

UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW

Edited by
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CONTENTS

List of contributors page viii

Preface xv

Introduction: the complexities of foundational
change 1

MICHAEL BYERS

PART I **International community**

- 1 The international community, international law, and the
United States: three in one, two against one, or one and the
same? 25

EDWARD KWAKWA

- 2 The influence of the United States on the concept of the
“International Community” 57

ANDREAS PAULUS

- 3 Comments on chapters 1 and 2 91

MARTTI KOSKENNIEMI, STEVEN RATNER, AND
VOLKER RITTBERGER

PART II **Sovereign equality**

- 4 Sovereign equality – “the *Wimbledon* sails on” 117

MICHEL COSNARD

- 5 More equal than the rest? Hierarchy, equality and
US predominance in international law 135
NICO KRISCH
- 6 Comments on chapters 4 and 5 176
PIERRE-MARIE DUPUY, MATTHIAS HERDEGEN, AND
GREGORY H. FOX

PART III **Use of force**

- 7 The use of force by the United States after the end of the
Cold War, and its impact on international law 197
MARCELO G. KOHEN
- 8 Bending the law, breaking it, or developing it? The
United States and the humanitarian use of force in the
post–Cold War era 232
BRAD R. ROTH
- 9 Comments on chapters 7 and 8 264
THOMAS FRANCK, JOCHEN ABR. FROWEIN, AND
DANIEL THÜRER

PART IV **Customary international law**

- 10 Powerful but unpersuasive? The role of the United States
in the evolution of customary international law 287
STEPHEN TOOPE
- 11 Hegemonic custom? 317
ACHILLES SKORDAS
- 12 Comments on chapters 10 and 11 348
RAINER HOFMANN, ANDREW HURRELL, AND
RÜDIGER WOLFRUM

PART V **Law of treaties**

- 13 The effects of US predominance on the elaboration of treaty
regimes and on the evolution of the law of treaties 363
PIERRE KLEIN

- 14 US reservations to human rights treaties: all for one and
none for all? 392
CATHERINE REDGWELL
- 15 Comments on chapters 13 and 14 416
JOST DELBRÜCK, ALAIN PELLET, AND BRUNO SIMMA

PART VI **Compliance**

- 16 The impact on international law of US
noncompliance 427
SHIRLEY V. SCOTT
- 17 Compliance: multilateral achievements and
predominant powers 456
PETER-TOBIAS STOLL
- 18 Comments on chapters 16 and 17 477
VAUGHAN LOWE, DAVID M. MALONE, AND
CHRISTIAN TOMUSCHAT
- Conclusion 491
GEORG NOLTE

Index 515

The international community, international law, and the United States: three in one, two against one, or one and the same?

EDWARD KWAKWA

When governments, urged along by civil society, come together to create the International Criminal Court, that is the international community at work for the rule of law. When we see an outpouring of international aid to the victims of recent earthquakes in Turkey and Greece – a great deal of it from those having no apparent link with Turkey or Greece except for a sense of common humanity – that is the international community following its humanitarian impulse. When people come together to press governments to relieve the world's poorest countries from crushing debt burdens... that is the international community throwing its weight behind the cause of development. When the popular conscience, outraged at the carnage caused by land mines, succeeds in banning these deadly weapons, that is the international community at work for collective security. There are many more examples of the international community at work, from peacekeeping to human rights to disarmament and development. At the same time there are important caveats. The idea of the international community is under perfectly legitimate attack because of its own frequent failings.

Kofi A. Annan, Secretary-General of the United Nations¹

How does one reconcile the position of the United States as the single super-power with the realities of interdependence and an ever-expanding international legal order that governs relations in the international community?

I am grateful to Chris Borgen for his comments on an earlier draft. The views expressed here are my personal views and are not necessarily shared by WIPO or by the United Nations.

¹ See "Secretary-General Examines 'Meaning of International Community' in Address to DPI/NGO Conference," Press Release SG/SM/7133, PI/1176 (15 Sept. 1999).

To what extent can the United States, acting alone, be a guardian, a dictator, a rule maker and/or a mediator in the international community? What is the significance of the United States' single superpower status vis-à-vis the evolution of the fundamental aspects of the international legal system?

In addressing these and other related questions, this chapter starts with a definition and analysis of the term "international community." It argues for an inclusive definition of the term, in order to embrace various non-State entities that play an important role in international politics. The next two sections explore the position of the United States in the international community and vis-à-vis international law. It is almost taken as a truism that the United States' interests and actions are not always coterminous with those of the wider international community. Indeed, the term American "unilateralism" or "isolationism" is frequently used to refer to US action that is not sanctioned by the "international community." The chapter argues that in being unilateralist or isolationist, the United States acts according to its perceived interests, as does any other State. The difference, however, is that the sheer might and superpower status of the United States are such that its actions are bound to have a greater impact on the international community and on the foundations of international law. Indeed, because of the strength and dominance of the United States in almost all aspects of human endeavor, even the most insignificant changes in US foreign policy can have disproportionate and far-reaching consequences in the international community and for international law. The restraints on the United States during the Cold War period are much reduced today, and thus its influence on international relations and the international legal system is all the more obvious.

That said, this chapter argues that the inexorable trend of globalization and interdependence is such that the national interests of the United States would be better served by multilateralist rather than unilateralist policies, and concludes that the United States now has both an unprecedented opportunity and a pressing need to influence some of the fundamental aspects of the international legal order. In doing so, however, the United States will need the active cooperation of key segments of the rest of the international community; the incredible power of the United States will not be enough to enable it to "go it alone" in international rule making.

This chapter identifies international organizations (governmental as well as nongovernmental) as one of the most obvious forms or manifestations of

the international community.² In view of the importance of international organizations in the international community and in the formulation of international law, the position of the United States and its participation in international organizations seems to be a useful means by which to ascertain the role of the United States in the international community and in influencing international law. This chapter therefore places particular emphasis on the role of the United States in international organizations.

