approach to international law).

117. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (“This theory rejects the usual explanations of CIL based on *opinio juris*, legality, morality, and related concepts. States do not comply with norms of CIL because of a sense of moral or legal obligation; rather, their compliance and the norms themselves emerge from the states’ pursuit of self-interested policies on the international stage”).

118. Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 467 (2006). This view about international law come from a social scientific view of state interest focused on the rational actor. As Goldsmith and Posner have argued, “international law emerges from and is sustained by nations acting rationally to maximize their interests (i.e., their preferences over international relations outcomes), given their perception of the interests of other states, and the distribution of



Vermeule have also questioned its importance when international problems grow very severe, as they do in times of war or crisis.<sup>119</sup>

The Goldsmith and Posner view builds on a rich tradition of political science skepticism about the merits of international law.<sup>120</sup> A primary school in international relations—the rational choice realists—have always suspected that international law is nothing more than a meaningless exercise in labeling by hopeful academics and other hangers-on, a position articulated by Hans Morgenthau in the post-war period,<sup>121</sup> and many others since.<sup>122</sup> International relations realism, along with its legal sympathizers, treats states as self-interested unitary actors of varying strengths locked in an anarchic struggle to survive, and unconstrained by legal principle when it conflicts with self-interest.<sup>123</sup>

But from the perspective of IFR, the anarchic struggle is not so obvious—not, at least, after four decades of effort to create international institutions capable of regulating world finance. In light of this experience, branding coordination enterprises as somehow unrelated to the project of international law—or international relations—seems bizarre.<sup>124</sup> IFR, after

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state power.” *Id.* at 463. Rather than hewing to international legal obligations because they are law, “self-interest and the logic of the strategic situation do a much better job of explaining the behaviors associated with international law.” Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113, 134 (2003).

119. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

120. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 n.2 (1999) (“Our approach has many affinities with the rational choice school in international relations.”)

121. See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3–15 (1960) (describing the tenets of realism). Morgenthau’s work built on earlier skepticism by E. H. Carr. See EDWARD HALLETT CARR, *THE 20-YEAR CRISIS, 1919 THROUGH 1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1940).

122. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 88 (1979) (stating that “[i]nternational systems are decentralized and anarchic”); see also ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (1967) (likening international law to systems like Eskimo law, with weak enforcement, self-help, and a lack of delegation to officials with authority).

123. Many realists argue that international institutions have no effect on the important aspects of international life—namely, the competition between states. See John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 7 (1994) (assessing three major international relations theories that assert the value of institutions—liberal institutionalism, collective security, and critical theory—and noting their logical flaws and inconsistencies with the historical record); John J. Mearsheimer, *A Realist Reply*, 20 INT’L SECURITY 75, 82 (1995) (“Realists . . . believe that institutions cannot get states to stop behaving as short-term power maximizers . . . Institutional outcomes invariably reflect the balance of power. Institutions, realists maintain, do not have significant independent effects on state behavior.”).

124. And not just from an IFR perspective, it is perhaps worth noting. See, e.g., Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1204 (2008) (“In many cases - and perhaps most - an essential expectation behind the externally directed coordination function of foreign affairs and international law is the coordination of rules and standards”); Mariano-Florentino Cuellar, *Reflections on Sovereignty and Collective Security*, 40 STAN. J. INT’L L. 211, 242 (2004) (“we can imagine at least two ways in which international law can enhance international peace and security: by directly reducing enforcement and compli-

all, is regulation, interpreted by lawyers, and devised by bureaucrats, via an increasingly legalized process. It looks a lot like law.

But at the same time, it emphasizes coordination. The rules must be agreed upon, rather than imposed. IFR operates through consensus, and its coercion mechanisms are modest and horizontal (as I discussed earlier, IFR relies upon peer review to police compliance by regulators with their international commitments).<sup>125</sup>

But coordination has long made for law that anyone would recognize as “real.” And coordination has to occur at *some* equilibrium; that equilibrium may favor one interested party over others. The process of IFR is not only replete with winners and losers, but with compliance as well. One cannot ignore all cases where legal or regulatory instruments were deployed in the service of coordination and cooperation. Indeed, a large part of international law may be conceived of as law made in the service of enlarging pies, which might still be considered important and legal.

## B. The Global Transformation of Accounting

Consider, as an example familiar to IFR, the sea change in the way that corporations report their results across the world—the global transformation of accounting standards.<sup>126</sup> At some point in the not too distant future, the SEC will implement a new set of accounting standards: one devised in Europe, by European accountants and securities regulations, to European specifications, and consistent with European preferences.<sup>127</sup> In doing so, it will repeal, amend, or ignore its formerly preferred standards: the Generally Accepted Accounting Principles (GAAP), which will wither

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ance costs, and by facilitating coordination to promote transnational norms that would tend to enhance security.”); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1857 (2002) (discussing the role of international law in enhancing coordination, and observing that “[i]f one adopts a more realistic model of a coordination game, however, international law can play a significant role”).

125. See *supra* notes 60-55 and accompanying text.

126. See William W. Bratton, *Heedless Globalism: The SEC’s Roadmap to Accounting Convergence*, 79 U. CIN. L. REV. 471, 471-72 (2010) (“International Financial Reporting Standards (IFRS) swept the globe even as Generally Accepted Accounting Principles (GAAP) retained their hold over companies and securities markets in the United States.”); see also Lawrence A. Cunningham, *The SEC’s Global Accounting Vision: A Realistic Appraisal of a Qllixotic Quest*, 87 N.C. L. REV. 1, 3 (2008) (“This Article probes the most revolutionary development in securities regulation since the New Deal: the Securities and Exchange Commission’s willingness to jettison rules requiring companies to apply recognized US accounting standards by inviting use of a new set of international ones created by a private London-based organization.”).

127. For more discussion, see Bratton, *supra* note 132, at 474 (“Ironically, a switch to IFRS would also allow management to reclaim some of the lost territory while simultaneously enhancing rents collected by its auditors.”); Cunningham, *supra* note 132, at 3 (noting the revolutionary nature of “the Securities and Exchange Commission’s willingness to jettison rules requiring companies to apply recognized U.S. accounting standards by inviting use of a new set of international standards created by a private London-based organization”). For a history of the International Accounting Standards Board, told from the perspective of a former SEC commissioner, see Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT’L L. 883, 901 (2009).

into desuetude. American regulators have grudgingly agreed to accept the standards soon.<sup>128</sup>

This international process will have affected the way that every public company in the world reports its results, and in doing so will have achieved an equilibrium that will force American regulators and companies to change their ways—it is, in short, a coordination game that American interest has played only grudgingly, and ultimately with little impact on the final product. But, of course, it will be worth it to have a set of accounting standards that work for all companies, be they based in Stockholm, Shanghai, or Schenectady.<sup>129</sup> In this sense, accounting harmonization is a coordination game which benefitted everyone, but Europe in particular; Europe not only reaped the windfall of standard accounting, but also chose the standard itself.

