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INTERNATIONAL INSTITUTIONS**

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# ON THE LEGITIMACY OF INTERNATIONAL INSTITUTIONS

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**ABSTRACT:** The concept of legitimacy can occupy a useful space in international law. For example, a de facto government is the legitimate government compared to a de jure government which is the lawful government. International customary law is legitimate by definition. But international institutions, although lawful, are less legitimate because their interests are exclusive—even though they purport to serve inclusive interests.

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# ON THE LEGITIMACY OF INTERNATIONAL INSTITUTIONS

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## I. THE CONCEPT OF LEGITIMACY

In the draft paper I prepared before coming to grand old Heidelberg to participate in this conference, I began by taking the position that the word “legitimate” was hopelessly ambiguous. It seemed to be trying to occupy a space between “lawful” and “unlawful”, yet that space is hard to measure or even imagine. Of course the ambiguity can be removed by eliminating the space—by stipulating that “lawful” and “legitimate” are synonymous. Black’s Law Dictionary tells us simply that “legitimate” is that which is “lawful, legal, recognized by law, or according to law.” Simple, but not helpful.

However, in listening to the distinguished participants during the conference, I became persuaded that a space all its own might exist for “legitimacy” in international law. I’m not at all sure that such a space exists in domestic law. But international law has some features that distinguish it from domestic law. Accordingly, in revising this

paper for publication, I take the opportunity to begin it a different way, and to present what I believe is an unambiguous example in international law of a real difference between lawful and legitimate.

Legitimacy can sometimes usefully describe a space between international law and international politics. I will use as an example the distinction in international law between de jure and de facto recognition of governments. Although I will only discuss one real case, the principles involved can readily be extended to almost all other cases of recognition of governments.

The case I want to discuss is the situation that arose in 1936 when Italy, seeking to assert on the world stage its new fascist personality, abruptly invaded and conquered the state of Ethiopia. Emperor Haile Selassie, who embodied the Ethiopian government, fled to Great Britain.

Italy set up a functioning government in Ethiopia. Now the beleaguered country had two competing governments: the effective puppet government in Addis Ababa, and the government in exile consisting solely of the person of Haile Selassie. Great Britain, not wishing to reward Italy for its aggression, maintained its existing de jure recognition of Haile Selassie as the government of Ethiopia. The British Foreign Office stated after the Italian conquest: “an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia” is accorded recognition at the Court of St. James.<sup>1</sup>

Receiving an ambassador from a foreign government is the bright-line test of de jure recognition. Haile Selassie remained the “lawful”—not necessarily the

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<sup>1</sup> Haile Selassie v. Cable & Wireless, Ltd., 1938 L.R. Ch. 545. The fascinating proceedings in the British courts, stretching out over four cases that reversed each other, can be found in Anthony D’Amato, International Law Coursebook 5-17 (1994), also available at <http://anthonydamato.law.northwestern.edu/ILC-2001/INTLAW02-2001-edited.pdf>

“legitimate”—government of Ethiopia up until November 30, 1938, when Great Britain dismissed Selassie’s Envoy and instead recognized the King of Italy as the de jure government of Ethiopia. Thus for the period 1936-1938, the only lawful government of Ethiopia was Haile Selassie. When he brought suit in a British court for monies owed to Ethiopia by a British corporation, the court had no choice but to accept Selassie as the person entitled to the monies in view of the fact that he was the lawful government of Ethiopia.

The complicating factor was the status of the King of Italy in Ethiopia during the period 1936-1938. The British Foreign Office took the abnormal step of actually designating the King of Italy as the de facto government of Ethiopia. To be sure, verbal designations of this sort are hardly conclusive of the international legal question. (There is no formal bright-line test, such as the exchange of ambassadors.) However, customary international law does in fact recognize the status of a de facto government as in some instances distinct from a de jure government. The Ethiopian case from 1936 to 1938 was indeed one of those instances.

Here is where the concept of legitimacy can be useful. The King of Italy in 1936-38 was the legitimate government—the de facto government—of Ethiopia. Legitimate does not mean lawful. In a British court where title to Ethiopian assets are at issue, it is the lawful government, not the legitimate government, as we have seen, that must prevail. But what, then, does the term “legitimate de facto government” mean under international customary law?

One thing it does not mean is what many scholars have asserted it to mean: that the de facto status of a government simply is a temporary designation for a government

that is on its way to becoming the de facto government. This cannot be correct as the following thought experiment will show. Suppose at some point in the 1936-38 period, say in 1937, a combination of French and Dutch forces managed to drive out the Italian government and retake Ethiopia for Emperor Haile Selassie. In that event, we could not say that the de facto government of the King of Italy was simply a temporary stage on the way to its acceptance de jure. Instead, we would say that Selassie “remains” the lawful government of Ethiopia, and all talk about de facto governments would be dropped. In light of this simple thought experiment, we need another explanation for the term “de facto.”