The “international community”

The phrase “international community” is used in this chapter to refer not only to the community of States, but also to the whole array of other actors whose actions influence the development of international legal rules. This includes intergovernmental organizations, international (and national) nongovernmental organizations (NGOs), transnational corporations and even individuals. I use this expanded definition of the international community for three reasons. First, a wide array of actors participates in the formulation of international law. Second, various experts who have studied and written on the issue agree that the concept of an international community is wider than just States. And third, the rationale for the existence of the international community strongly suggests that the community comprises not only States, but also various non-State entities. These three reasons are explained below.

The term “international community”³ has found its way into international legal literature and now seems to be used with reckless abandon. Too often, however, the term is unaccompanied by any explanation of its precise

² In this regard, it is worth remembering that under traditional international law, there was only one kind of international actor – the State. Under this formulation, the “international community” would be restricted to the community of States in the international system, and there were very few States. At present, however, there are almost 200. The primary means through which these States interact at the multilateral level is international organizations. It is also instructive that several international organizations now have non-State entities as members, and that NGOs also play an active part, indirectly and directly, in the deliberations and policy making of several international organizations. Moreover, international organizations are generally structured such as to require a large degree of cooperation and collaboration among their members. With the ineluctable advance of globalization and interdependence, international organizations have become much more important in the international community.

³ “International community” is sometimes used in the literature interchangeably with “world community” or “global community.” In the 1970s and the 1980s, “global community” was frequently used by Marxists, who tended to look beyond the State at the ways in which classes existed and affected each other worldwide.

form or contents. As Philip Allott explains, the use of the term “international community” “by politicians, diplomats, journalists, and academic specialists is tending to establish within general consciousness a fictitious conceptual entity with effects and characteristics which surpass the practical purposes of those who make use of it.”⁴

What does it really mean to refer to the “international community” in an international law and/or international relations context? A starting point is recognition of the obvious truth that any number of plausible definitions of the term “international community” is conceivable.

The reference to “international community” is found in several international legal instruments and documents. At the treaty level, one of the most well-known examples is the 1969 Vienna Convention on the Law of Treaties, which defines *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.”⁵ Clearly, the Convention uses the term “international community” to refer only to States. A more recent treaty that incorporates the term is the Rome Statute of the International Criminal Court, which limits the Court’s jurisdiction to “the most serious crimes of concern to the international community as a whole.”⁶ This seems to be a more inclusive use of the term, insofar as the “international community” is not expressly limited to States.

⁴ Phillip Allott, “The True Function of Law in the International Community” (1998) 5 *Journal of Global Legal Studies* 391, 411. See also Philip Allott, “The Concept of International Law” in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), pp. 69–89.

⁵ Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969) at article 53, reprinted in (1969) 63 *American Journal of International Law* 875. The United States signed the Vienna Convention on the Law of Treaties on 24 April 1970, but has not yet ratified the Convention. See UN Treaty Database, at <http://untreaty.un.org> (last visited 8 March 2002). It is generally accepted, however, that certain provisions of the Convention reflect customary international law. A good candidate for this would be Article 18 of the Convention, which provides that “until it shall have made its intention clear not to become a party to the treaty,” a State is obliged to refrain from acts which would defeat the object and purpose of that treaty. For an excellent discussion of the legislative history of the Vienna Convention on the Law of Treaties, see generally Richard Kearney and Robert Dalton, “The Treaty on Treaties” (1970) 64 *American Journal of International Law* 495–561.

⁶ See the Preamble and Article 5 of the Rome Statute of the International Criminal Court, adopted and opened for signature 17 July 1998, UN Doc. A/Conf. 183/9 (1998); (1998) 37 *International Legal Materials* 999. The position of the US government in relation to the Rome Statute of the International Criminal Court is now well known. See generally David Scheffer, “The United States and the International Criminal Court” (1999) 93 *American Journal of International Law* 12–22.

There are also specific references to the “international community” in the jurisprudence of the International Court of Justice. There is, for example, the ICJ’s famous statement in the *Barcelona Traction* case, confirming the existence of certain legal obligations of States towards “the international community as a whole.”⁷ The juxtaposition of States with “the international community as a whole,” in this context, would seem to suggest a tacit acknowledgment that the “international community” comprises States and an undefined universe of other entities. The ICJ has also invoked the term in several other cases.⁸

The third and most frequent set of references to the “international community” can be found in the resolutions, declarations, and decisions of international organizations, in particular the UN General Assembly and the UN Security Council. For example, in its landmark 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States, an “ambitious codification of contemporary international law [that] has been widely accepted,”⁹ the General Assembly stressed that all States “are equal members of the international community.”¹⁰ Once again, the reference was to States.

Several other resolutions often invoke the name of the international community, without specifying the entity to which that term refers. In their textual formulation, however, it seems clear that the drafters of those resolutions assumed that the international community did not refer exclusively to States. Indeed, there are several resolutions in which the organizations of the United Nations system and even non-State entities, such as private donors, are expressly referred to as integral parts of the international community. For example, in the context of international assistance for the rehabilitation and reconstruction of Nicaragua, the General Assembly commended

⁷ *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Judgment, (1970) ICJ Reports 3.

⁸ See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (1971) ICJ Reports 16, 56 (stating that Namibia is entitled to look to the “international community for assistance”); *United States Diplomatic and Consular Staff in Tehran*, Judgment, (1980) ICJ Reports 43 (appealing to the “international community”).

⁹ Michael Reisman, “The Resistance in Afghanistan is Engaged in a War of National Liberation” (1987) 81 *American Journal of International Law* 906, 908.