The history of accounting standards coordination is an interesting one, filled with stops, starts, and conflict. In the 1980s, capital market regulators tentatively agreed to support an effort by professional accounting organizations to try for global harmonization of accounting rules.<sup>130</sup> The effort proved controversial, as American regulators comfortable with the unique American approach to financial statements withdrew their support for the enterprise in the early 1990s.<sup>131</sup>

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128. The proposed rule may be found on the SEC website. See SEC, <http://www.sec.gov/> (last visited Nov. 18, 2014). Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers, 17 C.F.R. pt. 210, 229, 230, 240, 244, 249 (proposed Nov. 14, 2008) available at <http://www.sec.gov/rules/proposed/2008/33-8982.pdf>. The decision is not without controversy, however, and it is premature to declare that the commitment to IFRS by 2014 is absolute (though eventual commitment is probably inevitable). For a critique see Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785, 805–06 (2009) (“The SEC engaged in a multi-year project in which it repeatedly promised to allow U.S. companies to use IFRS instead of GAAP. The market crisis likely delayed this move, but more important, it called into question the justifications for the move. IFRS offers issuers greater discretion with respect to financial reporting, thus reducing financial statement transparency.”).

129. For a discussion of the evolution of this process, see James D. Cox, *Coping in A Global Marketplace: Survival Strategies for A 75-Year-Old SEC*, 95 VA. L. REV. 941, 944 (2009) (“in fall 2008 the SEC placed the death of GAAP, at least for securities disclosures, on the agenda by proposing that ultimately all U.S. issuers must comply with IFRS. Increasingly, the SEC’s regulatory posture on financial reporting issues is one of accommodation to foreign issuers rather than its historical position of demanding obedience to the U.S. way.”); Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1486–91 (2007) (focusing on the SEC’s willingness to adopt the international standards). See also David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT’L L. 563, 611 (2008) (examining the “three characteristic ways that international regulators make rules”).

130. See *International Convergence of Accounting Standards—A Brief History*, Financial Accounting Standards Board, available at [http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176156304264#The\\_1970s\\_and\\_1980s](http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176156304264#The_1970s_and_1980s) (last visited Nov. 18, 2014) [hereinafter *Convergence of Accounting Standards*].

131. Cf. Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1486 (2007) (“Some form of competition has existed for years between the SEC/FASB and the IFRS promulgators. The SEC historically provided international leadership

That exit, however, did not stop the process of devising common accounting standards.<sup>132</sup> Instead, the international efforts moved to Europe; the creation of international accounting standards after the SEC's rejection has been managed by the International Accounting Standards Board, a London-based public-private arrangement created in 2001.<sup>133</sup> IASB has devised a set of accounting standards, the International Financial Reporting Standards (IFRS), which have enjoyed quick adoption in European and other countries.<sup>134</sup> IFRS was essentially created without American participation.<sup>135</sup> It has, in the course of the last decade, become the favored accounting system in almost every relevant country in the world, save one.<sup>136</sup> IFRS growth, as Stavros Gadinis has shown, has hypertrophied in the past two decades. It is, at least nominally, the world's new accounting system.<sup>137</sup>

And therefore, perhaps unsurprisingly, IFRS is rather different from American accounting rules. It is a principle-based, rather than rule-based accounting system, in that it is less technical than traditional American accounting. IFRS relies more on the holism concept of *gestalt*, applying this principle to assess the accuracy of a company's returns.<sup>138</sup> Accounting firms have developed treatises on the differences between IFRS and GAAP;<sup>139</sup> among other things, IFRS takes a different view about when

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on accounting matters, filling the lacuna that exists in the international arena, which lacks a centralized power . . . In accounting, the SEC and FASB use diplomacy to influence promulgators of alternative accounting systems in a process in which the SEC both exerts political pressure and succumbs to it.”)

132. Cf. *Convergence of Accounting Standards*, *supra* note 136.

133. For an overview, see *About the IFRS Foundation and the IASB*, IFRS FOUNDATION, <http://www.ifrs.org/The+organisation/IASCF+and+IASB.htm> (last visited Feb. 2, 2013) (describing the history of the IASB).

134. See *Who We Are and What We Do*, IFRS FOUNDATION INTERNATIONAL ACCOUNTING STANDARDS BOARD, available at [http://www.ifrs.org/The-organisation/Documents/WhoWeAre\\_JAN-2014\\_ENG.pdf](http://www.ifrs.org/The-organisation/Documents/WhoWeAre_JAN-2014_ENG.pdf) (last revised Sept. 2014).

135. As Henry Hansmann and Reiner Kraakman have observed, “uniform accounting standards are rapidly crystallizing out of the babble of national rules and practices into two well-defined sets of international standards: the GAAP accounting rules administered by the Financial Auditing Standards Board in the U.S. and the International Accounting Standards administered by the International Accounting Standards Committee in London.” Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 457 (2001).

136. *Closing the GAAP*, THE ECONOMIST (Jul. 21, 2012), <http://www.economist.com/node/21559350/>.

137. Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT'L L. J. 157 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2214709](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214709).

