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Intervention in a 'Divided World': Axes of Legitimacy

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Abstract

In the post-2001 era, many fear that the 'international community' that had been developing in the years after the Cold War is becoming irremediably divided. Challenges to the 'international community' have come from such radically disparate quarters as US unilateralism and Islamicist attacks on 'Western' internationalism. Many worry that such divisions will severely hamper the ability of the international community to intervene in local crises, whether for humanitarian purposes or to stop ethnic conflict. This article challenges the major assumptions upon which this common view is based. First, it rejects the notion that the 'international community' ever had the kind of unity that is retrospectively attributed to it. Secondly, it rejects the notion that such an illusory unity is necessary for the legitimacy of international interventions even of the boldest variety. Rather, by examining recent fears in light of the history of bold international action since World War I, it develops a complex schema for evaluating forms of international legitimacy and forms of critique of that legitimacy. In light of this analysis, it shows how legitimacy can be achieved, even if only provisionally, even under the most fractious international conditions. In particular, it shows how the achievement of such legitimacy depends on distinguishing actions in the name of internationalism from seemingly similar actions that lie in international law's discredited colonial past.

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> *Following World War I, which ended more than 83 years ago, the whole Islamic world fell under the Crusader banner – under the British, French, and Italian governments. They divided the whole world . . . Those who refer things to the international legitimacy have disavowed the legitimacy of the Holy Book . . .*
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> Osama Bin Laden, November 2001[1]

> *[The UN must] prove to the world whether it's going to be relevant or whether it's going to be a League of Nations, irrelevant.*
>
> George W. Bush, September 2002[2]

> *And while it is difficult to see the world body go down the drain like its predecessor the League of Nations . . . it is equally difficult to see how the United Nations will regain the* status and relative coherence *it enjoyed before Operation Iraqi Freedom.*
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> The Independent (Banjul) March 2003[3]

1 'Status and Coherence'

A *The Internationalist Dream*

It would be tempting to look back at the long post-Cold War decade as an era of the more or less steadily growing legitimacy of an activist internationalism – an era that began with '1989' and ended somewhere between '9/11' and the US invasion of Iraq. A representative example of this perspective was provided by a writer in a Gambian newspaper shortly after the start of the invasion of Iraq (the third of the three epigraphs to this article).[4] The writer declared that the US attack would probably signal the demise of the 'status and relative coherence' previously enjoyed by the United Nations, condemning it to the fate of its predecessor, the League of Nations. This writer's views characterized much of pro-internationalist world opinion at the time of the American action.

If internationalism seems to such observers to have suffered a severe blow, the post-Cold War decade often appears to them by contrast as something of a golden age, in which internationalism had 'status' and 'coherence'. This contrast between the deep fractures of the present with a more harmonious recent past reflects the persistent dream of an international community with the status of a legitimate identity and the coherence of integrated ideals and practices. Above all, this dream is that of a community that would thoroughly integrate state power into internationalist

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[1]   Translation of Osama bin Laden speech, broadcast on Al Jazeera television network on 3 November 2001, available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1636782.stm

[2]   Remarks by President George W. Bush, available at http://www.whitehouse.gov/news/releases/2002/09/20020919-7.html.

[3]   Baba Galleh Jallow, *Of Iraqi Freedom, Democratic Contagion and Giant Mistakes*, *The Independent* (Banjul), 24 March 2003.

[4]   *Ibid.*

principles – hence the gravity of the US invasion of Iraq. This internationalist dream has usually been articulated in the mode of absence – as a nostalgic lament for the loss of community or a millenarian hope for its construction. It is a dream that particularly appeals to legal internationalists – and may account for the fact that writings addressed to the problem of 'The Disintegration of International Society'[5] and 'International Law in a Divided World'[6] have come to constitute a traditional genre favoured by some of the leading international lawyers over the past century. It may also account for the fact that a dichotomy between an international law founded on the principle of equality and one founded on the power of 'hegemonism' has seemed a useful analytical axis to widely divergent observers over the past several decades.[7]

It would not be difficult, however, to argue that remembering the long post-Cold War decade as a time of steadily, even if unevenly, growing internationalist legitimacy is a retrospective illusion. Words like Srebrenica and Rwanda should be enough to remind us of internationalism's *incoherence* during that period, due to the selectivity of its attentions; words like Kosovo should remind us of its uncertain *status*, due to the intermittence of respect shown by states to the need to subordinate their action to the authority of the formally constituted international community.

To be sure, many who share the nostalgia for the long post-Cold War decade may readily acknowledge that it was a time of numerous swings in internationalist prestige. Yet, criticism of post-Cold War internationalism is usually presented in the ameliorative mode. Challenges to the selectiveness of internationalists' attentions or the lack of inclusiveness of participation in their decision-making councils are usually intended to lead the international community to make good on its universal claims, rather than attack its foundation. Such criticisms, therefore, are not incompatible with treating the failures and disappointments of the long decade as the inevitable travails of a universal international community struggling to be born, however regrettable and even tragic those travails may have been.

Since the end of the long post-Cold War decade, however, the very ideal of the gradual transformation of the world into a community governed by widely-accepted internationalist principles and institutions has been subjected to a series of high-profile attacks. Perhaps the most well known of these attacks issued from the very different quarters of Osama bin Laden and George W. Bush (the first and second epigraphs to this paper). As we shall see, where bin Laden primarily attacked the *status* of internationalism due to its putatively illegitimate identity, Bush primarily attacked its *coherence*, due to the putative gap between its principles and its institutions. Like the internationalist writer in the Gambian newspaper, both of these challengers cited the League of Nations as an important reference, though each did so with very different

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[5]   Schwarzenberger, 'The Rule of Law and the Disintegration of the International Society', 33 *AJIL* (1939) 56.

[6]   See, e.g, A. Cassesse, *International Law in a Divided World* (1986); R. Higgins, *Conflicts of Interest: International Law in a Divided World* (1965); Lissitzyn, 'International Law in a Divided World', 542 *Int'l. Conciliation* (1963) 1.

[7]   See, e.g., Vagts, 'Hegemonic International Law', 95 *AJIL* (2001) 843; UN GA Res. 103, A/Res/34/103 (14 Dec. 1979). The 1979 GA Res. 103, entitled, 'Inadmissibility of Hegemonism in International Relations,' probably marks something of a high-water mark of 1970s Third Worldism in international fora.

intents. As a result of such attacks, the prospect of the ideological redivision of the world into competing 'legitimacies' has begun to appear to some internationalists as a grave danger, provoking a variety of discursive and practical strategies. Strategies designed to meet other challenges to internationalism in the past, such as those of Fascism in the 1930s, Communism during the Cold War, and the US during the Vietnam era, have begun to play a visible role.

In this article, I propose that we reject the nostalgia for the long post-Cold War decade as both historically inaccurate and theoretically flawed. It would be easy, for example, to show that current challenges to internationalism – and the counter-attacks on them – were in full play throughout the long decade. More fundamentally, I propose that we reject the utopian dream of an international community that would finally have integrated power and principle. Indeed, activist internationalism will always appear to some as mere power for at least two reasons. First, ideological divisions in the world are not a product of a fall from grace, but of the human condition – periodic announcements of the 'end of ideology' notwithstanding. 'Status' challenges, attacking the putatively universal community as ideologically partisan, will therefore be a persistent feature of international debate. Secondly, the final integration of power and principle is impeded by the fact that internationalist principles and institutions are themselves deeply heterogeneous – rendering the achievement of 'coherence', even 'relative coherence', a provisional and contested affair. Internationalism, especially in its legal dimension, consists of a body of rules and institutions in which 'self-determination' must always confront 'sovereignty', 'minority protection' must face 'individual rights', 'free trade' must always confront the 'right to development', the equality-principle that governs the General Assembly must always face the power-principle that governs the Security Council, and so on. Attempts at effecting 'coordination'[8] among these elements will never achieve more than a temporary consensus. The bin Laden-style attacks on internationalism's status and the Bush-style assaults on its coherence are not exceptional, but only the latest instances of perennial challenges. Indeed, such challenges reveal much about the theoretical and practical elements of internationalist legitimacy – a legitimacy found not in a golden past or future, but provisionally wrested out of the divisions of the present, particularly out of the crucibles of the kinds of local conflicts whose pacification our era has implicitly identified as central tasks for any internationalism.

Taking the legitimacy of international intervention in local conflicts as my focal point, I argue that we should reject the quest for an international community that would finally have achieved status and coherence. Rather, I advocate a focus on the situational, provisional aspect of legitimacy, on the way that internationalist actors must continually seek to reachieve legitimacy in relation to a variety of constituencies and in the face of ever-changing developments. In short, I argue for an understanding of internationalist legitimacy which is less foundational and more vulnerable, less static and more tentative, less certain and more messy.