¹⁰ Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Declaration on Friendly Relations), 24 October 1970, GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

“the efforts made by the international community, *including the organs and organizations of the United Nations system*, to supplement the action taken by the Government of Nicaragua.”¹¹ Similarly, the same body, in the context of international cooperation on humanitarian assistance in the field of natural disasters, encouraged “Governments in natural-disaster-prone countries to establish, with the support of *the international community, in particular the donors*, national spatial information infrastructures relating to natural disaster preparedness, early warning, response and mitigation.”¹² And in its resolution on the implementation of the First UN Decade for the Eradication of Poverty, the UN General Assembly recognizes that “while it is the primary responsibility of *States* to attain social development, the *international community* should support the efforts of the developing countries to eradicate poverty and to ensure basic social protection.”¹³ It is arguable that the General Assembly adopted the text of this resolution in recognition of the fact that “States” and “the international community” are not one and the same entity.¹⁴

Finally, it is worth noting that the term “international community” is sometimes used by way of distinguishing it from what it is not rather than designating what it is.¹⁵ Indeed, that seems to be the basis on which some States have at times been referred to as “rogue States,” “pariah States,” or “States of concern,” and other entities as terrorists against which the international community is at war.¹⁶

¹¹ See GA Res. A/47/169 (22 Dec. 1992) (emphasis added).

¹² See GA Res. A/55/163 (14 Dec. 2000) (emphasis added).

¹³ See GA Res. A/55/210 (10 Dec. 2000) (emphasis added).

¹⁴ Similarly, in a resolution adopted in the context of the terrorist attacks on the United States in September 2001, the UN Security Council called on “the international community to redouble their efforts to prevent and suppress terrorist acts”: UN Doc. S/RES/1368 (2001), 12 Sept. 2001. It is instructive to note that in the preceding paragraph, the resolution called on “States,” not on “the international community.”

¹⁵ Under such formulations, “international community” would be distinguished from entities that are deemed to be undesirable in that community. See e.g. Kofi Annan, “Fighting Terrorism on a Global Front,” *New York Times*, 21 Sept. 2001, 35 (op-ed, asserting that “The international community is defined not only by what it is for, but by what and whom it is against”).

¹⁶ Thomas Henriksen, for example, states that “what has become painfully clear during the 1990s is that a handful of rogue States have rejected the global economic order and international standards for their own belligerent practices.” The most dangerous category of such States, he argues, is the “terrorist rogue State.” According to Henriksen, this “deadly manifestation in the emerging world order has captured Washington’s attention. These nation-States fail to comply with the rules of international law. Their behavior is defiant and belligerent. They promote radical ideologies. They share an anti-Western bias, in general, and an anti-American hatred, in particular. Rogue political systems vary, but their leaders share a common antipathy toward their citizens’ participating in the political process. They suppress human and civil

It would serve no policy goal to restrict “international community” to State actors. First, a wide array of non-State actors participate in the formulation of international law. As McDougal and Reisman have pointed out, international law is formulated through a diverse process of communication within the international community:

The peoples of the world communicate to each other expectations about policy, authority, and control not merely through state or intergovernmental organs, but through reciprocal claims and mutual tolerances in all their interactions. The participants in the relevant process of communication . . . include not merely the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, private associations, and the individual human being *qua* individual with all his or her identifications.¹⁷

Nongovernmental organizations such as Amnesty International, the International Committee of the Red Cross and other non-State entities are very active members of the international community and influential in the formulation of international legal rules. It is fair to suggest that the Statute for the International Criminal Court and the Ottawa Landmines Convention¹⁸ would not have seen the light of day without the active lobbying of networks of NGOs.¹⁹ Nor can one ignore the role of the global media.²⁰ Non-State actors are likely to play increasingly important roles in much decision making in the international community and in the formulation of international law, as governments increasingly lose control over the flow of technology, information, and financial transactions across their borders.

rights as do diplomatic rogue States, but their international bellicosity is the key variable drawing our attention to them”: Thomas Henriksen, “Using Power and Diplomacy to Deal With Rogue States,” Hoover Essays in Public Policy No. 94 (February 1999), reprinted at <http://www-hoover.stanford.edu/publications/epp/94/94b.html> (last visited 8 March 2002).

¹⁷ Myres McDougal and Michael Reisman, “The Prescribing Function: How International Law is Made” (1980) 6 *Yale Studies in World Public Order* 249, reprinted in Myres McDougal and Michael Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community* (New York: Foundation Press, 1981), p. 84.

¹⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, concluded at Oslo on 18 September 1997. To quote one author, this convention, “perhaps the most celebrated example of NGO influence, has been hailed as a defining moment in the democratization of international law making.” See Stewart Patrick, “America’s Retreat from Multilateral Engagement” (2000) 641 *Current History* 434.

¹⁹ See also Michael Reisman, “Redesigning the United Nations” (1997) 1 *Singapore Journal of International and Comparative Law* 17 (arguing that the remarkable advances in human rights and environmental protection were largely a result of lobbying and other efforts by NGOs).

²⁰ See chapter by Achilles Skordas, below.

In the context of the Internet, as argued below, the Internet Corporation for Assigned Names and Numbers (ICANN), a nongovernmental entity, is playing the lead role in formulating policy relating to the governance of the Internet. And it is noteworthy that the UN Secretary-General has launched a global compact with the business community,²¹ and that it was an individual, Ted Turner, who paid the \$34 million deficit when the United Nations and the United States reached agreement on the payment of the United States' arrears to the United Nations.²² In short, while States make the ultimate decisions, one cannot simply ignore the impact of non-State entities on the ultimate decision-making processes of States.

Secondly, several writers agree that the concept of an international community is wider than States. Bruno Simma, for example, opines that the international community is "a community that comprises not only States, but in the last instance all human beings."²³ Christian Tomuschat also argues that "it would be wrong to assume that States as a mere juxtaposition of individual units constitute the international community. Rather, the concept denotes an overarching system which embodies a common interest of all States and, indirectly, of mankind."²⁴ Hedley Bull seems to have had the concept of the international community in mind when he referred to a "great society of all mankind." His words are instructive: "the ultimate units of the great society of all mankind are not States (or nations, tribes, empires, classes or parties) but individual human beings, which are permanent and indestructible in a sense in which groups are not."²⁵

²¹ The Global Compact was launched by UN Secretary-General Kofi Annan at the 1999 World Economic Forum in Davos, Switzerland, when he challenged the business community to enter into a compact in which they would embrace and help enact a set of core values in the areas of human rights, labor standards, and environmental practices. This challenge has received favorable responses from the international business community. See generally <http://www.un.org/News/facts/business.htm> (last visited 8 March 2002). For a discussion on the objectives and operation of the Global Compact, see generally John Gerard Ruggie, "global.governance.net: The Global Compact as Learning Network" (2001) 7 *Global Governance* 371-78.