Suppose there are some British citizens who are trying to exit from Ethiopia but are restrained by the government. They get word to the British Foreign Office that they need help in getting an exit visa. Whom should the Foreign Office contact? Certainly not Haile Selassie, who is powerless and sitting in a hotel room somewhere in London. Clearly the Foreign Office must petition the de facto government of Ethiopia, which is in this case the King of Italy. For it is obviously the de facto government that has the requisite power to release or to detain the British citizens.

There are many similar situations that can arise: a British company wants to enter into a contract to construct a bridge in Ethiopia and wants to know its rights if it enters into a contract with the King of Italy. Or suppose some Ethiopian citizens temporarily in Great Britain want to obtain visas to enter Ethiopia. If the King of Italy is the functioning government of Ethiopia, then he must be dealt with in order to allow daily interactions with the conquered territory of Ethiopia. Any conflicts with Ethiopia (which the King renamed Abyssinia) can only be resolved, as a practical matter, if the King of Italy is a

party. The fact that the King of Italy is not the lawful government of Ethiopia does not disable it from being a responsible party to these routine situations that can come up from time to time. Accordingly, it makes pragmatic sense to call the King of Italy the legitimate government of Ethiopia even as we continue to designate Haile Selassie as its lawful government.

What this example shows is the existence of a definite space in international legal discourse for the term “legitimate” as distinct from the term “lawful.” More importantly, it shows that what is legal in international law is sometimes very close to what is political.<sup>2</sup> This is perhaps best exemplified by the way customary law is formed. When a rule of customary law is in the process of being formed, there was no prior rule on the subject (by definition). There was only a political controversy, resolved in some political fashion. Its resolution, however, is then adopted by the international legal system and called a “precedent” (or a “custom”) under customary international law. Thereafter in similar conflicts governing rule will be identical to the original rule that was arrived at empirically in the first political controversy. Hence customary law is constructed directly upon the political practices of states.

Once we see how endemic is the conception of legitimacy in international law, we can begin to use it cautiously in describing phenomena that interface the legal and the political. Prominent among these phenomena are international governance institutions.

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<sup>2</sup>Students who first encounter international law in law school can object strenuously that the King of Italy should not be able to shoot and bomb his way into the position of a legitimate government of Ethiopia. And indeed today a country cannot obtain title to territory by conquest. But back in 1936-38 the question still seemed to be open. This does not mean that the Ethiopian example won't happen again; it only means that it will happen in non-conquest situations, such as two equally well situated and competing military groups competing for governmental control of a country that is temporarily without a government.

## II. INTERNATIONAL GOVERNANCE INSTITUTIONS

David Mitrany prophesied in 1943 that international organizations and institutions would gradually take over the functions of government, leaving to the states only local governmental matters such as public health and safety.<sup>3</sup> His goal was to eliminate political divisions that caused conflict by overlaying states “with a spreading web of international activities and agencies, in which and through which all nations would be gradually integrated.”<sup>4</sup>

Mitrany acknowledged that there was “no prospect that under a democratic order we could induce the individual states to accept a permanent limitation of their economic sovereignty by an international authority.”<sup>5</sup> Yet certain governmental functions—which individual states might find onerous, routine or boring—could very well be entrusted to international institutions. We might say that Mitrany was hoping to usher in world federalism quietly through the back door.

Today, if we look at the growing power and reach of international institutions, it might appear that Mitrany’s dream is being realized. Such institutions include the World Bank, the International Monetary Fund, the Multilateral Investment Guarantee Agency, the Inter-American Development Bank, the Council of Europe, the European Union itself, NATO, the OAU, the World Trade Organization, GATT, the Shanghai Cooperation Organization, the International Sea-Bed Authority, and so on, criss-crossing the globe with treaty-regimes..

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<sup>3</sup> David Mitrany, *A Working Peace System* (1943).

<sup>4</sup> *Id.* at 27.

<sup>5</sup> *Id.* at 33.

These are all lawful international institutions.<sup>6</sup> The United Nations Charter itself encourages the formation of regional organizations and specialized intergovernmental agencies. One might want to go on and say that these agencies and institutions are all surely “legitimate.” But the question would then be: legitimate compared to what? Unless the term “legitimate” occupies some space of its own, as we saw in Part I, it would simply reduce to the semantic equivalent of “lawful.”

Let us consider comparing the legitimacy of international institutions with customary international law. There is no doubt that customary international law is legitimate. By comparison, are international institutions less legitimate? Can we go so far as to say that they are in a sense illegitimate?