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[8] Cassesse, *supra* note 6, at 160–163.

B *Axes of Challenge, Axes of Competition*

Those who challenge the legitimacy of dominant internationalist ideals and institutions usually present bids to legitimate competing alternatives. Those who attack the *status* of internationalism present an external critique of its identity as a whole, an identity they perceive as both specifiable and pernicious ('Crusader', 'Capitalist', 'Imperialist', 'American', etc.). In keeping with the nature of their challenge, they usually propose a competing internationalism embodying a different identity ('Islamic', 'Communist', 'Third Worldist', 'multilateralist', etc.). Bin Laden provides an example of this kind of critique and competing bid.

By contrast, those who attack the *coherence* of internationalism problematize the specifiability of its identity by highlighting the heterogeneity of its internal elements. They allege that these elements – discursive, practical and institutional – have been wrongfully or irrationally articulated, wrongfully or irrationally assembled, wrongfully or irrationally implemented. They may make a bid to establish a competing alternative structure by presenting a competing configuration of these elements – for example, by giving some element, such as self-determination or sovereignty, more weight relative to the other elements than it possesses in the prevailing regime, while still seeking to achieve coherence, though a new kind of coherence, between their favorite element and the others. They may, alternatively, reject the search for coherence and seek legitimacy for their perspective by defying the demand for satisfying the claims of all the elements. In opposition to the legitimacy of coherence, they may thus make a bid for a 'legitimacy through defiance' – a legitimacy that derives its power by overtly privileging certain elements and denigrating others.[9] George W. Bush provides an example of this kind of legitimacy bid.

I argue that external critiques of internationalism's *status* – i.e., the ideological rejection of the legal system *as a whole* – do not alone account for the most serious challenges to internationalism in the past century. Rather, the strength of these challenges stems from their ability to link this external opposition with an internal critique of internationalism's incoherence. In the past, for example, Nazi and Communist publicists sought to undermine the prevailing international legal order both by attacking its identity (for example, as 'Jewish' or 'Capitalist') *and* by heightening the tensions between heterogeneous principles as they related to particular local conflicts. The challengers' external critique, their attempt to delegitimate the system as a whole, weakened internationalists' authority to persuasively produce new configurations of these disparate concepts in response to new developments in local conflicts. At times, these challengers made bids for a competing legitimacy of coherence; at other times, they sought a legitimacy of defiance by fiercely denigrating previously hallowed principles and exorbitantly privileging others. This kind of linkage between external and internal critique, and between critique and competing legitimacy bids, has played a very powerful role at various junctures over the past century.

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[9]   I have explored this phenomenon in detail in 'Legitimacy through Defiance: From Goa to Iraq', 23 *Wisc. J. Int'l. L.* (2005) 93.

Such double challenges enable us to see, by contrast, the double source of internationalism's legitimacy. In periods of internationalist self-confidence, its internal tensions have been a great resource. It has been precisely international law's ability to marshal a range of seemingly conflicting ideas about personal and collective identity and about local and international political order that has enabled it to create its most audacious experiments. The boldest of these experiments include the international regimes to settle nationalist conflicts ranging from Upper Silesia, 1923, to Kosovo, 1999. A close study of such cases shows internationalists' efforts at dynamically achieving and reachieving legitimacy – through continually persuading relevant publics that the internationally sponsored regime was producing an evolving and coherent whole out of its heterogeneous elements in response to the changing exigencies of the local situation. These kinds of local, provisional successes established the identity of internationalism as a whole, not as that of a system with a fixed ideology, but as a work-in-progress, subject to constant revision through situational engagement. The revisability of these experiments was made possible precisely by the heterogeneity of their elements, by the fact that no one configuration was logically inevitable. To be sure, this revisability also meant that power could never be finally integrated into principle, because principle was in the process of constant, and contestable, permutation.

A feature of such situational attempts to achieve legitimacy is a third kind of legitimacy problem, beyond status and coherence. Precisely at the moment of its successes, internationalism has been haunted by the spectres of its discredited pasts, exercises of internationalist power that have been more or less thoroughly delegitimated. During the long post-1989 decade, this kind of legitimacy problem took the form of the resurgence in public debate of nearly forgotten historical terms: terms like trusteeship, protectorate, proconsul, even recolonization. These terms were deployed by both detached observers and committed partisans of the post-1989 experiments in bold internationalism: at times with the knowing wink of the ironist, at times the high tones of the pedant, at times the angry polemics of the militant.

Though lacking the overtness of systematic opposition and the shrewdness of internal critique, the resurgence of these historical references insidiously gnaws away at internationalist legitimacy. It tarnishes the cutting-edge ventures of internationalist idealism by pairing them with delegitimated forms of outdated power. Indeed, the long post-Cold War decade seems to have forced us to frankly confront the relationship between international law's two famously contradictory talents: making the world safe for the exercise of power and making the world safe for the highest ideals of humanity. At least after Kosovo, no one engaged in internationalist theory or practice could deny that power and idealism were thoroughly intertwined, that pure idealism and pure *realpolitik* had become equally quixotic aspirations. Talk about the enforcement of human rights seemed to inevitably evoke talk about proconsuls and protectorates; talk about strategic projection of power seemed to inevitably evoke talk about international legality and cross-cultural understanding. What once seemed like international law's past (colonial or quasi-colonial institutions and doctrines) and what seemed like its future (human rights and community) now seemed destined to haunt each other.

I think that this third challenge to internationalist legitimacy is a salutary element in the dynamics of legitimacy that I am emphasizing here. The inevitable haunting of internationalism by the spectres of its unsavoury past makes any final achievement of legitimacy impossible, and forces internationalists to continually seek to prove their differentiation from those spectres. Rather than dream of a final integration of power by principle, I propose that we continually goad power-holders by comparing them to those in the past who are now viewed as unprincipled. Depriving those with power of any secure legitimacy should spur them on to avoid words and deeds deserving of the most ignominious illegitimacy.

This article, then, seeks to understand international law's attempts to achieve legitimacy in response to three kinds of challenges – attacks on the status of its identity, critiques of the coherence of its words as well as its deeds, and attempts to associate it with spectres from its unsavoury past.

2 Status

In one of his video pronouncements not long after September 11 2001, Osama bin Laden made a bid to be the theorist of a new attack on the status of internationalism. In this speech, he opposed 'international legitimacy' to an incompatible and superior legitimacy.

> Those who claim that they are the leaders of the Arabs and continue to appeal to the United Nations have disavowed what was revealed to Prophet Muhammad, God's peace and blessings be upon him.
> Those who refer things to the international legitimacy have disavowed the legitimacy of the Holy Book and the tradition of Prophet Muhammad, God's peace and blessings be upon him.[10]

To be sure, this seems a weak bid, at a theoretical level – relying on a set of clichéd oppositions between secular law and religion, between international institutions and those of a particular tradition, between self-proclaimed leaders and their authentic counterparts, and so on. Nevertheless, the challenge made up in obsessional comprehensiveness what it lacked in theoretical subtlety. In this rather lengthy manifesto, Bin Laden gave an overarching interpretation of the far-flung events of the long post-Cold War decade under the single theme of the oppression of 'Islam' by the 'West'. Somalia, Palestine, Iraq, Bosnia, Chechnya, Kashmir, even poor East Timor: Bin Laden cited all these disparate conflicts only in order to subsume them under his one grand theme. The manifesto sought to delegitimate activist internationalism in all its forms – describing actions undertaken in the name of internationalist principles, such as the interventions in Somalia and East Timor, as mere acts of power by 'Crusader forces'.

Even leaving aside this last, atavistic reference, bin Laden's narrative was ambitious in historical scope. Reaching beyond the 1990s to the 20th century as a whole, he declared: 'Following World War I, which ended more than 83 years ago, the whole Islamic world fell under the Crusader banner.'[11] With this quite specific historical

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[10] Bin Laden, *supra* note 1.
[11] *Ibid.*

frame, Bin Laden proposed nothing less than a systematic challenge to the entirety of modern internationalism. For the origins of internationalism's proudest achievements – including human rights, self-determination, and international institutions – lie precisely in its renewal at the end of World War I, exactly 83 years prior to bin Laden's speech.