²² The British Ambassador to the United Nations, Jeremy Greenstock, actually joked that "clearly the UN has recognized Turner as a government." See "UN OKs reduced US dues in accord; Turner donation plays crucial role," *Washington Times*, 23 Dec. 2000, A1.

²³ Bruno Simma, "From Bilateralism to Community Interest" (1994) 250(VI) *Recueil des cours* 215 at 234.

²⁴ Christian Tomuschat, "Obligations Arising for States Without or Against their Will" (1993) 241(IV) *Recueil des cours* 209, 227.

²⁵ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), p. 22.

These are remarkably prescient words, given the period when they were written.

The third and, perhaps, most compelling reason why the reference to “international community” should not be restricted to States is to be found in the rationale for the existence of such a community. The importance of the concept of an international community lies in the simple truth that it is this community that provides a sociological foundation – a *raison d’être* – for international law. We thus learn from political theory that a viable community rests on a minimum consensus of shared values. In that sense, members of the community generally accept the community’s rules because of a shared sense of commonality.²⁶

The UN Secretary-General succinctly explains the common values of the international community as follows:

What binds us into an international community? In the broadest sense there is a shared vision of a better world for all people, as set out, for example, in the United Nations Charter. There is our sense of common vulnerability in the face of climate change and weapons of mass destruction. There is the framework of international law. There is equally our sense of shared opportunity, which is why we build common markets and, yes, institutions – such as the United Nations. Together, we are stronger.²⁷

A few examples should help establish what may be seen as a sense of community. In September 2000, the largest-ever gathering of world leaders, including ninety-nine heads of state, three crown princes and forty-seven heads of government, met at the United Nations in New York and adopted a Millennium Declaration, in which they stated expressly their belief that certain fundamental values were essential to international relations in the twenty-first century. The specific values they identified were:

²⁶ See also Simma, “From Bilateralism to Community Interest in International Law,” above note 23, at 233 (putting forward a “first, very tentative, definition of ‘community interest’” as “a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States”).

²⁷ See “Secretary-General Examines ‘Meaning of International Community’” above note 1. See also Georges Abi-Saab, “Whither the International Community?” (1998) 9 *European Journal of International Law* 248, 251 (arguing, in the context of the law of cooperation, that it is “based on the awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort. In other words, it is based on a premise or an essential presumption, which is the existence of a community of interests or of values”).

freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility.²⁸ The Global Compact, alluded to earlier, sets out a core set of nine principles in the areas of human rights, labor standards and the environment. These principles have been embraced and are being enacted not only by States and international organizations, but, more importantly, also by private sector and business entities.²⁹ And in the context of the September 2001 terrorist attacks on the United States, debates around the world made it explicit that the international community shared certain core values that had to be promoted and protected.³⁰

The examples cited all point to the existence of certain basic common interests among members of the international society. While the common interests or core values are often identified and discussed in the context of intergovernmental meetings or among State elites, it is undeniable that the core values in question are generally assumed to be equally applicable to non-State entities. It is this commonality that constitutes the foundation stones of an “international community.” To be sure, international law is a system of principles and norms governing relations in the international community. Indeed, the very idea of community rests on the implicit assumption that certain issues affect the world as a whole, and therefore they cannot effectively be addressed or tackled unilaterally.³¹

In addition to the changing nature of its participants, the “international community” is also becoming increasingly interdependent – economically, politically, environmentally, and culturally. This increased interdependence has made international cooperation an indispensable tool for the survival of the “international community.” As Thomas Franck puts it, there now

²⁸ See GA Res. 55/2 (8 Sept. 2000), reprinted at <http://www.un.org/Depts/dhl/resguide/r55all.htm> (last visited 8 March 2002).

²⁹ See generally <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (last visited 8 March 2002).

³⁰ See e.g. statement by Jeremy Greenstock (United Kingdom) to the Security Council, UN Press Release SC/7143 (12 Sep. 2001) (confirming the conclusion of the European Union that the terrorist acts were “not only against the United States, but against humanity itself and the life and freedom shared by all”); statement by Wang Yingfan (China), *ibid.* (arguing that the attacks “took place in the United States, but represented an open challenge to the international community as a whole”); statement by Alfonso Valdivieso (Colombia), *ibid.* (the attacks “were not only against the United States, but against the entire community of civilized people and their values”); statement by Anund Priyay Neewoor (Mauritius), *ibid.* (the acts were “also aimed at democracy and the free world”); and statement by Jean-David Levitte (France), *ibid.* (taking the view that the terrorist acts “were a challenge to the international community as a whole”).

³¹ The notions of international public policy or *jus cogens*, as well as obligations *erga omnes*, all presuppose a community of common interests or shared values.

exists a “global community, emerging out of a growing awareness of irrefutable interdependence, its imperatives and exigencies.”³² The increasing globalization and interdependence of the world community is a subject on which much has been written. In large measure, interdependence and globalization, however defined, are processes that are shaped more by markets than by governments. Most relevant in this context is the observation that certain institutions are now shedding their status as intergovernmental organizations and converting into fully private companies.³³

The place and the role of the United States in the international community

Robert Keohane and Joseph Nye distinguish between “behavioral power” – “the ability to obtain outcomes you want” – and “resource power” – “the possession of the resources that are usually associated with the ability to get the outcomes you want.”³⁴

³² Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1997), p. 12.