138. For an overview, albeit a skeptical one, see Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1486–91 (2007).

139. *Compare IFRS and US GAAP: A Pocket Comparison*, Deloitte Touche Tohmatsu Ltd. (July 2008), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_assurance\\_IFRS\\_US\\_comparison2008.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_assurance_IFRS_US_comparison2008.pdf), and *IFRS and US GAAP: Similarities and Differences*, PricewaterhouseCoopers, LLP (October 2014), available at [http://www.pwc.com/en\\_US/us/issues/ifrs-reporting/publications/assets/ifrs-and-us-gaap-similarities-and-differences-2014.pdf](http://www.pwc.com/en_US/us/issues/ifrs-reporting/publications/assets/ifrs-and-us-gaap-similarities-and-differences-2014.pdf), with *IFRS Compared to US GAAP: An Overview*, KPMG LLP (November 2013), available at <http://www.kpmg.com/>

assets must be “marked to market” (an important question for banks and other institutions that have the capacity of holding those assets for long terms).<sup>140</sup>

As foreign jurisdictions have gained more and more of the business of floating stocks and bonds and raising capital, American capital market regulators have given up hoping that they might do so in ways consistent with the complicated GAAP.<sup>141</sup> The capitulation to GAAP is still ongoing, but from the multidecade perspective of states, it has been rapid.<sup>142</sup> The SEC has permitted foreign companies that list on American stock markets to use IFRS to file their American annual and quarterly reports.<sup>143</sup> The agency, along with the CFTC, also intends to make IFRS an option for any company that chooses to use it by 2014.<sup>144</sup> Before long, the SEC will permit its publicly traded companies to report their results through IFRS;<sup>145</sup> the only question is when, and how much, the agency and American accountants will be able to affect the end result of IFRS. As such, American companies will find that the accounting returns that they are legally required to provide will have changed into something American regulators and accountants did not choose. The result—a global system of accounting—will be cheered by American financial officers, but it will not have been done on American terms.

If this sea change in the way American businesses do business cannot be described as law, then it is difficult to know what law, precisely, is. Yet

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CN/en/IssuesAndInsights/ArticlesPublications/Documents/IFRS-compared-to-US-GAAP-An-overview-O-201311.pdf, and *US GAAP versus IFRS: The Basics*, Ernst & Young LLP (November 2013), available at [http://www.ey.com/Publication/vwLUAssetsAL/IFRSBasics\\_BB2435\\_November2012/\\$FILE/IFRSBasics\\_BB2435\\_November2012.pdf](http://www.ey.com/Publication/vwLUAssetsAL/IFRSBasics_BB2435_November2012/$FILE/IFRSBasics_BB2435_November2012.pdf) (comparing the large number of differences between IFRS and GAAP).

140. Another significant difference between IFRS and GAAP includes the recognition of contingent revenue, which, under GAAP, normally does not occur until the contingency is resolved; IFRS, in contrast, looks to the probability of the transaction occurring and the ability to measure the contingent revenue. Furthermore, the systems also diverge in their method of revenue accounting for service transactions. The IFRS requires the use of percentage-of-completion method, whereas GAAP specifically prohibits such accounting in most cases. PricewaterhouseCoopers, LLP, *supra* note 139, at 20.

141. For a discussion, see William W. Bratton & Lawrence A. Cunningham, *Treatment Differences and Political Realities in the GAAP-IFRS Debate*, 95 VA. L. REV. 989 (2009) (“the globalization wave continues to rise and GAAP’s days appear to be numbered”).

142. See PricewaterhouseCoopers, LLP, *supra* note 139, at 37–38.

143. The SEC has made its views known on the question. SECURITIES AND EXCHANGE COMM’N, WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS: AN ANALYSIS OF IFRS IN PRACTICE, SEC 3, 58 (2011), available at <http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-paper-111611-practice.pdf>.

144. *Id.* For SEC statements on the agency’s cautious embrace of IFRS, see SECURITIES AND EXCHANGE COMM’N, WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS: EXPLORING POSSIBLE METHOD OF INCORPORATION (2011) available at <http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-paper-052611.pdf>.

145. Press Release, SEC, *SEC Proposes Roadmap Toward Global Accounting Standards to Help Investors Compare Financial Information More Easily* (Aug. 27, 2008), available at <http://www.sec.gov/news/press/2008/2008-184.htm>.

it has been created by IFR, a system that depends upon the coordination of interests, rather than upon the legal commitment of a treaty.

### C. Conclusion

Accounting is technical, and acronyms like GAAP v. IFRS daunt almost as much as they reveal what, exactly, to what the distinction amounts between rules-based and principles-based accounting. But the import of the triumph of IFRS can be gleaned by abstracting away from it, and from the details of accounting. The commitment to an international effort in accounting has worked a sea change in the way that companies report their results, and the sea change has come without much American involvement—even though it will, in the near future, affect American companies as much as anyone else.

It is, in short, a win-win coordination game that has benefited some more than others. Looking at international law through an IFR lens prompts the observer to consider just how much international law—often shorthanded as a mechanism for states to contract with one another, after all—is comprised of this sort of coordination. International law has been quite a successful mechanism for resolving some of the cross-border externalities created by a globalizing world, with its problems of environmental degradation, economic contamination, and trade and investment. Here, international law, and indeed often international soft law—taking on many international legal characteristics—coordinates outcomes among states that simply must be resolved through a variety of institutional arrangements. In environmental law, it has often been a treaty; the same goes for international trade. For IFR, networks and soft legal institutions have been the recourse.

In each of these cases, it is impossible to imagine the existence of an international police force, or indeed that many countries would care enough about the issues presented to mobilize their own soldiers to compel their counterparties to obey. Yet it is in these areas where international law has created a welter of regimes that affect what we do. While almost none of these regimes has the power to impose losses on participants, it is nonetheless the case that coordination creates some winners who win more than others, as IFR exemplifies.

### III. Contestation

Can a legal system claim to be a system if its rules cannot be reduced to writing? International lawyers have traditionally appeared to worry that the answer is no.<sup>146</sup> The search for rules that are reducible to writing is one of the features of classic international legal scholarship, which has made rulewriting one of its highest aspirations.<sup>147</sup> Countless articles identify

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146. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 86 (Richard A Epstein et al. eds., 3d ed., 1999).

147. Hence, the various Restatements of international law and the work of the International Law Commission. For a discussion of the ILC, see Jill McC. Watson, *The Inter-*

new international norms.<sup>148</sup> Puissant scholars in particular might be garlanded with appointment to the International Law Commission, where they would be charged with writing international law, at least in draft form, for states to consider adopting.<sup>149</sup> And Article 38(2) of the Statute of the International Court of Justice gives scholarly writings the same status—as secondary sources of international law—as judicial opinions.<sup>150</sup>

But perhaps international law, and less formal versions of international governance, express principles, but do so through an iterated process of principle revisitation. Rather than fixing rules in stone, IFR changes its baselines all the time.<sup>151</sup> The question is whether more formal variants of public international law are so different.