In thinking about current responses to this latest attack on the status of internationalism, it is useful to compare them with responses to the two other most prominent attacks of this kind: the Fascist/Nazi challenge and the Communist/Soviet challenge. These three challenges were radically different in political intent and historical context. Nevertheless, they share a set of formal similarities, among them a broad contempt for the legitimacy of the prevailing form of internationalism, a desire to unmask the self-proclaimed universal as particular, and a bid to establish an alternative international political identity with global aspirations, such as the German *Reich* or the Communist International.

The Fascist and Communist challenges prompted a variety of responses from legal internationalists, responses which may be divided into three broad categories: the *purist responses*, the *alternative community responses*, and the *higher law responses*. Each of these responses has had its counterparts in recent years, coming into prominence with Kosovo, but accelerating after 9/11 and the invasion of Iraq.

The *purist responses* consisted simply in the reassertion of the dignity and validity of international law and internationalist principles in the face of attacks and distortions by their enemies. Purism came in many political stripes, from mainstream treatises to Popular Front manifestoes. For example, after the Italian invasion of Ethiopia, a group of right-wing French intellectuals issued a pro-Italian 'Manifesto in Defense of the West', mocking the League of Nations' 'false juridical universalism'.[12] In response, a group of leftist and liberal intellectuals responded, not with an equally politicized diatribe, but rather with a 'Manifesto for the Respect of International Law'.[13] Among other things, this manifesto defended the League of Nations, which at that 'very hour' was 'justifying its existence in the eyes of all men of good will' – surely a formalist assertion in 1935 if ever there was one. The 'falseness' of the League's universality in 1935, like that of the United Nations in the first half of 2003, was undeniable as an empirical matter – whether or not that universalism could be defended as a matter of normative purism.

The *alternative community responses* were more complex and took a variety of forms. In the face of undeniable ideological division, they accepted that internationalist norms and institutions could not simply claim universal status. Rather, they frankly made a claim to the creation of partial international communities to replace the fractured universal community. Often this kind of effort involved favourably contrasting the anti-formalist stance of the alternative community with the legal formalism of the prevailing system.

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[12]   'Manifesto for the Defense of the West', *Le Temps* (4 Oct. 1935), at 1 (all translations mine unless otherwise noted).

[13]   'Manifesto for the Respect of International Law', *Le Populaire* (5 Oct. 1935), at 1.

For example, some justified Munich, 1938, as the site of a concrete grappling with real problems, bypassing the formalistic impasses of the League. Such commentators argued that an international conclave embodying the 'spirit of Geneva'[14] had transpired in Munich, while only international law's dead letter remained in Switzerland. A similar discourse had begun to develop in 1935 to justify Franco-British plans to make a deal with Italy on Ethiopia.[15] In both of these cases, the alternative international community, though partial, united ideological allies and adversaries: the French, British and Germans in Munich, the French, British and Italians in the Ethiopia negotiations.

A different variant of the *alternative community response* focuses not on an informal coalition between ideological adversaries, but on an overt presentation of an ideological alliance as the true internationalist community, even if non-universal. This strategy was most fully deployed during the Cold War. The Soviets and the Americans each presented their respective partisan alliances as embodying true internationalism, at the expense of a UN viewed as either paralysed or under the sway of the ideological adversary.[16] In these cases, the alternative community was a select group of states united by substantive values, as opposed to the merely formally grounded – and merely numerically universal – United Nations. A somewhat weaker form of this variant developed in the aftermath of Munich, in which some in France sought to forsake the irremediable fractures of Europe in favour of a *'repli impérial'* – not so much an assertion that the French empire represented the interests of the whole world, but that the empire, rather than Europe, constituted the centre of gravity of the French world.[17]

These *alternative community responses* were very elaborate precursors to the 'illegal-yet-legitimate' school of international lawyers in response to the Kosovo

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[14] Editorial, 'An Overshadowed Assembly', *Times of London*, (3 October 1938), at 5.

[15] For some versions of these plans, see 'Summary of the Franco-British Suggestions', 16 *League of Nations OJ* (August 1935) 1620; 'Note of the Committee of Five to the Ethiopian and Italian Representatives', September 1935, in Canadian Secretary of State for External Affairs (ed.), *Documents Relating to the Italo-Ethiopian Conflict* (1936), at 54; Text of the Suggestions for an Agreed Settlement of the Conflict, December 1935, in *Ibid.*, at 173. See also the ambivalent response of leading international lawyers to the proposals, for example, Scelle, 'La Politique extérieure française et la S.D.N.', 10 *Année politique française et étrangère* (1935), at 292–293; Rousseau, 'Le Conflit Italo-Ethiopien (ch. III)', 45 *Revue Générale de droit international public* (1938), at 61–62.

[16] Compare the US justification of the invasion of the Dominican Republic, 1965, with the Soviet justification of the invasion of Czechoslovakia, 1968. See Meeker, 'The Dominican Situation in International Law', 53 *Dep't of State Bull.* (1965) 60; 'Pravda Article Justifying Invasion of Czechoslovakia', 7 *ILM* (1968) 1323. The US justification relied heavily on the OAS, as an international community based on the substantive value of anti-communism; the Soviet justification relied heavily on the Warsaw Pact, as a community based on the substantive value of Marxism-Leninism. Both at least implicitly acknowledged the formal illegality of their actions under the Charter. It should perhaps be noted here that the 'United Nations' originated as such a partial international community: the coalition of forces arrayed against the Axis Powers.

[17] See, e.g., an editorial in the newspaper, *La République*, published a short time after Munich. Under the title, 'From Munich to Our Colonial Empire', the editorial declared: 'Our own Central Europe is the African continent. Our country is too great for quarrels between Germans and Slavs ever-resurgent in the Balkans.' Quoted in Ageron, 'A propos d'une prétendu politique de 'repli impérial' dans la France des années 1938–1939', 12 *Revue d'histoire maghrebine* (1978) 225.

intervention[18] – and the far smaller 'illegal-yet-legitimate' school in response to the invasion of Iraq.[19] In fact, one can divide the recent 'illegal-yet-legitimate' responses in three groups, each with analogies to their historical precursors. Some versions resembled the Munich/Ethiopia method of constructing a pragmatic community of ideologically disparate states, a community which claims to embody the spirit of the formally legal institutions, while bypassing their procedures. Other versions resembled the Cold War Warsaw Pact/NATO method of constructing a partial community grounded in particular substantive values, designed to oppose an ideological adversary. In the case of Kosovo, the question of what kind of alternative community should replace the UN partly depended on individual publicists' attitudes towards Russia: a state seen by some as amenable to pragmatic cooperation, while viewed by others as the potential leader of some vaguely perceived pan-Slavic ideology. Finally, the valorizations of an 'American empire' heard in some US policy-making quarters as the long decade ended, and particularly after September 11, may be viewed as an assertion that the US is the true embodiment of internationalism in our time, however few its allies – or as simply a *repli impérial* in the French style. 'Illegal-yet-legitimate' justifications of the US invasion of Iraq have thus sometimes taken the form of presenting the US as the only effective agency of the true internationalist interest, an interest impeded and betrayed by the majority of the UN, and have sometimes taken the form of presenting US policy as a *repli Américain,* directed at safeguarding primarily the ideals of an American sphere of influence.

A third kind of response to the Fascist and Communist challenges, the *higher law responses,* consisted in attempts to surmount ideological division by hoisting law ever further upwards to achieve a legitimate position above the fray. One can distinguish two strands in these responses, the principled strand and the functionalist strand. The principled variant seeks a set of principles, such as peace or minimal distributive fairness among relevant states, which their proponents portray as transcending deep ideological divides. This variant played an important role in the discussions of 'peaceful change' in the 1930s, in reaction to the fascist/Nazi challenge. Of course, the transcendental principles put forward were historically contingent, to put it mildly. Among the principles of minimal distributive fairness at play in these discussions were notions about a fair distribution of colonial possessions between the colonial 'haves', France and Britain, and the colonial 'have-nots', Germany and Italy.[20]

The second, functionalist, strand seeks to ground the legitimacy of international law in interests that states share by virtue of their common condition *as states.*[21] Functionalist higher-law responses often argue for a long-term perspective. While acknowledging that ideological differences may fracture the international community

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[18] See, e.g., The Independent International Commission on Kosovo, *The Kosovo Report* (2000) 186.

[19] See, e.g., Slaughter, 'Good Reasons for Going Around the U.N.', *International Herald Tribune*, 19 March 2003, available at http://www.wws.princeton.edu/slaughter/Commentary/GoodReasons.pdf.

[20] See, e.g., Leitner, 'Les problèmes généraux du 'Peaceful Change', in *Fédération universitaire internationale, Problèmes du 'Peaceful Change'* (1936) 78; Kunz, 'The Problem of Revision in International Law', 33 *AJIL* (1939) 54.