³³ Two of the best-known examples are the International Telecommunications Satellite Organization (INTELSAT) and the International Maritime Satellite Organization (INMARSAT). In July 2001, INTELSAT severed its ties with its 146 member governments and transformed itself into a Bermuda-based holding company. See generally <http://www.intelsat.com> (last visited 8 March 2002).

INMARSAT also converted, in April 1999, from an international treaty organization to a private company. See generally <http://www.inmarsat.org> (last visited 8 March 2002). Also significant is what Jan Klabbers refers to as “the straddling of the public/private divide or, in better-sounding terms, the creation of public–private partnerships.” He provides the example of the International Organization for Standardization (ISO), which sets standards of considerable influence in the field of environmental regulation, and encompasses the standardization in statutes of a number of States. See Jan Klabbers, “Institutional Ambivalence by Design: Soft Organizations in International Law” (2001) 70 *Nordic Journal of International Law* 403 at 406 (citing Naomi Roht-Arriaza, “Shifting the Point of Regulation: The International Organization for Standardization and Global Law Making on Trade and the Environment” (1995) 22 *Ecology Law Quarterly* 479–539).

³⁴ Keohane and Nye further divide “behavioral power” into “hard” and “soft” power. Hard power, they contend, is “the ability to get others to do what they otherwise would not do through threat of punishment or promise of reward,” and soft power is “the ability to get desired outcomes because others want what you want; it is the ability to achieve desired outcomes through attraction rather than coercion”: Robert Keohane and Joseph Nye, *Power and Interdependence*, 3rd edn. (New York, 2001), p. 220. See also Michael Reisman, “Law From the Policy Perspective,” in Myres McDougal and Michael Reisman, *International Law Essays: A Supplement to International Law in Contemporary Perspective* (New York: Foundation Press, 1981), p. 8 (defining power simply as “the capacity to influence”), but cf. Reisman, “Redesigning the United Nations,” above note 19, at 8 (defining power as “the relative capacities of actors to influence events without regard for lawful arrangements”); Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge

There can be little doubt that the United States is, by any measure, the most powerful country in the international community today. As aptly put by Joseph Nye, “not since Rome has one nation loomed so large above the others.”³⁵ The military might of the United States is unchallenged and without rival. The US economy is the largest and most influential in the world. For example, the United States accounts for over 15 percent of total world exports and imports, and is the world’s largest exporter of goods and services.³⁶ In short, US global, economic, technological, military, and diplomatic influence is unparalleled in the international community, among nations as well as global, international, and regional organizations.

There are certain consequences that flow ineluctably from this special position of the United States. It implies, for example, that the United States has a distinctive and, by definition, a greater responsibility in the international community. It is a responsibility arising from the undisputed facts of American dominance in almost all aspects of human endeavor. This point is forcefully made by Phillip Allott:

the people of the United States bear a very heavy responsibility for the future of humanity – an imperial responsibility. It is the same kind of responsibility that the British exercised, for better and for worse, in the nineteenth century; that Rome exercised in the last century B.C. and the first and fourth centuries A.D.; that Greece exercised at the time of Alexander, in the fourth century B.C. It is a responsibility based on the sheer facts of American military and economic and cultural power, and the extent of American economic and political and military investment in the rest of the world.³⁷

The fact that the United States is called upon to act and indeed expected to play a lead role far more than any other State is a reality in the international system.³⁸

University Press, 1999), p. 5 (defining power as “the ability, either directly or indirectly, to control or significantly influence how actors – in this case States – behave”).

³⁵ Joseph Nye, *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone* (New York: Oxford University Press, 2002), p. 1.

³⁶ See generally *World Trade Annual Report 2001* (Geneva: WTO, 2001). Admittedly, in terms of world trade and impact at the World Trade Organization, it is arguable that the European Union is on an equal footing with the United States. This should, however, be viewed in the light of the fact that the European Union is composed of fifteen distinct economies.

³⁷ Phillip Allott, “The True Function of Law in the International Community” (1998) 5 *Journal of Global Legal Studies* 391.

³⁸ See also Henriksen, “Using Power and Diplomacy,” above note 16, at 5 (“As the remaining superpower, the United States faces a unique political environment. It is both the world’s reigning hegemon and sometime villain. America’s economic, military, and technological prowess endows it with what [former] Secretary of State Madeleine K. Albright has termed indispensability.

There is another aspect to the story: the superpower status of the United States in the international community not only creates expectations in the rest of the international community, but also creates perhaps even stronger expectations or perceptions, within the United States, of what should be the role of the single superpower. US National Security Adviser Condoleezza Rice makes the point clearly when she suggests that “Great powers do not just mind their own business,” and that the power that a superpower such as the United States wields “is usually accompanied by a sense of entitlement to play a decisive role in international politics.”³⁹

Another corollary of being the single superpower may very well be a feeling of insecurity or extreme sensitivity to even the most remote sign of external threats, resulting in a foreign policy that seeks to ensure, among other things, absolute security.⁴⁰ On the other hand, there are reasons to suggest that peace and prosperity, particularly in a single superpower, could encourage a sense of complacency or preoccupation with internal domestic affairs, and thus make the average American forget that they are a part of a larger international community.⁴¹

Whatever the political upheaval or humanitarian crisis, other States expect the United States to solve the world’s problems and to dispense good deeds. Those expectations arise from the fact that America has often come to the rescue in the past and that the United States is not a traditional nation”).

³⁹ Condoleezza Rice, “Promoting the National Interest,” (2000) 79 *Foreign Affairs* 45 at 49. Rice has also opined that “there are times when the US isn’t going to be in a position of agreement with everybody else, and given our particular role in the world, we have an obligation to do what we think is right.” See Massimo Calabresi, “Condi Rice: The Charm of Face Time,” *Time*, 10 Sept. 2001, 48.