### A. Ever Evolving International Governance

The traditional vision of the scholarly role in international law exposition is one that posits international law as reducible to rules, if one thinks it through carefully enough—a vision that may stem from the work of the natural law aficionados that founded the discipline.<sup>152</sup> In the 17th century, Hugo Grotius argued that the fundamental tenets of international law could be derived from principles of justice that had a validity transcending time and context and that could be discovered through reason.<sup>153</sup> Grotius believed that natural law, and thus the international law which depends upon it, “would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”<sup>154</sup>

The search for the rules of international law has accordingly been an abiding passion for legal theorists.<sup>155</sup> But it also threatens to set overly precise standards for a discipline that, on account of its horizontal structure, is likely to arrive at those sorts of standards very slowly, and only

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*national Law Commission: 1949-1998*, 95 AM. J. INT'L L. 747 (2001) (book review) (“The International Law Commission (ILC) of the United Nations was established more than fifty years ago with the goal of continuing the effort, begun in the nineteenth century, to develop and codify international law.”). George Walker believes that the latest Restatement of International Law “has renewed discussions of how to ascertain international law.” George K. Walker, *Sources of International Law and the Restatement (Third)*, *Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 3 (1988).

148. Jiangming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 289 (1999).

149. Michael Owen, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 859 (2002) (“state responsibility is the last significant area of the great effort to codify international law.”)

150. Statute of the International Court of Justice art. 38 para 2.

151. David Zaring, *Post-Crisis International Financial Regulation*, available at [http://murphy.tulane.edu/files/events/ZARING\\_the\\_change\\_in\\_international\\_finance.pdf](http://murphy.tulane.edu/files/events/ZARING_the_change_in_international_finance.pdf).

152. See Shen, *supra* note 148, at 291-92.

153. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres: Prolegomena [The Law of War and Peace: Prolegomena]* ¶11 (James Brown Scott ed., Francis W. Kelsey trans., 1925); for a discussion, see William P. George, *Grotius, Theology, and International Law: Overcoming Textbook Bias*, 14 J. L. & RELIGION 605, 606-07 (2000).

154. GROTIUS, *supra* note 153, at ¶11.

155. Shen, *supra* note 148 at 289.

after much disagreement, tentative agreement, and revisitation of the issue. As Peter Malanczuk has observed of international law: “The horizontal system of law operates in a different manner from a centralized one and is based on principles of reciprocity and consensus rather than on command, obedience, and enforcement.”<sup>156</sup>

This is not a surprise to observers of IFR. The horizontal nature of international financial regulation means that it resembles an argument more than it does a list of rules, and reflection on the way it works suggests that the desire to fix international law principles on ratified paper should, perhaps, be tempered. After all, neither IFR nor public international law offers a monopoly on violence (which makes them different from a conventionally Weberian definition of a legal system).<sup>157</sup> And, like IFR, public international law features ambitious claims about what the law requires, and plenty of pushback against those ambitious claims by skeptics of legal evolution—regardless of what legal scholars and the ILC identify as evolving.<sup>158</sup>

International financial regulators frequently appear to agree about very little.<sup>159</sup> They meet and argue about the sorts of rules that they would like to impose across the world’s financial markets.<sup>160</sup> The debates can be heated.<sup>161</sup> Agreement is difficult. And when there is resolution on issues—when, say, a capital adequacy rule meets with consensus by the world’s banking regulators—the issue must be revisited when the facts require, as they often do.<sup>162</sup> For example, the capital adequacy accord promulgated by the Basel Committee on Banking Supervision—the signature achievement of IFR—has gone through three complete revampings, as well as other intermediate clarifications and reconceptualizations that are

156. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 6 (7th ed. 1997).

157. Max Weber explains that the government “upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.” 1 MAX WEBER, *ECONOMY AND SOCIETY* 54 (Guenther Roth & Claus Wittich eds., 1978). For a discussion, see Benedict Sheehy & Jackson N. Maogoto, *The Private Military Company-Unraveling the Theoretical, Legal & Regulatory Mosaic*, 15 *ILSA J. INT’L & COMP. L.* 147, 164 (2008) (“It is the State’s monopoly of violence that underpins the international legal system and justifies the emphasis on State sovereignty”).

158. For example, Curt Bradley and Jack Goldsmith have identified one such dispute over the transformation of human rights norms into customary international law. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815, 818, 839 (1997) (comparing Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 *GA. J. INT’L & COMP. L.* 1, 12–21 (1996), with Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT’L L.* 82, 83 (1992)).

159. See Jonathan Gage & Alan Friedman, *U.S. and G-7 Allies Disagree About Regulation Measures: Global Financial Reform: A Clash of Perceptions*, *N.Y. TIMES* (Jan. 30, 1999), <http://nytimes.com/1999/01/30/news/30iht-davos.t.html>.

160. See *id.*

161. As Singer observed, the United States and Britain nearly abandoned the process of devising the first capital adequacy accord. See Singer, *supra* note 10, at 36–67.

162. See *supra* note 116 and accompanying text.



almost too numerous to mention.<sup>163</sup> Students of IFR do not think that the accord is unimportant even though it is constantly revisited—indeed, IFR is structured to make that sort of revisitation constant.<sup>164</sup>

In international financial supervision, we have seen at the beginning only limited work, like efforts by regulators to stay in touch with one another, and to divide responsibilities over multijurisdictional financial enterprises.<sup>165</sup> That was then paired with efforts to cooperate across borders—but only to assist financial regulators in carrying out their domestic responsibilities.<sup>166</sup> Later still came deeper and more far-reaching efforts to do things in the same way and with the same approach.<sup>167</sup> This evolving sort of cooperation was first done through core principles of financial institutional supervision (these “Principles” are quite short, broadly defined guidelines that every regulator is meant to apply to its own organization and to the regulated industry within its purview; they come in numbers of 21,<sup>168</sup> 28,<sup>169</sup> or occasionally as many as 40,<sup>170</sup> and are one of the first acts of every financial regulatory network).

In some cases, the supervision has become even more elaborately cooperative, and has resulted in the creation of complex rule systems that

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163. *Basel Regulatory Framework*, Federal Reserve System, <http://www.federalreserve.gov/bankinforeg/basel/USImplementation.htm> (last visited Nov. 17, 2014).

164. *The Basel Committee’s Work*, BANK OF INTERNATIONAL SETTLEMENTS, [http://www.bis.org/bcbs/bcbs\\_work.htm](http://www.bis.org/bcbs/bcbs_work.htm) (last visited Nov. 17, 2014).

165. *The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace*, GROUP OF THIRTY, 12–13, 16 (2008), available at <http://www.group30.org/images/PDF/The%20Structure%20of%20Financial%20Supervision.pdf>.

166. See, e.g., IOSCO’s Multilateral Memorandum of Understanding Int’l Org. of Sec. Commissions, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf> (rev. May 2012).