[21] See, e.g., Lissitzyn, *supra* note 6, at 68–69.

for a while, they assert that the deeper interests that all states share will ultimately assert themselves. The two strands of the higher-law responses, the principled strand and the functionalist strand, are often interwoven in the work of a single author, together bolstering the claim that a legitimate international law can be established despite the appearance of a 'divided world'.[22]

To summarize these three responses to attacks on internationalism's status: where the *purist responses* reassert a pristine, universal international law against a deceitful double, and the *alternative community responses* accept the challenge of a divided world by constructing a partial alternative to the formally universal community, the *higher law responses* seek to raise international law above the divided world and establish a relegitimated, if thinner, internationalism, beyond the superficial fractures of a given historical moment.

I would argue that none of these responses have been particularly persuasive in the past. I would also argue that the danger that their weakness posed to international law did not lie in its supposed need for an unassailable theoretical foundation. Rather, the danger lay in the damage the ideological challenges posed to international law's ability to present itself as a unitary and legitimate authority able to persuasively and dynamically reconfigure its heterogeneous internal elements to meet new local crises. For the Fascist and Communist challenges coupled their systematic opposition with a kind of challenge that the bin Laden-type opposition has not yet pursued, that of internal critique.

3 Coherence

One of the secrets of international law's resilience over the past century has resided in its productive use of the tension between the heterogeneous elements of its doctrinal and institutional toolbox for responding to local conflicts. The elements of this toolbox – sovereignty and self-determination, minority protection and individual rights, local democracy and international tutelage, local and international tribunals, and so on – have different and often incompatible historical and conceptual foundations. Yet, it is precisely the fact that these legal tools do not cohere in any logically necessary fashion that has permitted the best legal innovators to distribute them differently in individual legal regimes, regimes that present themselves as custom-designed for the unique exigencies of particular local conflicts. And as such situations evolve, it is precisely the tensions between the legal tools that make possible the flexibility to redistribute their relative weight to meet changing needs – to reachieve legitimacy through a new and different coherence of the elements. International law's strength in approaching local conflicts thus does not depend on the provision of 'clear mandates'.[23] On the contrary, it depends on complex, heterogeneously composed mandates – and on the presence of an agile and legitimate implementer of those mandates, able to

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[22] See, e.g., Cassesse *supra* note 6, at 123–164.

[23] See *contra Report of the Panel on United Nations Peace Operations* ('the Brahimi Report') (2000), available at http://www.un.org/peace/reports/peace_operations/.

use the conflicts between the elements of the international regime as a resource for responding to changing or previously misunderstood features of the situation.

Nevertheless, the secret of international law's resilience is also its Achilles heel. The relative stability of the contents of this toolbox over the past century represents a potential source of blindness for internationalism insofar as it leads decision-makers to place very different conflicts in similar conceptual frames. Equally dangerously, the heterogeneity of the tools has served the goals of those who seek to subvert both the local internationalist experiments and the system as a whole. The two major historical challenges to legal internationalism, Fascism and Communism, drew much of their strength from internally subverting the prevailing internationalism in particular cases – exploiting the tensions between the elements in local internationalist experiments to destroy the legitimacy of the prevailing internationalism as a whole.

Alongside their broad contempt for the system as a whole, these challenges thus drew much of their resources in particular cases from that very system. They combined external and internal critique, attacks on internationalism's status and attacks on its coherence. For example, the Italian claim to Ethiopia and the German claim to the Sudetenland were justified in terms of some of the core (albeit heterogeneous) concepts of the Versailles settlement – self-determination for some groups, international tutelage for other ('backward') groups, and minority rights for still other groups.[24] As a result, elite opinion-makers in Western Europe, including international lawyers, often found it difficult to respond to these claims without conceding considerable conceptual and even political ground – or, in the words of one contemporary observer, found it difficult to do so 'without belying themselves'.[25] Thus, the Italians criticized the sovereignty of Ethiopia on the grounds that it was just as 'backward' and deserving of tutelage as territories under League Mandate or the colonial rule of the British and French; they claimed that the structure of the Ethiopian state flew in the face of the self-determination or minority rights of the country's non-Amharic peoples; and they claimed that Italian rule would embody the principle of internationalist tutelage. Some prominent liberal international lawyers, including Georges Scelle, found it difficult to defend the sovereignty of Ethiopia in light of these other principles. Having conceded much on the terrain of coherence, they responded on the terrain of status – contending that fascist Italy could not properly represent the international community in the otherwise justified task of placing the country under trusteeship. But the ideological divisions of the 1930s, and the accompanying external attacks on the international system, meant that it was no longer possible to achieve consensus on the identity of the true agents of the international community.

Similar examples can be drawn from the history of Communist challenges to legal internationalism. These included the early anti-colonialism of left-wing Communists in the 1920s, which coupled an internal attack on the *prima facie* racism of the unequal application of self-determination with an external attack on the League of

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[24]   I discuss this at length in 'Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"', 6 *Nordic JIL* (1996) 421.

[25]   Teissonière, 'Faut-il résister aux violents?' 49 *La Paix par le Droit* (1938) 13.

Nations as an 'association of imperialist pirates'.[26] Later examples include Soviet defences of their various unilateral interventions. These defences, which mirrored US justifications of analogous interventions, exploited the tensions between prevailing international norms, and linked this coherence challenge to an assertion about the status of the Warsaw Pact as an alternative international community.[27] Thus, over the course of nearly a century, legal internationalists have been confounded not by totalizing rejections of their system standing alone, but rather by the ability of the challengers to couple their ideological rejection with internal critique.

The strength of such challenges was thus due to the fact that internationalism's resilience has not resided in purist obliviousness, Manichaean divisions between competing international communities, or Herculean attainments of a higher law above partisan conflict. Rather, it has consisted in Legal Realist-style exploitation of contradictoriness and inconsistency as resources that facilitate case-specific complexity and flexibility. The significance of past ideological attacks on the status of internationalism as a whole stemmed from the damage they inflicted on internationalists' authority to persuasively reconfigure their disparate legal concepts in response to changing local conflicts – to establish new legitimacies of coherence. The challengers attacked the particular configuration of international legal elements laid down for particular conflicts by the prevailing international authorities; their external attacks crippled the ability of those authorities to establish new configurations.

Panicked responses to the current crisis in internationalist legitimacy, to the extent that they are provoked solely by the prospect of a new totalizing rejection of the system, are thus misplaced. Current status challenges, such as the Islamicist and US challenges, are likely to have a significant effect on activist internationalism only if the challengers attempt to undermine the system from within as well as from without. Consider, for example, the US administration of Iraq, which lacks status legitimacy in the eyes of most of the world. One could imagine a US occupation authority that was able to overcome its status illegitimacy and achieve a legitimacy of coherence through a skilful deployment of the various elements in the international toolbox for local conflicts. Of course, whether the actual US administration of Iraq will ever be able to achieve legitimacy in this way is, as of this writing, highly questionable.

Beyond the skill and intent of the American administrators, there are two key obstacles. First, the high degree of status illegitimacy of the US occupation makes the actions of the American administrators suspect both locally and internationally. Secondly, the US justification of the invasion of Iraq involved not only an attack on the status of internationalism embodied in the UN, but also – at least in some official pronouncements – a *defiant attack on the coherence* of international norms. The pronouncements I have in mind are those that suggest that the US was rejecting the legitimacy of coherence by denigrating some principles at the expense of others, rather than merely seeking a reconfiguration of their relative weights – in other

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[26]   Quoted in A. Rose, *Surrealism and Communism* (1991) 132.
[27]   See Meeker and Pravda articles, *supra* note 16.

words, making a bid to achieve *legitimacy through defiance*. Bids for legitimacy through defiance frankly seek approval for the boldness of their actions precisely by virtue of the fact that they defy some prevailing norms. Such bids thus may be viewed as seeking a *surplus legitimacy* – attempting to use the very legitimacy-deficit of their actions as a basis for a higher legitimacy.

A brief comparison between justifications of the use of force in Kosovo, 1999, and Iraq, 2003, can illuminate the distinctiveness of bids for legitimacy through defiance. Both uses of force were justified through exploiting the tensions between international legal principles. The principles restricting the use of force stated in the Charter were juxtaposed to principles permitting unilateral uses of force, such as humanitarian intervention and expansive notions of self-defence, purportedly grounded in customary law; the substantive obligations the Security Council imposed on particular states, Yugoslavia and Iraq, were juxtaposed to the Council's refusal to grant enforcement authority to other states. Both Kosovo and Iraq thus implicated conflicts among substantive principles, between treaty and custom, and between substance and procedure.