⁴⁰ We are told that an important Pentagon planning document stated in 1992: “Our first objective is to prevent the re-emergence of a new rival . . . that poses a threat on the order of that posed formerly by the Soviet Union . . . Our strategy must now refocus on precluding the emergence of any potential future global competitor.” See John Mearsheimer, “The Future of the American Pacifier” (2001) 80(5) *Foreign Affairs* 46.

⁴¹ John Ikenberry highlights the issue when he points out in a recent study that “in a world of unipolar power Americans need to know very little about what other governments or peoples think, but foreigners must worry increasingly about the vagaries of congressional campaigns and the idiosyncratic prejudices of congressional committee chairmen.” G. John Ikenberry, “Getting Hegemony Right” (2001) 63 *The National Interest* 17 at 19.

The phenomenon of one State dominating the international system is not without precedent. Nor is US isolationism, unilateralism or even multilateralism necessarily a phenomenon only of the post-Cold War world. As Paul Johnson eloquently reminds us, “there is nothing unique, as many Americans seem to suppose, in the desire of a society with a strong cultural identity to minimize its foreign contacts. On the contrary, isolationism in this sense has been the norm whenever geography has made it feasible.” Johnson lists examples including ancient Egypt (“which, protected by deserts, tried to pursue an isolationist policy for 3,000 years with unparalleled success”), Japan (“a more modern example of a hermit State” which “used its surrounding seas to pursue a policy of total isolation”), China (“isolationist for thousands of years,

What is the record of the United States in respect of intergovernmental organizations? It is instructive that a large majority of the American public seems to favor an active American involvement in the international community and in the United Nations in particular.⁴² The more significant fact, however, is that while over 80 percent of the United States public want to strengthen the United Nations, American policy makers think that only 14 percent of the public favor such action.⁴³ This naturally raises questions as to whether official United States positions vis-à-vis the international community and international law are necessarily a reflection of the preferences of the American people.

In the particular context of the United Nations, let us consider the following statistics for a minute:

- US citizens hold more UN Secretariat jobs than the citizens of any other member State, as well as the top posts at the United Nations Children's Fund (UNICEF), the World Bank (IBRD), the World Food Program (WFP) and the Universal Postal Union (UPU);
- the United Nations is headquartered in the United States city of New York, and the United States government has signed a headquarters agreement with the United Nations to that effect. In addition, the United States is a member of every specialized agency of the United Nations (including, after an eighteen-year absence, the United Nations Educational, Scientific and Cultural Organization – UNESCO) and other significant intergovernmental organizations;
- of the \$318 million in procurements approved by the UN Secretariat in New York in 1998, American companies alone received 31 percent of the business, or \$98.8 million.⁴⁴

These and other related statistics seem to point to the obvious: that the United States is heavily involved in international community activity, and that the United States benefits significantly from such activity. There are,

albeit an empire at the same time”) and Britain (which “has been habitually isolationist even during the centuries when it was acquiring a quarter of the world”). Paul Johnson, “The Myth of American Isolationism: Reinterpreting the Past” (1995) 77(3) *Foreign Affairs* 159 at 160.

⁴² See “Setting the Record Straight: What do Americans Really Think of the UN?” at <http://www.un.org/News/facts/think.htm> (last visited 8 March 2002) published by DPI/1963/Rev. 2 June 1999.

⁴³ *Ibid.*

⁴⁴ See “Setting the Record Straight: Facts about the United Nations,” at <http://www.un.org/News/facts/setting.htm> (last visited 8 March 2002) published by DPI/1753/Rev. 17 June 1999.

in addition, other statistics that refute the criticisms of inefficiency and waste that are sometimes leveled at the United Nations by United States government officials.⁴⁵ For example, consider the following:

- The budget for the United Nations' core functions – the Secretariat's operations in New York, Geneva, Nairobi, and Vienna and the five regional commissions – is \$1.25 billion a year. This is about 4 percent of New York City's annual budget;
- the total expenditure of the entire UN system – including the United Nations' funds, programs and specialized agencies – was just over \$10 billion in 1997. This is roughly half of the annual revenue of a United States corporation such as Dow Chemical, which earned over \$20 billion in 1997; and
- the total cost of all UN peacekeeping operations in 1998 was some \$907 million – the equivalent of less than 0.5 percent of the US military budget, and less than 0.2 percent of global military spending.⁴⁶

These statistics speak volumes. On the one hand, they suggest that the United Nations does not spend (or “waste”) anywhere near as much money as is often claimed by the US government. On the other hand, they could also suggest that the United Nations is so inexpensive that the United States can easily afford to be involved in UN activity, regardless of whether the United States cares about the UN.

There are reasons to suggest that the United States tends to be much more supportive of organizations whose membership comprises like-minded market democracies than of more heterogeneous or universal bodies. Examples of the former are the Organization for Economic Cooperation and Development (OECD) and the North Atlantic Treaty Organization (NATO), and examples of the latter are the United Nations and some of its

⁴⁵ US and other government officials often allege that the UN is a bloated bureaucracy that wastes taxpayers' money. For a discussion of various arguments used by US government officials to support withholding of US payments to the United Nations, see generally Richard Nelson, “International Law and US Withholding of Payments to International Organizations” (1986) 80 *American Journal of International Law* 973–83; Elisabeth Zoller, “The Corporate Will of the United Nations and the Rights of the Minority” (1987) 81 *American Journal of International Law* 610–34; President, “Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000” (1999) 35 *Weekly Compilation of Presidential Documents* 2458; and Sean Murphy, “Contemporary Practice of the United States Relating to International Law: States and International Organizations” (2000) 94 *American Journal of International Law* 348–50.

⁴⁶ “Setting the Record Straight: United Nations,” above note 44.

specialized agencies. The United States similarly places greater importance on organizations that reflect its dominance, whether through a formal system of weighted voting, as in the World Bank and the International Monetary Fund (IMF), or through a system where it has veto power, as in the UN Security Council.⁴⁷ This is manifested, for example, in the fact that the United States has been eager to reduce its contribution of 25 percent of the UN regular budget, notwithstanding the fact that it pays the equivalent of \$1.11 per American, compared with, say San Marino, whose contribution to the UN regular budget, while less than a fraction of 1 percent, amounts to \$4.26 per citizen of San Marino.