167. See Int’l Ass’n of Deposit Insurers, *Core Principles for Effective Deposit Insurance Systems* (Feb. 29, 2008), [http://www.iadi.org/docs/Core\\_Principles\\_final\\_29\\_Feb\\_08.pdf](http://www.iadi.org/docs/Core_Principles_final_29_Feb_08.pdf); Int’l Ass’n of Ins. Supervisors, *Insurance Core Principles and Methodology* (Oct. 2003), [http://www.iaisweb.org/\\_temp/Insurance\\_core\\_principles\\_and\\_methodology.pdf](http://www.iaisweb.org/_temp/Insurance_core_principles_and_methodology.pdf); see FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - The FATF Recommendations* (Feb. 16, 2012), [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

168. The International Association of Deposit Insurers, with the assistance of the Basel Committee, came up with 21 core principles of effective deposit insurance administration. See Int’l Ass’n of Deposit Insurers, *Core Principles for Effective Deposit Insurance Systems* (Feb. 29, 2008), [http://www.iadi.org/docs/Core\\_Principles\\_final\\_29\\_Feb\\_08.pdf](http://www.iadi.org/docs/Core_Principles_final_29_Feb_08.pdf) for the complete list.

169. IAIS developed its set of 28 core principles of insurance supervision in 2003. Int’l Ass’n of Ins. Supervisors, *Insurance Core Principles and Methodology* (Oct. 2003), [http://www.iaisweb.org/\\_temp/Insurance\\_core\\_principles\\_and\\_methodology.pdf](http://www.iaisweb.org/_temp/Insurance_core_principles_and_methodology.pdf).

170. The FATF has 40 standards designed to combat money laundering, to which it has added nine designed to stymie terrorism financing. For the complete list of standards, see *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations*, THE FATF (Feb. 16, 2012) <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html>.

leave little room for domestic discretion.<sup>171</sup>

The Basel III Capital Accord is an example of this kind of international regulation, as are the International Financial Reporting Standards (IFRS) that are being adopted by most securities regulators and promulgated by the International Accounting Standards Board with assistance and government input from the International Organization of Securities Commissions (IOSCO).<sup>172</sup>

Of course, progress in IFR, like in its domestic counterpart and in many other international problems, is periodic, sporadic, and prompted by crisis. The Basel Committee was founded after a banking crisis in 1974.<sup>173</sup> Its most recent iteration of capital adequacy rules, the so-called Basel III, was prompted by the latest global financial crisis that emanated from the collapse in American housing prices.<sup>174</sup> Throughout this period, innovation in finance has created brand new markets—derivatives trading has only become a big business in the last twenty years—and is getting, if anything, even more global.<sup>175</sup> Regulators have struggled to keep pace, and doing so has required them to constantly move the targets and goalposts of their missions.<sup>176</sup>

Other international lawyers might benefit from thinking about their own bailiwicks through a paradigm of revisitation, rather than one that looks for a Restatement-like fixity of rules. International law fosters a debate about bedrock commitments more often than it might appear. It might be useful to think of public international law, like IFR, as that which resolves questions over obligation through contestation rather than through mandate.

Thinking of public international law in this way insulates it from the persistent criticism that it is often breached, without consequence to the breaching party. This critique is surely true; even if states observe most of their treaty obligations most of the time,<sup>177</sup> in any particular time and, indeed, in particularly important times, powerful states may break their legal obligations in the interests of their national security or other national priorities. Well-known American examples of this phenomenon include the recent airstrikes in Libya, one pursuant to an aggressive interpretation of a United Nations Security Council resolution,<sup>178</sup> and the response to the

171. See Narissa Lyngen, *Basel III: Dynamics of State Implementation*, 53 HARV. INT'L L.J. 519, 519-20 (2012).

172. For more on the IFRS, see *supra* notes 143-144 and accompanying text.

173. Basel Committee on Banking Supervision, *A brief history of the Basel Committee* (Oct. 2014), <http://www.bis.org/bcbshistory.pdf>.

174. See *id.*

175. As former CFTC chair Brooksley Born observed, “[d]uring the past decade, the world derivatives markets have grown exponentially in size and importance.” Brooksley Born, *International Regulatory Responses to Derivatives Crises: The Role of the U.S. Commodity Futures Trading Commission*, 21 NW. J. INT’L L. & BUS. 607, 608 (2001).

176. See generally *id.*

177. As Louis Henkin has memorably observed, “[m]ost nations observe most international law most of the time.” LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2nd ed. 1979).

178. The coalition bombing of Libya has elicited conflicting responses. For a discussion of the different positions, see Robert Booth, *Libya: Coalition Bombing May Be in*

International Court of Justice's decision in the *Nicaragua Harbors* case.<sup>179</sup> Indeed, Jonathan Charney has argued that customary international law, if it ever changes, must go through periods of noncompliance where states break rules and adopt new ones in an effort to encourage their peers to do the same.<sup>180</sup>

While some argue that occasional noncompliance by the powerful means that international law is not very relevant to the interactions of states,<sup>181</sup> others recognize that all those lawyers deployed and all the time spent on legal instruments must amount to something.<sup>182</sup> Thinking of international law in this way—as a way of debating values without expecting uniform compliance with these values—explains some of the potential of international law a bit more persuasively, and it also illuminates some of the tensions behind something that occasionally looks like a pitfall of inter-

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*Breach of UN Resolution's Legal Limits*, THE GUARDIAN, Mar. 28, 2011, <http://www.guardian.co.uk/world/2011/mar/28/libya-bombing-un-resolution-law>. See also Curtis Doebbler, *The Use of Force Against Libya: Another Illegal Use of Force*, JURIST (Mar. 20, 2011), <http://jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php> (concluding that “an application of international law to the facts indicates that in fact the use of force is illegal”). The Libya intervention was not clearly authorized by Congress. See Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES (Mar. 21 2011), [http://www.nytimes.com/2011/03/22/world/africa/22powers.html?\\_r=1&](http://www.nytimes.com/2011/03/22/world/africa/22powers.html?_r=1&).

179. See Katrina J. Church, *The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors*, 18 N.Y.U. J. INT'L L. & POL. 169 (1985-1986) (discussing the legality of American action in Nicaragua). For facts of the case and details of the proceedings, see Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L L.J. 15 (2001).

180. Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 916 (1986) (“to change customary international law, a nation often must violate it”).