However, where the Kosovo justifications tended to make the effort to present a competing configuration of the prevailing international requirements, some of the US pronouncements on Iraq tended to denigrate, rather than reconfigure, the elements disfavouring the intervention. NATO pronouncements on Kosovo, for example, tried to show that the intervention represented a legitimate, even if novel, form of cooperation between the UN and NATO. In Bruno Simma's words:

> Indeed, one is immediately struck by the degree to which the efforts of NATO and its member states follow the 'logic' of, and have been expressly linked to, the treatment of the Kosovo crisis by the Security Council. In an address delivered in Bonn on 4 February 1999, US Deputy Secretary of State Strobe Talbott referred to an 'unprecedented and promising degree of synergy' in the sense that the UN and NATO, among other institutions, had 'pooled their energies and strengths on behalf of an urgent common cause'; as to the specific contribution of the UN, he saw this in the fact that 'the UN has lent its political and moral authority to the Kosovo effort'.[28]

Despite the seeming violation of formal legal norms in their accepted configuration, NATO officials attempted to make their actions appear to conform to the logic of the principles as a whole, once their relative authority had been reconfigured. In other words, they tried to present an alternative legitimacy of coherence.

By contrast, many of the US pronouncements prior to the invasion of Iraq frankly declared American intentions to defy the prevailing international legal system. The most overt example of this stance was provided by George W. Bush in declaring that it was the UN that had 'to prove to the world whether it's going to be relevant or whether it's going to be a League of Nations, irrelevant'.[29] Bush thus made an open challenge to the status of the UN, attacking the legitimacy of its identity.

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[28] Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 11. Simma rejects the legal soundness of this position.

[29] Bush, *supra* note 2.

However, his challenge was not limited to its status aspect. Rather, it also focused on the coherence of the system's internal normative elements, frankly rejecting any obligation to accommodate them all. This aspect of the challenge frankly declared American intentions to ignore some prevailing norms, rather than to reconfigure the normative system. In particular, Bush attacked the UN's purported unwillingness to enforce the substantive obligations it had imposed on Iraq, and stressed the importance of the substantive obligations at the expense of the procedural norms for enforcement.

> We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced – the just demands of peace and security will be met – or action will be unavoidable.[30]

Bush was thus asserting that the US would not be engaged in a simple act of flouting the UN, as he might have if he were only attacking the status of the UN. Rather, he announced that the US would be upholding some of its norms at the expense of others – linking his attack on the *status* of the UN, its identity as an 'irrelevant League of Nations', with an attack on the legitimacy of the *coherence* of its norms. And he sought legitimacy for the US action precisely by virtue of its bold willingness to violate certain norms, particularly procedural norms, in order to support others; this was a bid for a surplus legitimacy for brash, taboo-breaking behaviour by means of an attack on both the status and coherence of the international system.

To be sure, this bid for legitimacy through defiance generally failed outside the US and the substantive case for the invasion was based on a mass of false factual assertions. Nevertheless, it offers a clear example of such a bid. It is also important to note that bids for legitimacy through defiance have come from across the political spectrum at various times. There are few people who would not view them sympathetically in at least some circumstances – except perhaps for formalists of the '*pereat mundus, fiat jus!*' school.

In the particular situation of the US in Iraq, however, this bid for legitimacy through defiance has presented serious difficulties for its protagonist. As I have noted, the US lacks international status legitimacy in Iraq due to the failure of its bid to secure support for the invasion through defying the international system. In the years since the invasion, it has tried to achieve a legitimacy of coherence by attempting to show the implementation of widely shared international values in its conduct of the occupation. Yet, the pre-war US attack on the coherence of international norms as well as on the status of international institutions have made its bids for a new legitimacy of coherence very fragile. Having sought a surplus legitimacy for its coherence-defying action in invading Iraq, it has been ill-equipped to seek the legitimacy of coherence in its self-proclaimed role as internationalist administrator of that country. Nor has the actual conduct of the American occupation of Iraq come close to providing the factual basis for such a legitimacy bid.

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[30]   *Ibid.*

4 'Our Law': Producing Unity through Heterogeneity

I have argued that the secret of internationalism's resilience over the past century has resided in its productive use of the tension between the heterogeneous elements of its doctrinal and institutional toolbox for responding to local conflicts. To portray a successful example of the production of legitimacy out of disparate concepts, I turn in this section to an incident from the early days of the UN Mission in Kosovo (UNMIK). It is in such attempts to manage local crises that the alchemy of international coordination of heterogeneous concepts can be seen in action. And yet, it is precisely here, when the alchemy has worked its unifying magic, that international law rediscovers its unsettling historical doubles – internationalist regimes doubled by the word 'protectorate', internationalist administrators doubled by the word 'proconsul'.

The incident to which I turn presents a striking allegory of the dynamics of situational legitimacy, the provisional construction of internationalism in a particular context out of heterogeneous conceptions and practices. This incident was widely reported in the elite Western press, exemplified by this symptomatic account in *Le Monde*:

> 'A new Kosovo is beginning; we have changed the law', declared Mr. Kouchner to the judges and journalists who surrounded him at the meeting. It had been convened, they explain at UNMIK, after a cascade of resignation threats by those who formed the nucleus of the new 'independent and multiethnic' judicial system of Kosovo. A week ago, three judges from Prizren launched the movement. They rejected Section 3 of 'Regulation 1' (signed by Mr. Kouchner on July 25th to define his own powers), which declared that 'The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with [internationally recognized human rights standards].' A campaign was then launched by the KLA against what it interpreted as the maintenance in Kosovo of Yugoslav laws which were, in fact if not always in the text, an instrument of Serb repression in the province. Judges were then subjected to pressures to resign. Nipping this offensive in the bud, Bernard Kouchner apologized before 50 of the judges for having 'insufficiently consulted them, especially before publishing Regulation 1.' Assuring them that his mission is to 'permit the emergence of an autonomous administration', he promised not to take any further decisions without 'involving the people of Kosovo.' A working group, joined by international experts, will draft the law of Kosovo – *'our law, which is neither Serb nor Yugoslav,'* he emphasized. This work will be coordinated with the Council of Europe, which is supposed to present a first 'purge' of existing laws at the end of September. . . . The great majority of judges declared themselves satisfied with the statements of the U.N. 'proconsul' and promised to get to work to rapidly fill the legal void that has prevented the trials – but not the detention – of hundreds of people already arrested by KFOR in Kosovo.[31]

One would have had to invent this story if it hadn't been conveniently reported in the press. This real-life allegory contains all the quandaries of the robust internationalism of the long post-1989 decade. A UN administration established itself in a territory on the basis of a use of force of controversial legality. The appointment of a famous humanitarian as the head of the territorial administration symbolized the

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[31] 'Vers une « loi du Kosovo, » ni serbe ni yougoslave,' *Le Monde,* 17 August 1999 (author's translation, emphasis in the original).

internationalist desire to transmute this questionable force into legitimate law, to absorb power into principle. In accordance with this desire, Kouchner's first act was to attempt this transmutation by establishing a *legal* framework 'to define his own *powers*'. This act was particularly urgent since KFOR, itself already an internationalist transmutation of NATO, had arrested hundreds of people outside of a legal framework. The 'new beginning of Kosovo', declared Kouchner, was not the NATO intervention, but the fact that 'we have changed the law' – a pronouncement that was not an observation of fact, but rather, a bid for the construction of legitimacy.

Yet, the question of what constituted legitimate legal change turned out to be a highly contestable matter. Kouchner appears to have first conceived his task as a matter of legal technique, the establishment of a neutral legal framework to permit the work of his administration to begin. He sought to achieve this goal by declaring that 'law' would now prevail over military force and by subjecting domestic law to the test of international human rights standards. In defining the meaning of 'law' as the law in effect before the start of the exercise of NATO power,[32] he chose the seemingly neutral approach of legal continuity, the protection of acquired rights. The KLA and its allied judges, in response, challenged the notion that the question of a rule of 'law' was simply a technical matter. By asserting that *this* 'law' had a partisan identity, that of Serbian supremacy, they rejected the neutrality of legal continuity. Nor were they satisfied with the purging filter of international standards, seeking, instead, a total rejection of the illegitimate Yugoslav legal source. Indeed, Kouchner's law, which pretended to the neutral identity of impartial technique, became for them a mere tributary of this partisan source.