The saga involving the United States' payment of its arrears (dues) and annual contributions to the United Nations is a good example of the impact of the single superpower's financial contributions on international community activity. In 1999, the United States Congress adopted legislation authorizing the payment of certain arrears to international organizations over a three-year period. This payment was, however, made subject to the fulfillment of certain conditions, one of which was action by the UN General Assembly to reduce the regular budget ceiling assessment (for the United States) from 25 percent to 22 percent, and the United States' assessed share of peacekeeping operations from 31 percent to 25 percent. Although the United States refusal to pay its arrears may have been based on political grounds, that action had the effect of redrawing the scales of assessments for contributions by member States to the United Nations,⁴⁸ and presumably affected the Organization's ability to engage in international community activities of various kinds.

The position of the United States on the UN Commission on Human Rights (UNCHR) provides an example of the value the single superpower attaches to certain international bodies. In April 2001, the United States was surprisingly voted off the UNCHR.⁴⁹ The loss of a seat on the commission

⁴⁷ While most observers would readily argue that the UN General Assembly represents the community of States, being the only truly legitimate, in the sense of representative, body that decides through a majoritarian process of discussion and largely nonbinding votes or consensus, this view has not always found favor with the United States.

⁴⁸ See "Scale of Assessments for the Apportionment of the Expenses of the United Nations," GA Res. A/Res/55/5B-F (23 Dec. 2000).

⁴⁹ This was the first time since 1947 (the creation of the commission) that the United States had been voted off the commission. The vote, which was conducted by secret ballot, means that the United States will not be represented on the commission from 1 Jan. 2002 to 31 Dec. 2004. See *The Economist* at <http://www.economist.com/library/focus/displaystory.cfm> (last visited

was not without effect. It meant that the United States was unable to sponsor any resolution within the commission, such as a resolution condemning Cuba for human rights violations. Even if the United States could find another country to act as the main sponsor of such a resolution, the fact remained that the United States was unable to vote on it.

A single superpower that placed little or no value in multilateral institutions probably would have ignored the vote removing it from the UNCHR. Quite clearly, however, there are those in the United States who see value in having the United States remain engaged in the international community. There is no other way to explain the fact that the United States House of Representatives voted to withhold \$244 million in dues unless the United States was restored to the UNCHR, as well as the statement by United States Secretary of State Colin Powell that "one thing I can guarantee is that [the United States] will be back [on the UNCHR] next year"⁵⁰ – which indeed it was. Whatever one thinks about the UNCHR, there is no denying that it has effectively enunciated important statements of principle and sensitized public opinion by establishing commissions of inquiry or appointing special rapporteurs to investigate gross human rights violations.⁵¹ The

8 March 2002). It is significant that among the various reasons given for the loss of the seat were the fact that the United States had not, at the time, confirmed who would be its permanent representative at the United Nations, and the fact that it had recently shown increased disdain for multilateralism, for example, by rejecting the Kyoto Protocol and the Anti-Ballistic Missile Treaty.

Also significant is the fact that on the same day, and in the same room in which the United States was voted off the UNCHR, the United States lost its seat on the UN International Narcotics Control Board, which it had helped found in 1964, and which had been co-chaired for several years by Herbert S. Okun, a senior American diplomat.

⁵⁰ For reactions to the United States' loss of its seat on the UNCHR, see generally Marc Lacey, "House Warns UN of Pocketbook Revenge," *New York Times*, 11 May 2001, 8. See also David Sanger, "House Threatens to Hold Back UN Dues for Loss of Seat," *New York Times*, 9 May 2001, 1.

⁵¹ For example, the UNCHR has repeatedly adopted annual resolutions condemning Myanmar's human rights practices, and appointed a Special Rapporteur on the Situation of Human Rights in Myanmar (then Burma) in 1992, whose mandate has been extended since then. See Situation of Human Rights in Myanmar, Commission on Human Rights Res. 1999/17, UN ESCOR, 52nd mtg; UN Doc.E/CN.4/RES/1999/17 (1999), available at <http://www.unhchr.ch/Huridocda> (last visited 8 March 2002). In 2001, a new Special Rapporteur was appointed to succeed the incumbent. See UN Press Release (6 Feb. 2001).

At its 2001 Session, the commission strongly condemned human rights abuses in Afghanistan, Burundi, Iran, and Iraq, expressed grave concern at human rights abuses in Cuba, Democratic Republic of Congo, Sierra Leone and Sudan, and strongly censured Russia for its actions in Chechnya. See UNCHR Report of the Fifty-Seventh Session (19 March–27 April 2001), E/CN.4/2001/167E/2001/23 (1 Oct. 2001). These resolutions have had the effect of highlighting

determination of the single superpower to remain engaged with the commission, while possibly a face-saving measure, nevertheless shows, contrary to popular wisdom, the importance that United States policy makers attach to certain multilateral institutions.

It would seem that what the United States perceives as its vital interests inevitably determines the degree of US involvement in any community activity. US government pronouncements are replete with examples that demonstrate that the United States often acts to protect its own specific interests, rather than those of the international community as a whole. A good example was provided when the administration of President Bill Clinton adopted, in the context of multilateral peace operations, a policy position stating that the United States would participate in UN actions only if its own interests were involved. This is the import of Presidential Decision Directive 25 of 4 May 1994. In the directive, the United States government set criteria for United States involvement that placed a clear premium on United States interests: "If US participation in a peace operation were to interfere with our basic military strategy . . . we would place our national interest uppermost. The United States will maintain the capability to act unilaterally or in coalitions when our most significant interests and those of our friends and allies are at stake. Multilateral peace operations must, therefore, be placed in proper perspective among the instruments of US foreign policy."⁵²

the plight of victims of human rights abuses, encouraging condemnation and rebuke from large segments of the international community, and thus putting the governments concerned under pressure to modify their human rights policies. In effect, even bodies that ostensibly are not known for their effectiveness or efficiency may well have an impact with their decisions.