Customary international law is the only law in the world which applies equally to every state, big or small. By contrast, the internal laws of international institutions apply only to their members. Suppose the Asian Development Bank has 43 member states in a world currently consisting of approximately 190 states. The Bank for International Settlements has 55 member states, and the Inter-American Development Bank 47 members, and so on. Now, following a suggestion once made by Oliver Lissitzyn, we draw a circle on a sheet of paper and label it ADB.<sup>7</sup> We draw another circle that is somewhat larger than the first because it has more member states, and call it BIS. A third circle, labeled IADB, is between the size of the first two. These circles are drawn so they overlap. If two circle-regimes each have the same six states among their membership, then the degree of overlap of the two states is proportional to their six common elements.<sup>8</sup>

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<sup>6</sup> There exist of course unlawful international organizations such as Al Qaeda and other terrorist groups.

<sup>7</sup> Oliver Lissitzyn, *International Law Today and Tomorrow* (1965).

<sup>8</sup> Lissitzyn himself, however, carried this idea too far. He said that international law was nothing but the overlapping circle-regimes.

Instead of overlapping the circles according to membership, the overlap can be made more functional by making the overlaps signify jurisdictional competences. For example, there is probably a considerable overlap between the jurisdiction of the Asian Development Bank and that of the Shanghai Cooperative Organization, or between GATT and the WTO. These overlaps would be difficult to ascertain, and yet even a rough approximation might prove useful for some purposes.

I have omitted the international institution called the United Nations. With a membership of nearly all the states in the world, it is larger than all the other circles and indeed includes those circles within its circumference. Yet we can be misled by looking at the United Nations as an inclusive organization. Its real power lies in the Security Council, and more so among the five permanent members within the Council. Although largely blocked by Cold-War vetoes from 1945 until 1990, the Council has emerged with a vengeance in the past decade and a half. Indeed, unless the International Court of Justice modifies or overrules its ill-advised preliminary decision in the Lockerbie case, the Security Council may have succeeded in arrogating to itself the power to modify the treaty arrangements and jurisdictional competences of all other international institutions.

### III. WORLD GOVERNMENT

We are a long way from David Mitrany's vision. He would have had no overlapping circles. Every institution would take up a specific governmental function such as banking, investment, mineral resources of the sea-bed, world trade, and copyright protection, and all states would be members of these institutions. It is certainly an

impractical vision for today's world. Just to take one example, the World Bank is presently funded by loans made to it by the voluntary decisions of some of its members. If there were one World Bank, lending would cease because the rich nations would have to relinquish oversight of their loans to the majority of states. The loans would then seem too risky to make. Hence the World Bank would have to resort to taxation in order to raise money. But taxation would be a huge step toward centralized world government, and nations today are not willing to contemplate such a step.

Yet we may be proceeding toward world government anyway. The use by these international institutions of executive and legislative powers, even though only affecting their own members, inevitably spills over their jurisdictional competences to constrain the choices and the powers of other international institutions. As some of these institutions increase their power and others are reduced to shell organizations, we may see a slow-motion movement toward a world government to be eventually composed of a coalition of themselves. Yet a the world government that serves the interests of the most powerful interest groups will inevitably use its police power to suppress dissent, impose cultural uniformity and infiltrate the underclass anywhere in the world. This time around, as compared to Pax Romana 2000 years ago, the coalition government will have the brutal efficiency of advanced technological means of warfare, centralized communications and the unchallenged power to regulate currency and print more of it at the government's discretion. In terms of individual freedoms we may arrive at a situation like the claim of the President of the United States that he may use his executive power, in the name of national security, to listen in to private telephone conversations or open and read anyone's mail. A world government might be an unrestrained government. It

could either claim “emergency” powers in a continuous emergency, or amend its own constitution.

The road to world government is a one-way street. Once that government arrives, there will be no counterforce in the world to take it down—no “humanitarian intervention” so to speak.

Compared to customary international law, I would argue that the law made by international institutions is illegitimate. It is a top-down law as compared with customary international law, which is bottom-up. We know how international institutions make law: they have a legislative branch and an executive branch. It is worth spending a moment to make some additional comments on how international law makes customary law.

#### IV. FORMATION OF CUSTOMARY INTERNATIONAL LAW

In the beginning, before nation-states, international law existed only as a potential; it had no actual existence because it lacked substance. The substance would come from the new nation-states. But this presented an immediate problem: if what states did became what they should do, then everything states did would be lawful. Some kind of filter had to be imposed in order to distinguish some of the practices of states as law-creating from other practices that would either be irrelevant to law or counter to it. Yet this raises a second problem: before there are any rules of international law at all, how can we say some state practices could be counter to the law?