This kind of attack on internationalist legitimacy may be interpreted as proceeding from an internal critique of the *coherence* of the elements of the Kosovo regime to an external critique of its *identity*. The internal critique was aimed at Kouchner's initial configuration of the famously conflicting elements in the UNMIK mandate, embodied in Resolution 1244's call for: (1) 'the *sovereignty* . . . of Yugoslavia'; (2) '*autonomy* and . . . *self-administration* for Kosovo'; *and* (3) administration by '*international* civil and security presences'.[33] Given the many tensions latent in this multiple mandate, Regulation 1's provision banning legal rules incompatible with Resolution 1244 (in addition to those that conflicted with international human rights standards) provided ample room for internal critique from almost any perspective. The Albanian opposition rejected the version of coherence among Resolution 1244's elements embodied in Regulation 1's stance of technical legal neutrality. It accompanied this critique of Regulation's 1 bid for a legitimacy of coherence with an alternative bid for a legitimacy of defiance – rejecting the notion that the principle of Yugoslav sovereignty

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[32] The relevant portion of Regulation 1 reads: 'The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with [internationally recognized human rights standards], the fulfilment of the mandate given to UNMIK under United Nations Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK'. UNMIK/REG/1999/1 Section 3 (25 July 1999).

[33] UN SC Res. 1244, S/RES/1244 (1999).

should play any role at all. Finally, it implicitly delegitimated Kouchner's internation-alist status as a whole, accusing it of partiality, demoting him from his identity above the fray to that of merely one player in the conflict.

While one may only imagine his private frustration, Kouchner's admirable public recovery from this snafu shows that he understood precisely what was involved. Without internationalist status legitimacy, the delicate work of coordination among conflicting groups, let alone legal concepts, would be impossible. He immediately set about, therefore, to ground his authority in a different concept of legitimacy than the one with which he began his tenure. By reshaping his internationalist identity, he sought to relegitimate his status, thus making it possible for him to proceed with the work of reconfiguring the elements of the internationalist regime for Kosovo and make a new bid for a legitimacy of coherence.

Gathering the Albanian judges, he made an explicit appeal for an alliance with them. This appeal involved a different identity for international authority – no longer that of neutral technocracy, but rather, that of an ally, however asymmetri-cal, with a deserving population. He apologized for his failure to consult and prom-ised henceforth to 'involve the people' – hardly necessary measures when he had conceived the matter at hand as merely technical. He encapsulated his new stance in his declaration that the law to be drafted would be '*our law, which is neither Serb nor Yugoslav*'.

A thought-provoking and ambivalent phrase. For if the 'our' in 'our law' referred to the pure universality of internationalism (the royal 'our'), one would have rather expected the rest of the phrase to read 'neither Serb nor Albanian' – i.e., it would be a neutral law, not ethnically marked. By contrast, 'neither Serb nor Yugoslav' might suggest that it would be Albanian. This would suggest that Kouchner was abandoning a bid for a universalist internationalism in favour of a partial com-munity that frankly acknowledged its partiality. Yet, if Kouchner were purporting to be speaking solely as the representative of the Albanians, then the 'our' would have been sufficient – the 'neither . . . nor' phrase would seem a bit like protesting too much. In fact, the very structure of the phrase 'neither . . . nor' evoked imparti-ality, even though the terms that followed those conjunctions partly confounded that evocation.

The ambivalences of his phrase, I would argue, suggest that Kouchner sought to achieve his legitimacy by doing something other than asserting *either* neutrality *or* partisan identity. Rather, Kouchner's 'our' strove to effect a complex alliance of two seemingly conflicting sources of legitimacy, that of overarching international authority and that of Albanian nationalism. He sought to achieve his legitimacy through a paradoxical alliance between the two – an internationalism that wagers its legitimacy on its ability to respond to the deepest needs of nationalist partisans.[34]

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[34]   I have explored this 'alliance' in detail elsewhere. See, e.g., Berman, '"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harv. L. Rev.* (1993) 1792.

At least in this crisis, Kouchner apparently succeeded. By reshaping the identity of his internationalism, he made credible his pledge to reconfigure the conflicting internal elements of the legal regime called for by Resolution 1244. The mass resignation of the judges was averted.

Kouchner eventually repealed Regulation 1, replacing it with Regulation 24. The new Regulation provided that Kosovo would be governed by the law in effect before 22 March 1989 – i.e., the law that prevailed during the period of Kosovo's autonomy within Serbia. This 1989 law cannot be said to be 'neither Serb nor Yugoslav' in a pure sense. Regulation 24 can, however, be seen as a reconfiguration of the internally heterogeneous mandate of Resolution 1244. 'Our law', as embodied in Regulation 24, would be neither solely Yugoslav nor solely Albanian – nor solely international. Rather, it would be a new configuration of conflicting elements, a new appeal for legitimacy made to the relevant publics.

To be sure, as Kouchner discovered, identifying the relevant publics may be a tricky matter to achieve in advance. Kouchner may have thought his public was a community of lawyers, perhaps international, perhaps Yugoslav, perhaps Kosovar. He may have thought his public was the UNMIK staff or the NGO world. He discovered, through its resistance, that a key relevant public was the organized sphere of Kosovar nationalism.

Conversely, as this example shows, the relevant public may only discover itself through finding itself addressed by an act of internationalist power. One might imagine that some of the Albanian judges may have shared a technocratic idea about the rule of law until finding themselves jolted by the reinstatement of Yugoslav law – or by finding themselves jolted by pressure from the KLA. Finally, internationalist actors themselves may only discover their full identity through this dynamic. Kouchner was undoubtedly more surprised than anyone to discover his identity as a Serb puppet (that is, in the eyes of the KLA) and to be obliged to reconstruct his identity as an ally (however provisional and asymmetrical) of Albanian nationalism.

Internationalist actors like Kouchner must, therefore, necessarily take the risk of appealing for legitimacy without a guarantee of success or even certainty about the addressees of their appeals. And with each new fragile configuration of conflicting elements, the cycle can always begin again, as new challenges unsettle the provisional equilibrium among the regime's elements. Legitimacy must be continually reachieved – and each new achievement will be a new configuration of those elements.

Finally, at the very hour of his success, Kouchner managed to evoke a different kind of legitimacy-trouble. For in reporting the result of this speech, *Le Monde* tells us that the '*great majority of judges declared themselves satisfied with the statements of the U.N. "proconsul"*.' Try as he might to ally himself with the Albanians, Kouchner could not shake off another doubling of his role as legitimate international authority: this time not by the image of him as a Yugoslav proxy, but as an imperial 'proconsul'. The term 'proconsul' may be one the Albanians would have used or it may reflect *Le Monde's* elite irony about internationalist idealism. But it suggests the impossibility of any definitive achievement of internationalist legitimacy.

International humanitarian, Albanian ally, or imperial 'proconsul'? Kouchner's variable ability to govern Kosovo, the changing measure of his legitimacy, depended on his ability to recognize these doublings of legitimacy and on his ability to shift among their attendant roles.

The 'Our Law' allegory presents the construction of legitimacy out of the shifts between its conflicting identities and elements diachronically, in terms of a dynamic unfolding. The UNMIK-promulgated Constitution of Kosovo (2001),[35] by contrast, presents this kind of construction in the form of a synchronic legal structure. This Constitution follows in the great tradition of internationalist attempts to resolve nationalist conflict through complex legal experiments, a tradition whose illustrious precursors include the interwar regimes for Upper Silesia, Danzig and the Saar, the Palestine Partition Resolution of 1947, and the Washington and Dayton Accords for Bosnia in the 1990s – composite regimes, at once local and international, designed for the pacification of seemingly intractable conflicts.

Among the features shared by these experiments, I would like to designate two here. First, they create a legal space for themselves by bracketing the question of sovereignty, either by explicitly deferring the question to a later time (the Saar and Kosovo), superimposing a unified, experimental regime on top of sovereign divisions (Upper Silesia, Palestine), or creating a novel a-sovereign entity (Danzig).[36] Secondly, they seek to achieve their goals of resolving nationalist conflict by juxtaposing, in a single legal regime, elements that seem to be incompatible, or at least that stand in tension with each other. The competing elements may include partition (between sovereigns or ethnic units) and unity (economic or political), minority rights and individual rights, universal suffrage and representation based on ethnic identity, local judiciary and on-site international or mixed courts.