⁵² See Bureau of International Organizations Affairs, US Dept. of State, Pub. No. 10161, repr. in (1994) 33 *International Legal Materials* 795, 801–02 (summarizing classified Presidential Decision Directive (No. 25) on Reforming Multilateral Peacekeeping Operations, 4 May 1994).

A most extreme form of US policy in respect of the United Nations was explained to the Members of the UN Security Council by Senator Jesse Helms, then chair of the US Senate Foreign Relations Committee. According to this view, the United States, as the single largest investor in the United Nations, has "not only a right, but a responsibility, to insist on specific reforms in exchange for [its] investment," in view of the fact that most Americans see the United Nations "as just one part of America's diplomatic arsenal," and that "a United Nations that seeks to impose its presumed authority on the American people without their consent begs for confrontation and . . . eventual US withdrawal." It bears repeating that the rest of the US government did not necessarily share this view. Indeed, the then Secretary of State, Madeleine Albright, made it clear that "only the President and the Executive Branch can speak for the United States. Today, on behalf of the President, let me say that the Administration, and I believe most Americans, see our role in the world, and our relationship to this organization, quite differently than does Senator Helms." See "Senator Helms Addresses UN Security Council" (2000) 94

The election of executive heads of multilateral organizations is one area in which the role played by the United States easily lends credence to the belief that the system of international governance advances the interests of the most powerful State in the international community. Consider for a moment: in 1996, the United States was able single-handedly to block the reappointment of Boutros Boutros Ghali as Secretary-General of the United Nations. Indeed, fourteen of the Security Council's fifteen members had voted in favor of his reappointment.⁵³ A similar power was exercised in 2000 when the United States effectively vetoed the candidacy of Germany's first choice to head the IMF, and in 2002 when it engineered the removal of the head of the Organization for the Prohibition of Chemical Weapons.⁵⁴ And even in institutions such as the WTO, where decision making ostensibly takes place on a consensus basis, the United States wields considerably more influence than other members of the WTO.⁵⁵

The result of US predominance in the selection of executive heads of intergovernmental organizations has been a sense of disempowerment among other members of the international community, and the initiation of studies in response to several calls for a more expedient, fair, and transparent process for such appointments.⁵⁶

It seems natural that any State should seek to shape international law and relations in ways that support its national interests and reflect the philosophical beliefs of that State. Thus in 1999 China vetoed the extension of the mandate of a UN force in the former Yugoslav Republic of Macedonia, not on the basis of disagreement as to the need for such a force, but for the

American Journal of International Law 350–54. These clashing sentiments again raise the issue of how one determines the preferences of the American people – and the constitutional issue of competence for foreign policy setting in the United States.

⁵³ See Sydney Bailey and Sam Daws, *The Procedure of the UN Security Council*, 3rd edn. (Oxford: Oxford University Press, 1998), p. 329.

⁵⁴ See Michael Elliott, "There's Got to Be a Better Way," *Newsweek*, 13 March 2000, 4; Marlise Simmons, "U. S. Forces Out Head of Chemical Arms Agency," *New York Times*, 23 April 2002, 4.

⁵⁵ At the WTO, trade laws are agreed upon less as a result of democratic voting than through a process of bargaining, negotiations, and reciprocal concessions. In effect, the WTO members exchange economic opportunities. By definition, then, the single superpower, having the most powerful economy, will derive a disproportionate advantage over other members in the formulation of trade law and policy. For a discussion on setting the rules for regulating the international economy and the role of the more powerful economies, see generally Edward Kwakwa, "Regulating the International Economy: What Role for the State?" in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), pp. 227–46.

⁵⁶ The IMF, the World Bank and the WTO have each started the process of reviewing their institutions' appointment methods; and the member States of WIPO recently adopted a new set of Policies and Practices for the Nomination and Appointment of Directors General.

simple reason that Macedonia had established a relationship with Taiwan. And in 1995, President Jacques Chirac of France announced that France would unilaterally test nuclear warheads in the Pacific Ocean. On both occasions, while some members of the international community protested, the protests were not as loud or as sustained as they might have been if the US government had carried out the actions. The reason may, again, lie in the fact that the single superpower status of the United States implies that actions by the US government carry greater weight and have deeper effects on the foundations of international law than similar actions by other governments. If that is the case, then it would seem to be that it is not unilateralism per se, but *American* unilateralism that has the most profound impact on the international community and the foundations of international law.

History and contemporary international relations are replete with examples of powerful States seeking to influence the international community in such a way as to promote their own values or perceived interests. John Gerard Ruggie admits as much when he suggests that "The most that can be said about a hegemonic power is that it will seek to construct an international order in *some* form, presumably along lines that are compatible with its own international objectives and domestic structures."⁵⁷ Louis Henkin makes a similar point by reminding us that international law seeks to promote "State commitment to its *national interest*, as the State sees it. State autonomy and impermeability imply the right of a State (not of others) to determine its national interest; to further that interest, not the interests of other States; to promote its own values as it determines them, not the values of other States or values determined by other States. A State's national interest and values, as it sees them, may (or may not) include altruistic consideration for other States, or concern for the welfare of some or all of its inhabitants."⁵⁸

The United States government does nothing wrong or exceptional in seeking to do what it has always done, what any other single superpower would do, and what is generally admitted by scholars and observers to be common practice. States *do* act in their own national interests. The more important issue, however, is how the vital or national interests of States, or in this case, of the single superpower, are defined. Defining US interests

⁵⁷ John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution," in John Gerard Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993), p. 25.

⁵⁸ Louis Henkin, *International Law: Politics and Values* (Dordrecht: Kluwer, 1995), p. 101.