181. This argument is perhaps most often associated with Jack Goldsmith and Eric Posner. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 225 (2005) (“International law is a real phenomenon, but international scholars exaggerate its power and significance”). And it has plenty of real world examples. The American use of force in Kosovo, for example, probably breached formal international law. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1 (1999). Many have made similar arguments about the American invasion of Iraq. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (positing that “the legal theory actually deployed by the United States is not persuasive”). As Harlan Cohen has observed, “for some, the patterns of noncompliance are proof that international law is ‘law’ in name only.” Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 67 (2007). And the force of the argument is such that, as Jacob Katz Cogan has observed, “the rule-of-law sentiment is so strong today that, for many scholars, the most important issue confronting international law is how to induce compliance with international norms, that is, how to encourage nations to obey international law.” Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 191 (2006) (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (review essay)).

182. See generally Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005)

national legal scholarship: where thoughtful academics announce the discovery of new favored rights, such as rights to be free of war,<sup>183</sup> to be free of want,<sup>184</sup> or to access healthcare.<sup>185</sup> It is better to think of this work as an effort to start a debate, rather than deriving a proof.

The point is not meant to be an overly constructivist one. Constructivists argue that legal meaning is created through communities of like-minded thought, rather than from any logical necessity; it is a sociological, arguably “soft” form of obligation that turns more on thought process than on external requirement.<sup>186</sup> But this Article is not a constructivist enterprise; it recognizes that legal obligation, when it crosses borders, is not always relative, and not always supported by nothing more than a bit of we-feeling among elites.<sup>187</sup> But recognizing the negotiated nature of a govern-

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183. See, e.g., David A. Soley, *Hunt v. Galtieri: A Hypothetical Scenario for Holding International Aggressors Civilly Liable in American Courts*, 33 EMORY L.J. 211, 224 (1984) (“The universality and clarity of this newly delineated international law eliminates much of the ambiguity behind which aggressive nations once hid.”).

184. See Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 GERMAN L.J. 1190 (2010) (arguing that “excessive buyer power” creates “harms suffered by farmers are serious enough as to constitute violations of the international human right to food”).

185. See Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CAL. L. REV. 1151, 1159 (2007) (“An American, certainly, would find it absurd to demand the government provide access to health care based on rights enumerated in the Universal Declaration of Human Rights.”).

186. I associate the constructivist element of political science mostly with a strand of international relations heterodoxy, see, e.g., JAMES FEARON & ALEXANDER WENDT, RATIONALISM V. CONSTRUCTIVISM: A SKEPTICAL VIEW, in HANDBOOK OF INTERNATIONAL RELATIONS 52 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2004). It has found its way into the international legal literature as well, see Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004). For a discussion, see David Zaring, *Regulating by Repute*, 110 MICH. L. REV. 1003, 1018 (2012). I have elsewhere observed that “difficult-to-enforce international norms have always required an internationalization of those norms by domestic administrative agencies charged with giving teeth to these agreements and accords of international regulators. And that in turn probably requires some confidence in the effectiveness and wisdom of the international legal institution.” David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT’L L. 475, 503 (2010).

187. Political scientists have long considered how international relationships can be formed through “epistemic communities” rooted in common understandings of problems. For an introduction to the literature, see *Knowledge, Power, and International Policy Coordination*, 46 INT’L ORG. 1 (Winter 1992), a special issue of the journal International Organization that was devoted to epistemic communities. An in-depth discussion of epistemic communities is beyond the scope of this Article, though it is worth noting that there are some similarities between IFROs and these communities. The technical nature of the work, the regularity of the meetings, and the neutral forum at which those meetings are held contribute to an atmosphere where bureaucrats can obtain transnational loyalties. As Tony Porter has concluded, such bureaucratic loyalty, as opposed to national loyalty, can be found in the Basel Committee. See TONY PORTER, STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE 81 (1993) (describing the evolution of international financial regulation from a political science perspective, with particular attention to the Basel Committee); see also David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 330 (1998) (noting the possibility of developing and using international administrative law and procedure to oversee rulemaking by transnational regulatory organizations).

ance regime is not meant to deny that there is legal obligation present in the international system.

## B. Contestation in Finance and Crime

One useful way of looking at what various parts of international law are supposed to do is to think about the fundamental question that those components are meant to answer. For IFR, the institution builders and rule makers are asking, “What does a safe and sound global financial system require?” Answering that question has been a negotiated process. It is not one which reaches a terminal result but one that evolves over time—which is why the international financial system is replete with the re-evaluation of standards.

The Financial Stability Board, for example, uses peer review to check on the commitment of its members and counterparties to the coordinated outcomes meant to be created through financial regulatory cooperation.<sup>188</sup> Peer review exemplifies the negotiated nature of IFR because, like all other sorts of peer review, it inquires into, rather than demands allegiance to, the values of the system.<sup>189</sup>

In this way, there has never been a time where the question “what does a safe and sound global financial system require?” has been clearly and unanimously answered. And of course, throughout all of these evolutions in the style and degree of international governance made, regulators have pursued their own interests and the interests of the industries they oversee—indeed, many political scientists, such as David Singer and Abraham Newman, have identified this sort of state influence as being a critical component in explaining the content of the rules of IFR.<sup>190</sup>

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188. The Board is, in conjunction with the IMF, dedicating a substantial portion of its resources to “peer review,” designed to see that its member countries are making progress towards implementing the programs that it has pursued internationally. These peer reviews feature self-reporting by the regulators to other members of the FSB, and are paired with, and modeled off of, the IMF’s own Financial Sector Assessment Program. Jeffery Atik, *Basel II: A Post-Crisis Post-Mortem*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 731, 758 (2011) (describing the IMF program). The IMF describes the purpose of the program as “a comprehensive and in-depth analysis of a country’s financial sector. See *The Financial Sector Assessment Program (FSAP)*, INTERNATIONAL MONETARY FUND <http://www.imf.org/external/np/exr/facts/fsap.htm> (last updated Sept. 30, 2014).

189. For a discussion of peer review, see J. B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 38 *ENVTL. L. REP. NEWS & ANALYSIS* 10553, 10554 (2008) (“Like scientific peer review, the review and critique would be conducted prior to the agency’s final decision by qualified, independent experts who have no pecuniary or other conflict of interest in the outcome of the agency’s decision.”). For criticism of the peer review process, at least as applied to the world of international trade law, see LARS NOAH, “*Republicanism*”: *Expert Peer Review and the Quest for Regulatory Deliberation*, 49 *EMORY L.J.* 1033, 1064–65 (2000).