The tension among the elements that compose such regimes arises from the implicit reference each makes to distinct notions of personal and collective identity, as well as distinct ideas about political organization. At least since the end of World War I, such regimes have wagered their legitimacy on the notion that a high level of legal complexity is needed to match the level of the complexity of the local conflict. Legitimacy would be attained when such complex and heterogeneous constructions could prove their ability both to pacify nationalist conflict and to provide all nationalist factions with a sense that their deepest longings have been satisfied. The legitimacy of any particular such regime, their proponents have contended, would emerge out of a suitable configuration of the conflicting concepts and institutions in the international toolbox. Thus, paradoxically, the advocates of such regimes have believed that *only a configuration of conflicting legal elements can achieve legitimacy in such conflicts.* In my studies of the interwar period,[37] I have used the phrase 'modernist faith' to describe

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[35]   'Constitutional Framework for Provisional Self-Government', UNMIK/REG/2001/9 (15 May 2001), available at http://www.unmikonline.org/constframework.htm.

[36]   See Berman, *supra* note 34, at 1874–1897.

[37]   See *ibid.*. See also Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction', in M. Loriaux and C. Lynch (eds), *Law and Moral Action in World Politics* (1999).

this paradoxical set of beliefs – a faith, now over 83 years old, rightly perceived by challengers such as bin Laden as a rival to their own faith. The structure of modernist faith shows the importance of the two dimensions of legitimacy I have highlighted thus far: (1) a situational legitimacy of coherence, i.e., recognition by relevant publics that regimes embodying particular configurations of the conflicting elements in the international toolbox constitute a good response to local exigencies; and (2) status legitimacy, i.e., recognition by relevant publics of the good title to 'internationalism' of the authority constructing and administering such regimes.

Following in this tradition, the Kosovo Constitution rests on the suspension of the question of sovereignty. It combines a variety of heterogeneous elements, which implicitly refer to distinct, and potentially conflicting, ideas of identity. Such elements include individual human rights and a variety of institutionalizations of the rights of 'Communities', defined by ethnic, religious or linguistic identity.[38] Such 'Community' rights include very robust versions of the kinds of rights originally developed to protect 'minorities' in a variety of international instruments since 1919. In relation to the long historical debate about whether minority rights should focus more on groups or individuals,[39] the Kosovo Constitution opts in several specific ways for group-centred provisions for the region's 'Communities'. For example, rather than simply providing for non-interference with group educational institutions, it mandates public funding of 'Community' schools. More strikingly, the Constitution reserves seats for non-Albanians in the Assembly.[40] It also provides for a complicated procedure, related to provisions in the Bosnia accords, whereby members of a 'Community' in the Assembly may temporarily block legislation that they declare violates the 'vital interests of the Community'.[41] The Constitution declares membership in a Community to be a wholly voluntary matter and non-membership to bring no 'disadvantage'.[42] Yet, it is clear from these provisions that non-participation in Communities could 'disadvantage' a Kosovar in the distribution of economic and political power – just one example of how the individualist and 'Community' strands in the document stand in very concrete tension.

The Constitution's judicial framework also juxtaposes ethnic-based and internationalist conceptions of a proper judiciary. The Constitution provides for both international and local judges.[43] The identity of the local judges should 'reflect the diversity of the people of Kosovo'.[44] The Constitution leaves latitude in the hands of the Special

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[38]   Compare Chapters 3 and 4 of the Kosovo 'Constitutional Framework,' *supra* note 35.

[39]   See, e.g., O. Janowsky, *The Jews and Minority Rights, 1898–1919* (1933). For more recent examples of such divergent views on minority rights, compare the relatively individual-rights focus of the European Framework Convention on National Minorities, reprinted in 34 ILM (1995) 351, with the more group-focused approach of the prior Council of Europe's Parliamentary Assembly 'Recommendation 1201, On an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights', reprinted in 14 *Human Rights L J* (1993) 144.

[40]   See 'Constitutional Framework,' *supra* note 35, Chapter 9.1.3.

[41]   See *ibid.*, Chapter 9.1.39.

[42]   *Ibid.*, Chapter 4.2.

[43]   *Ibid.*, Chapter 9.4.7.

[44]   *Ibid.*

Representative of the Secretary General to determine the number of international judges and the criteria for their appointment.[45] The balance between the competing elements in these provisions leaves room for reconfiguration aimed at achieving legitimacy among the various relevant constituencies. Such reconfiguration has occurred a number of times, including the incident with the Albanian judges described in detail above. In a very different vein, a November 2001 Yugoslav-UNMIK agreement[46] provided for increasing the number of international judges (especially for 'inter-ethnic' cases) and of ethnic Serb judges.

In the history of such local, yet international, regimes, the unity of the complex legal construction may have an on-site human or institutional embodiment, such as the Governing Commission of the Saar. In other regimes, such as Upper Silesia, the unity may simply be intended to emerge from the relation between the elements, often ultimately placed under the distant authority of the Councils of the League or of the UN. In either case, the unity of the regime as a whole may stand in tension with the constitutive parts. In Kosovo, supreme authority is vested in the Special Representative of the Secretary General, whose authority is not 'affect[ed] or diminish[ed]'[47] by the constitutionally established institutions – which are nonetheless intended to be precisely those of '*self*-government'.

Despite this ultimate tension, the entire document, with all its heterogeneities, expresses the classic modernist faith: the composite regime seeks to respond to 'the legitimate aspirations of the people of Kosovo to live in freedom, in peace, and in friendly relations with other people in the region'. The legitimacy of any particular regime of this sort depends on its ability to persuade others, both the conflicting local populations and the international community, of the validity of modernist faith in its particular configuration of conflicting principles – and on its ability to emulate Kouchner in a flexible willingness to reconfigure them if necessary. This ability depends on the agility of the embodiment of international authority in the particular situation, as well as on the status legitimacy of internationalism in the world generally.

Nevertheless, as we saw in the 'Our Law' allegory, even at the hour of the success of such endeavours, the entire complex structure remains haunted by the spectre of those disconcerting words: protectorate, proconsul. The shrewd role shifts of Kouchner, the skilful balancing of the Constitution – all this hard-won legitimacy is unable to shake off its disconcerting double. In the next section of this paper, I turn to face this double more directly.

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[45] *Ibid.* The criteria were adumbrated in provisions such as Regulation No. 2001/2 Amending Unmik Regulation No. 2000/6, 'On the Appointment and Removal from Office of International Judges and International Prosecutors', 12 Jan. 2001, available at http://www.unmikonline.org/regulations/2001/reg02-01.html.

[46] See 'Unmik – Fry Common Document', 5 Nov. 2001, available at http://www.srbija.sr.gov.yu/razno/pretrazivanje.php?q=unmik-fry+common+document.

[47] 'Constitutional Framework', *supra* note 35, Chapter 12.

5 Coming to Terms with the Past: The Spectre of Fez

On 30 March 1912, the French Republic and the Moroccan Sultan concluded the Treaty of Fez, with the goal of 'establishing a well-regulated regime' in Morocco.[48] The treaty provided for the military occupation of Morocco by France.[49] The 'new regime' envisioned by the treaty would include 'administrative, judicial, educational, economic, financial, and military reforms which the French Government shall judge useful to introduce on Moroccan territory'.[50] This regime would 'safeguard the religious situation, the traditional respect and prestige of the Sultan, and the exercise of the Muslim religion and religious institutions'.[51] France also agreed 'to provide constant support to his Cherifian Majesty against any danger which might threaten his person or his throne or which might compromise the tranquility of his State'.[52] Finally, the treaty provided that France would 'be represented before his Cherifian Majesty by a Resident General Commissioner, in whom shall be vested all the powers of the Republic in Morocco, and who shall safeguard the execution of the present agreement'.[53] In short: France established a protectorate over Morocco.

On 10 June 1999, the Security Council passed Resolution 1244 relating to Kosovo.[54] In the resolution, the Security Council 'b[ore] in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security'.[55] It declared itself '[d]etermined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes'.[56] The resolution provided for an international military presence and civil administration in Kosovo.[57] The goals of this international presence in Kosovo would be overseeing and re-establishing basic governmental functions, humanitarian assistance, democratization, institution-building, and economic reconstruction. Finally, the resolution provided for the appointment of 'a Special Representative to control the implementation of the international civil presence, and further request[ed] the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence'.[58] One could easily say that, in short, the resolution provided for the establishment of a protectorate over Kosovo. Indeed, the irony and quotation marks which attended

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[48] 'Traité de Protectorat du 30 Mars 1912', Préamble, reprinted in *Nationality Decrees Case*, PCIJ, Series C, Annex 8 (1923), at 343.

[49] *Ibid.*, Art. 2.

[50] *Ibid.* at Art. 1.

[51] *Ibid.*

[52] *Ibid.*, Art. 3.

[53] *Ibid.*, Art. 5.

[54] UN SC Res. 1244, S/RES/1244 (1999).

[55] *Ibid.*, Preamble.