Since there are no pre-existing rules by definition, we must assume that of all the possible rules that could be incorporated into international law, only those rules will be

incorporated that are compatible with the idea of law. Law is an invention designed to channel the behavior of persons toward peace and stability and away from anarchy.<sup>9</sup> Anarchy is the enemy of law. Thus the new international legal system will be attracted to state practices that imply rules that promote peace and stability.

Suppose a controversy breaks out between two states. If the controversy is later resolved short of war, then its resolution must be deemed “peaceful.” The new international legal system will adopt the rule that governed the resolution of the dispute. The adopted rule becomes a rule of customary international law. Indeed, this outcome is exactly what the other states in the system want. They do not want any controversy to escalate into general conflagration; rather, they want it contained within the interaction of the two states. Thus the inferred operative rule governing that containment is a rule that all the other states will implicitly adopt as a rule of customary international law that will henceforth apply to all states. The “rule” that we infer to have been operative in producing the conflict-resolution thus automatically constitutes a rule of international customary law. As more controversies are settled short of war, the rules implicitly governing the resolution of those conflicts are added to the corpus of international customary law. The addition is automatic; international customary law simply *constitutes* the rules that tame the forces of anarchy.

The process I have just described is not rule by the majority, nor rule by consent, nor rule by consensus, nor the rule of a representative democracy, nor any form of top-down governance. Rather, it is very much like the process of common-law formation in domestic law. Two individuals get into a dispute; the dispute is resolved by order of a

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<sup>9</sup> Based on my work-in-progress as well as on a paper delivered at a previous Max Planck Institute Conference. See Anthony D’Amato, International Law as an Autopoietic System, in Rudiger Wolfram & Volker Roben, *Developments of International Law in Treaty Making* 335 (2005).

court; and the court's judgment becomes a precedent for all other individuals had no part in the initial lawsuit but who just happen to find themselves within the ambit of that precedent. It is simply a matter of the common law "learning" to achieve peace by borrowing its norms from peaceful resolutions of conflicts. The only difference between this process of common-law formation and the formation of international customary law is that the latter (at least in the formative years) lacks an authoritative "court" to impose a settlement upon the parties. But this is not necessarily a shortcoming, for there are times when a judicially imposed "settlement" aggravates rather than settles a conflict. A conspicuous example is the Dred Scott decision of the United States Supreme Court in 1856, allowing the extension of slavery into the new territories of the United States.<sup>10</sup> The Court's unfortunate decision was a major factor leading to the outbreak, four years later, of the Civil War. The Dred Scott case has been thoroughly vitiated as a precedent. In brief, it is the fact of peaceful conflict-resolution, rather than the method by which it was achieved, that controls its adoption by the overarching legal system, whether it be the domestic legal system or the international legal system.

We find therefore that customary international law consists of norms or rules that earned their way into the corpus of customary law by proving their compatibility with other rules and the peaceful resolution of conflicts. Customary international law turns out to be an inductive process of retaining the results of the resolution of millions of international conflicts. These resolutions, these compromises, these results represent stable solutions to bilateral and multilateral conflicts, achieved usually through negotiation but sometimes simply by letting the problem die of its own weight as attention became focused elsewhere. When negotiation is involved, it will always help

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<sup>10</sup> 60 U.S. (19 How.) 393 (1857).

one side to show that the proposed rule to govern the controversy at hand is the one that is closest to other existing rules in the system. If a proposed rule is compatible with a half-dozen neighbor rules, then the system of rules is more likely to be coherent and hence preserved if the proposed rule is adopted. This would then be a very strong argument in the negotiation in favor of the proffered rule. In short, customary international law is doing its work even though the particular rule at issue is not (yet) listed in its set of rules.

## V. CONCLUSION: INCLUSIVITY V. EXCLUSIVITY

Rules and practices of international institutions may seem benign in their intended effects upon non-member states. Yet realism dictates that we should look beneath the surface of purported altruism. A regional bank, for example, may have investment policies in non-member countries that seem to further the latter's interests, and yet the real party in interest may be the bank itself. For example, building hydroelectric power stations in an underdeveloped country may appear to be in the latter's best interests, but we can be fairly confident that if it were not in the investment bank's financial interests the station would not be built at all.

International institutions are top-down, exclusive circle-regimes superimposed upon the globe. In this respect they do not have the equality and democratic bottom-up quality of customary international law. The more international institutions prosper and grow, the closer we may be getting to a coalition of those institutions that proclaims itself the government of the world. In such a world, customary international law would

disappear. As I suggested earlier, the problem with world government is that it is irreversible. If it turns out to stifle individual freedoms and abolish human rights, there will be no counterforce to overturn the government and reclaim those rights and freedoms. Hence I think we should reserve the term “legitimacy” to customary international law and keep a vigilant eye upon the practices of “lawful” international institutions.

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