190. See David Bach & Abraham Newman, *Transgovernmental Cooperation and Domestic Policy Convergence: Power, Information, and the Global Quest Against Insider Trading*, 36 (2009), available at <http://ssrn.com/abstract=1450395> (concluding that “[l]ead regulators are able to use their relationships to promote policy export and shape foreign legislative agendas . . . underscore[ing] the crucial, yet theoretically and empirically neglected role that power plays within transgovernmental relations.”); see Singer, *supra* note 10 (arguing that Basel in particular was a product of agitation from American

In sum, instead of iron rules, fixed and permanent, representing platonic ideals of sound international governance that might be fixed in print by legal scholars, financial regulation is a messy debate. But in this way it really may not be different than other kinds of more formal international laws.

One could look at perhaps the most active area of public international law over the last 20 years—international criminal law—and analyze it quite similarly. It too, has an animating question—what activities by states and individuals should be regarded as international crimes?—the answer to which is a subject of debate, even after the Rome Statute criminalized terms like “atrocities” and “aggression” and attempted to define them.<sup>191</sup> But even after the treaty’s conclusion, there is a great deal of negotiation about what should be beyond the pale and what should be regretfully tolerated as hardly unprecedented state and leader conduct.<sup>192</sup>

Consider the crime of aggression. First mentioned in the London Charter governing the Nuremberg trials, aggression was included in a laundry list of “crimes against peace;” ever since, it has been difficult to discern where the outer bounds of such a crime lie.<sup>193</sup> The United Nations General Assembly adopted a resolution on the definition of aggression, one that included both a general definition and a list of examples of aggression crimes, in 1974.<sup>194</sup> The general definition provided that “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>195</sup> The specifics include

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and British banks worried about competition from Japanese banks that, it was felt, operated under significantly less onerous regulatory requirements, especially requirements related to the amount of capital reserves required).

191. For one account of the effort to define the term “atrocities,” see William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL’Y 36, 41-42 (2010).

192. As Muneer Ahmed has argued, the debate is “epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an ‘enemy combatant’ and what is a ‘war crime’; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.” Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. REV. 1683, 1740 (2009). As William Fenrick has observed,

As a general statement, although it is relatively easy to identify which types of acts constitute war crimes, it is often quite difficult to spell out the elements of individual offenses because substantial portions of international humanitarian law are expressed at a high level of abstraction or generality and because many offenses have rarely, if ever, been prosecuted in criminal courts. This problem is particularly apparent where the law of the Hague is concerned.

William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUM. J. TRANSNAT’L L. 767, 772 (1999).

193. See United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (“London Agreement”), art. 6(a), Aug. 8, 1945, available at <http://www.unhcr.org/refworld/docid/3ae6b39614.html> (last visited Feb. 9, 2013). The charter governing the Tokyo trials of Japanese leaders contained a very similar laundry list.

194. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/Res/3314 (XXIX) (Dec. 14, 1974).

195. *Id.* art. 1.

blockades, airstrikes, and more capacious and arguable provisions such as “allowing [ ] territory . . . to be used by [another] State for perpetrating an act of aggression against a third,” or “substantial involvement” in the “sending” of “armed bands.”<sup>196</sup> The resolution has unsurprisingly been criticized ever since as “both too narrow and too broad.”<sup>197</sup>

International criminal lawyers hoped that the meaning of the international crime of aggression would be settled by the international process that defined international criminal law and created a tribunal to interpret and enforce it.<sup>198</sup> But, while the Rome Statute listed the crime of aggression as a cause of action over which the ICC would have jurisdiction, it was not until 2010 that the meaning of the term “aggression” was defined.<sup>199</sup> Then, at a Rome Statute review conference held in Uganda, the parties to the statute, after years of debate and negotiation, settled—after a fashion—on a definition.<sup>200</sup> Article 8 bis defines the crime of aggression as, among other things, “the planning, preparation, and initiation or execution, by a person in a position effectively to exercise control over or to direct a political or military activity of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the charter of the United Nations.”<sup>201</sup> The article also includes a laundry list of activities that do qualify, ranging from invasion to infiltration.<sup>202</sup>

In this way, although international criminal law is both at the heart and at the cutting edge of public international law, the parallels between its form of governance and that of IFR are striking even as the provenance of their legality differentiates them. Aggression remains one of the least defined and most debated aspects of international criminal law, and while this Article is not the place to try to sort out what, precisely, aggression is or should be, its indeterminateness is one of its features. This ambiguity is one of the reasons why the development of international criminal law provokes support (because of the idea that it can potentially evolve), and opposition (for the same reason).<sup>203</sup> And if that is the case, it underscores the

196. *Id.* art 3.

197. VALERIE EPPS & LORIE GRAHAM, *EXAMPLES AND EXPLANATIONS: INTERNATIONAL LAW* § 11.2.4 (2011).

198. See David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 *CASE W. RES. J. INT'L L.* 111, 117, 119 (2008).

199. See *id.* at 119.

200. For a discussion, see Claus Kress & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 *J. INT'L CRIM. JUST.* 1179, 1180 (2010).

201. Int'l Criminal Court, Assembly of States Parties, Resumed Seventh Session Feb. 9–13, 2009, Annex I, Report of the Special Working Group on the Crime of Aggression, at 11, art. 8 bis, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 20, 2009).

202. *Id.*

203. An American example of skepticism is provided by Jack Goldsmith's embrace of the term “lawfare,” which in his view is the use of criminal and other tools of international law to disempower American foreign policy. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 58–59 (2007). As Susan Carle has explained, the concept comes from Donald Rumsfeld: “The overarching theme Professor Goldsmith wants to promote, echoing Defense Secretary Donald Rumsfeld's concept of “lawfare,” is that government actors find themselves in a bind when they are forced to juggle political pressures to be effective along with liability concerns that con-

parallels between the negotiated and debated nature of informal international regulation like IFR and the much more formal public international law represented by the Rome Statute and its court.

Just as with financial regulation, state interest goes into this negotiation. Despite the creation of dispute resolution processes and tribunals, much of what international criminal law is also turns on its own stylized process of peer review, whereby multiple states act in judgment of the delicts committed by their peer states in the dock. The similarities go on from there—just as IFR is developed through financial crises, the mechanisms of criminal law have been prompted by atrocities.