[56] *Ibid.*

[57] *Ibid.*, paras 7–11.

[58] *Ibid.*, para. 6.

the use of the word 'protectorate' in the first year of debate about UNMIK gradually disappeared as time went on.

What is the relationship between these two documents? We could list their similarities. These would include: (a) *the recitation of international ideals* – in Fez, that of a 'well-regulated regime'; in Resolution 1244, that of international peace and security; (b) *military occupation* – in Fez, by France; in Resolution 1244, by the international security presence; (c) *the bracketing of sovereignty* – in Fez, by maintaining the nominal sovereignty of the Moroccan Sultan; in Resolution 1244, that of Yugoslavia; (d) *far-reaching internal reforms undertaken by the Protector* – in Fez, administrative, educational, economic; in Resolution 1244, adminstrative economic, political, civil; (e) *the explicit provisions for human rights* – in Fez, in the form of Muslim religious liberty; in Resolution 1244, in the form of broad human rights; (f) *ambiguity about the ultimate goal of the protectorate* – in Fez, between annexation by France and ultimate independence for a modernized Moroccan state; in Resolution 1244, between the restoration of Yugoslav sovereignty and ultimate independence for Kosovo; and (g) *the vesting of supreme power in a representative of the Protector* – in Fez, the French Resident-General; in Resolution 1244, the Special Representative of the Secretary-General.[59]

But we could also list their differences. Such differences would in part reside in the source of the legitimacy of the documents, in particular their relative position on the axes of sovereign consent and international community authority. On the one hand, the protectorate instrument is in the form of a treaty, a nominally consensual document, while the Security Council resolution is in the form of a mandatory resolution under Chapter VII. Yet it is important not to overstate the starkness of this contrast. While Resolution 1244 is in the form of a Chapter VII resolution, it also recites the consent by Yugoslavia to the principles contained in the G-8 document of May 1999 and the EU document of 2 June 1999.[60] Conversely, while the protectorate document is in the form of a treaty, it was the culmination of steady military and political encroachment by France.

Moreover, both documents seek to ground the legitimacy of their entire structure in a set of substantive international values. The French protectorate treaty recites the principles of what we would today call 'good governance' as the goal of the treaty; moreover, the French elsewhere described the 'lofty aims of the protectorate, . . . [as] above all a work of civilization, . . . a matter in which all [nations] have an equal interest'[61] – the functional historical equivalent to the more familiar recitation in 1244 of 'the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security'.

If we cannot read unequivocal differences between the two regimes off the text of their founding documents, we probably need to look elsewhere. That elsewhere

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[59]   It should be noted that just as regimes such as UNMIK find themselves doubled by the comparison to protectorates, so protectorates found themselves doubled by comparisons to colonies.

[60]   Res. 1244, *supra* note 54, Preamble.

[61]   'Final Conclusions of the French Government', *Nationality Decrees Case*, PCIJ, Series C, No. 2 (1923), at 242.

would include the political intent and historical context in which the two regimes were established. We would need to compare the political and economic motivations for the French occupation of Morocco with those animating the NATO and UN occupation of Kosovo. We would need to compare the substantive merit of the respective claims of France and the Security Council to represent the international community. We would need to look at the broader geopolitical context, particularly the outside powers that France and NATO were trying to ward off from the two regions. And we might, in the inevitably messy results of such multiple inquiries, arrive at a persuasive judgment of relative legitimacy.

But this judgment would not reside in a clear characterization of UNMIK as purely law and the French Protectorate as purely politics – a judgment that could only be anachronistic. France justified its action on legal grounds that were relatively plausible in 1912, just as the UN justified its actions on legal grounds that were relatively plausible in 1999. This is not to say that their relative legal plausibility, even in their respective contexts, was equivalent. But neither could we confidently assert *a priori*, without detailed comparative analysis, that one regime would come out ahead.

Bracketing for a moment the formal legal issues, normative judgment of international regimes should depend on an evaluation of the conception of the affected population that animates them. In the interwar context, I have argued that international lawyers viewed the nationalism to which their legal innovations responded as a 'primitive' force to be celebrated on account of its energy, and to be domesticated on account of its dangerousness.[62] This international legal 'primitivism', I argued, embodied the same kind of fear and fascination exerted on many contemporaneous cultural innovators by fantasies of racial, cultural, geographical and sexual 'Others.' Much of modernist creativity, across a range of domains – including art, music, literature and architecture, as well as law – emerged from attempts to link these 'primitives' with the most advanced technical innovations of the day.

The modernists' 'primitivist' fantasies, of course, only had the most dubious relationship with reality – except, perhaps, when these fantasies were internalized or performed by the modernists' 'Others'. Still, these fantasies were often an improvement on colonial conceptions of the 'native'. Often, though not always. In any case, though this topic would require another article, a comparative evaluation of regimes such as UNMIK would have to look carefully at the conception of the affected populations animating them – how they are imagined politically, economically, culturally, sexually, and how that imagination may be embedded in the details of the legal regime.

6 Legitimation Effects: Four Hypotheses

I conclude with four hypotheses about the effect on legitimacy of the seemingly unavoidable evocation by regimes such as UNMIK of the spectres of protectorates and

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[62] See, e.g., Berman, *supra* note 34.

colonies: the *delegitimizing effects hypothesis,* the *legitimizing effects hypothesis,* the *cautionary effects hypothesis,* and the *strategic effects hypothesis.*

The *delegitimizing effects hypothesis* is that evocation of the colonial past has the effect of an unmasking. In this view, audacious experiments like UNMIK purport to implement the most advanced internationalist principles, but actually represent the continuation or resurrection of colonial power in contemporary form. The claim of such regimes to have thoroughly pressed power into the service of humanitarianism would simply be an ideological cover for the reverse process. This kind of effect on legitimacy would primarily concern the status of the international regime.

By contrast, the *legitimizing effects hypothesis* is that this evocation actually serves to bolster the claims of these legal regimes. In this view, it is precisely their ability to evoke the colonial past and *to demonstrate their difference from it* that gives these regimes their distinctive legitimacy. To the extent that similarities exist, the regimes' advocates could contend, they stem from structural exigencies arising from any administration of territory by the power of an outside authority. But, the advocates would contend, it is the humanitarian manner in which such power is exercised and the goals for which it is exercised that demonstrate the radical difference of such regimes from their colonial counterparts – a demonstration of difference whose persuasive 'edge' depends precisely on the structural similarities. The evocation of colonialism would pose a high-stakes challenge to the regime to persuasively establish this differentiation. The achievement of such a legitimizing effect would depend on the ability of the particular international regime to demonstrate that the coherence of its elements proves its status legitimacy as a whole – in other words, that its actual practices work in such a way as to demonstrate that the regime as a whole is really 'internationalist' and not 'colonialist'.

The *cautionary effects hypothesis* looks at the association with colonialism as a useful tool in the hands of friendly critics of these regimes – for example, sympathetic, but wary, human rights NGOs. The association with colonialism would be a readily available and widely comprehensible criticism that can be made every time the regime threatens to step over the legitimate bounds of its powers. Such critics would be deploying the critique of status legitimacy strategically as a pressuring device to lobby for a reconfiguration of the coherence of the regime's elements.

The *strategic effects hypothesis* combines the first three. Like the *cautionary effects hypothesis,* it sees the association with colonialism as a useful tool. But this hypothesis would extend the range of players in whose hands the tool might be useful. There might be times, for example, when the affected population may wish to deploy the colonial association's delegitimizing effect not because they wish to terminate the regime, but rather, because they are engaged in a particular struggle over a particular issue. There might even be times when the international authority might wish to affirm the association with colonialism in a threatening manner, in order to command respect from a variety of bad actors in the region who may be impervious to gentler, more legitimate, arguments about the common good. (After all, if military force can sometimes be appropriate, psychological force might also be.) And so on.

From the perspective of the situational, political-historical approach to legitimacy taken in this article, each of these uses of the evocation of the colonial past might be appropriate depending on the particularities of a given international regime and its relation to the local conflict upon which it is deployed. Some regimes might, in fact, be illegitimate exercises of power; others might be noble ventures; still others might need to be kept on their toes by a range of vigilant actors. The legitimacy of neither the status nor the coherence of prevailing forms of internationalism should ever be taken for granted. Legitimacy, especially of the purported composites of power and idealism that have marked the most robust internationalism of the past century, can only ever be – and should only ever be – a provisional achievement, an achievement arrived at through internationalism's wrestling with its doubles, be they ideological adversaries, heterogeneous elements in local conflicts, or the spectres of its own unsavoury past.