The iterative nature of important concepts is not just limited to definition. The International Criminal Tribunal for Yugoslavia handled a different set of war crimes cases than did the International Criminal Tribunal for Rwanda, with the ICTY focusing more on leaders, and the ICTR on mid-level participants in the hostilities.<sup>204</sup>

Accordingly, the nature of the debates in IFR or in international criminal law need not look like an unrealistically pious search for truth. In both cases, of course, state interest play important roles in determining content and participation. The United States has stayed out of the ICC because it worries about the consequences for its soldiers posted abroad.<sup>205</sup> American regulators, along with their British counterparts, first pursued a capital adequacy agreement in IFR because the American and British banking industries were worried that they would be unable to compete with large Japanese banks.<sup>206</sup> No one would suggest that, simply because IFR and international law work through contestation and disagreement, that self-interest is abandoned. Indeed, self-interest explains why the dialogue is constant and the disagreements often sharp.

Moreover, the contestation is underscored by the consensus orientation of both IFR and international law more generally. The constant undercurrent of debate and revisitation; the need to convince everyone most of the time, is a feature of both IFR and international law. For IFR, the taste appears to be driven by the desire for harmonization, the need to motivate domestic agencies to want such harmonization, and the inclination to ensure a buy-in.<sup>207</sup> International law's preference for consensus is

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strain their actions." Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1339 (2008).

204. Morten Bergsmo, Catherine Cissé & Christopher Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 121 (1999).

205. Or so, at least, has been the conclusion of Congress, which passed the Servicemember's Protection Act for this reason. "The Act was designed to prevent United States participation in the ICC and to discourage other members of the international community from participating in the Court or assisting it in any way." Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537 (2003).

206. Or so argues Singer. See Singer, *supra* note 10 and accompanying text.

207. As I have elsewhere observed, international financial regulators act "on a consensus basis using general principles, meaning that the regulatory regime offered to extend to any particular regulator applies to all of the members. The consensus format



presumably rooted in its (not always explicable) commitment to the idea of sovereign equality of nations, the idea that Vanuatu and China are functionally similar in the eyes of the law.<sup>208</sup> In both cases, the desire for consensus is driven by the horizontal nature of global governance.<sup>209</sup>

This insight is not meant to be fundamental rethinking of what international law is all about. Instead, it aims merely to remind legal scholars that despite the predilection for doctrinal analysis, and particularly for the doctrinal analysis of insecure international lawyers, precision and reduction to writing have often been favored. But in reality, international governance happens through imprecision and constant revisitation.

## Conclusion

Because of the importance of coordination, contestation, and domestic institutions, international law looks more like international financial regulation than one might expect. The comparison underscores the horizontal nature of international legal obligation and emphasizes the way that soft law, in the international system, has more similarities to hard law than one might expect, given that the concepts were conceived as opposites.<sup>210</sup> These insights are the kind still ignored by leading textbooks of interna-

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of financial regulation appears to be rooted in an aversion to the types of side deals that international regulators might otherwise make.” David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT’L L. 685, 708 (2012). See also Joseph J. Norton, *Privatization of Public Pension Systems in Developing Nations: A Call for International Standards*, 64 BROOK. L. REV. 817, 857 (1998) (mentioning that the Basel Committee’s uses of consensus methods has had some positive results); TONY PORTER, STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE 66–67 (1993) (stating that while the process of the Basel Committee is clouded in secrecy, it does rely on consensus); David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT’L L. 475, 478 (2010) (discussing the consensus phenomenon).

208. “[I]nternational law accommodates developing countries because the system operates on a principle of consensus.” Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 193 (2003). See also William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT’L L. REV. 647, 741 (2001) (arguing that international law “binds states only to the degree that consensus is maintained.”)

209. See Elke Krahnemann, *National, Regional, and Global Governance: One Phenomenon or Many?*, 9 GLOBAL GOVERNANCE 323, 338 (2003).

210. For other works along this line of reasoning, see Gidon Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 331–32 (Cyril E. Black & Richard A. Falk eds., 1972) (arguing for a concept of law that acknowledges horizontal systems and that thus accounts for international law); OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 5–6 (1951) (stating that international law is enforced primarily in a horizontal, rather than vertical, manner); cf. Lea Brillmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2280 (1991) (“the distinction between horizontal and vertical interpretations of international law is already implicit in the case law. In this sense, the horizontal/vertical distinction is old wine in new bottles.”); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 476 (2001) (noting that “in most areas of the law, states have obligations without either the possibility or probability that they might be called before an international court”).

tional law. But they have not always been. The New Haven School argued that international law was more than doctrine, and should better be understood as a process of authoritative decisionmaking. Myres McDougal and Harold Lasswell, the founders of the school, wrote that “our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions.”<sup>211</sup> And their disciples agreed. “[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,” argued Eisuke Suzuki.<sup>212</sup> No less an authority than World Court judge Rosalyn Higgins agreed that “international law is a process, a system of authoritative decision-making, . . . a process for resolving problems.”<sup>213</sup>

It is an attractive approach to international law—rather than seeking doctrine where the doctrine is necessarily contested (and always has been, when it comes to international law), the New Haven school sensibly inquired what would be the organs making those decisions that are seen as legally required.

By the same token, it is the process of transforming international policy to domestic regulation that illustrates the critical role of sub-state actors in making international law, in either its hard or soft variants, into any sort of law at all. The process of coordination around a mutually beneficial standard is also a turn to process, rather than content. The continual debate and revision of principles, too, is a function of process, rather than any particular piece of substantive regulation.

The New Haven School has largely been forgotten because of its inability to pick from far too many methods of investigating the international

211. MYRES MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1987); 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* 103-113 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983); G. L. Dorsey, *The McDougal Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41 (1998); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953). See also David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law?*, 94 AM. SOC'Y OF INT'L L. 104 (2000) (defining international law “as a lived professional practice, as an intellectual discipline, as the culture developed by international lawyers to speak about what they see as the political and social world around them”).

212. 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). See also John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 667 (1968) (“the most useful conception of law is a broad one encompassing the entire process by which judges, legislators, litigants and many others pursue particular values through the whole panoply of authoritative community decision-making.”).

213. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: International Law and How we Use it* 267 (1994). See also Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 573 (2007) (“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.”)

system. Its explicitly utopian streak did it little good. But process need not be only interrogated with a value system favoring world peace at its forefront.

The New Haven School recognized that international legal procedure is what it is: fuzzy, varied, and often, quite ad hoc. It is similarities in process that animates each of the three lessons IFR has for public international law considered in this Article. As it turns out, IFR depends upon domestic agencies, the values of coordination, and a commitment to updating that renders it rather unfixd. Those characteristics animate a great deal of international law as well.

