

9-1-2011

Hard Versus Soft Law In International Security

Gregory C. Shaffer

University of Minnesota Law School, shaffer@umn.edu

Mark A. Pollack

Temple University, mark.pollack@temple.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>



Part of the [International Law Commons](#)

Recommended Citation

Gregory C. Shaffer and Mark A. Pollack, *Hard Versus Soft Law In International Security*, 52 B.C.L. Rev. 1147 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss4/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

HARD VERSUS SOFT LAW IN INTERNATIONAL SECURITY

GREGORY C. SHAFFER*

MARK A. POLLACK**

Abstract: The use and choice of hard and soft law in international governance has been the subject of ever-increasing scholarly interest. This law and social science literature has primarily assessed the relative strengths and weaknesses of hard- and soft-law instruments as *alternatives* for international governance, as well as how these instruments can be combined as mutually reinforcing *complements* to lead to greater international cooperation over time. By contrast, we argue that under certain conditions, hard and soft law can and do operate as *antagonists*. In short, states and non-state actors increasingly use soft law not to “progressively develop” existing hard law, but to undermine it. In our previous scholarship we have demonstrated this antagonistic interaction of hard and soft law in the economic realm, where the international trade system often interacts in antagonistic ways with related areas of international environmental and cultural law. In this Article, we look beyond economic law, examining the interaction of hard and soft legal instruments with respect to two fundamental questions of international security law: (1) the legality of the threat or use of nuclear weapons, and (2) the legality of the use of force in humanitarian intervention under the “responsibility to protect” doctrine. In both cases, states and non-state actors have employed hard and soft law, not as complements in a progressive process of international legal development, but as antagonists, with soft-law pronouncements being used to undermine long-standing hard-law norms. In both cases, the result has been to obscure, rather than to clarify and elaborate, the most fundamental norms of the international legal system.

INTRODUCTION

The use and choice of hard and soft law in international governance has been the subject of ever-increasing scholarly interest. This law

© 2011, Gregory C. Shaffer & Mark A. Pollack. We thank Alexander Bellamy, Tim Büthe, Gareth Evans, Timothy Meyer, Fionnuala Ni Aolain, and Thomas Weiss for their comments, and Mary Rumsey for her research assistance. All errors, of course, remain our own.

* Melvin C. Steen Professor of Law, University of Minnesota Law School.

** Professor of Political Science and Jean Monnet Chair, Temple University.

and social science literature primarily assesses the relative functional attributes and deficiencies of hard- and soft-law instruments as *alternatives* for international governance, as well as how these instruments can be combined as mutually reinforcing *complements* to lead to greater international cooperation over time.¹ By contrast, we have argued elsewhere that hard and soft law can operate, under certain conditions, not only as alternatives and complements, but also as *antagonists*, in two senses.² First, from a legal perspective, hard and soft legal norms can be antagonistic in a conflict-of-laws sense; that is, a proliferation of legal norms can and often do lead to inconsistencies and conflicts among norms in the international legal order.³ Second, from a political perspective, states and non-state actors can strategically create and deploy hard and soft legal instruments to attempt to undermine, change, and reorient existing international law.⁴ The primary reason that hard and soft law sometimes interact as antagonists and not complements is because of the conflicting distributive implications of law and legal change for states, and in particular (although not only) among powerful states.

In these situations of conflict, the interaction of hard and soft law can affect the purported advantages and nature of international hard and soft law as conventionally depicted. Specifically, the antagonistic interaction of hard and soft law can lead to the softening of hard law—that is, it can become less clear and precise in its meaning, thus reducing legal certainty and predictability. Stated differently, new soft law not only elaborates and fills out existing hard law in a complementary manner as typically depicted,⁵ but can be used strategically to undermine it.

In parallel, such conflict can lead to strategic hard bargaining within soft-law regimes, thus upsetting their purported advantages of consensus building through information sharing, deliberation, and persuasion. The existing literature has stressed how soft-law regimes offer advantages over hard-law regimes in that they afford greater flexibility,

¹ See, e.g., Nicholas Bane, *Hard and Soft Law in International Institutions: Complements, Not Alternatives*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 347, 350–51 (John J. Kirton & Michael J. Trebilcock eds., 2004) [hereinafter *HARD CHOICES*]; C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT'L & COMP. L.Q.* 850, 856–59 (1989).

² Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 *MINN. L. REV.* 706, 708 (2010).

³ *Id.* at 746.

⁴ *Id.*

⁵ See *infra* notes 97–108 and accompanying text.

experimentation, and deliberative exchange regarding alternative proposals to address policy challenges.⁶ Yet the processes within these regimes may become sclerotic where advocates of new soft law aim to undermine and reorient existing hard law. It is not that soft law simply becomes hardened in the sense of becoming legally binding, although that is often the aim of its proponents. Rather, soft-law processes may become beset by hard, strategic bargaining, thus undermining deliberation, which in turn diminishes the prospects for cooperative outcomes through persuasion and learning—the attributes of soft law processes.

In our previous work, we sought to understand the antagonistic interaction of hard and soft law in the area of international economic law, in particular where international trade law overlaps with that of other substantive regimes.⁷ Many of these areas involve situations in which a hard-law international trading system overlaps and interacts in complex ways with other softer regimes governing issues such as environmental protection, food safety, public health, and cultural heritage. Specifically, we showed how states have employed hard and soft law systematically as antagonists in issue areas such as the regulation of genetically modified foods and crops, the protection of intellectual property rights, and the protection of cultural diversity.

One potential objection to our previous work is that we draw our evidence for the antagonistic interaction of hard and soft law almost entirely from the realm of “low” politics (or “trade-and” issues), which international relations scholars often regard as being most favorable for international law and cooperation.⁸ In this Article, we assess whether our framework and the hypotheses derived from it are applicable to other situations in which actors seek to use international law strategically to advance their interests.

This Article thus formulates and tests four hypotheses about the choice and interaction of hard and soft law in the very different, “high politics” realm of international security. Specifically, we examine the interaction of hard and soft legal instruments with respect to two major questions of international security law, that of: (1) the legality of the

⁶ See *infra* notes 79–96 and accompanying text.

⁷ See generally Shaffer & Pollack, *supra* note 2.

⁸ See, e.g., Stanley Hoffmann, *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*, 95 DAEDALUS 862, 874, 882, 900–01 (1966). For a good discussion of the high-low distinction in international relations theory, see JENNIFER STERLING-FOLKER, THEORIES OF INTERNATIONAL COOPERATION AND THE PRIMACY OF ANARCHY 243–44 nn.13–16 (2002).

threat or use of nuclear weapons, and (2) the legality of the use of force in humanitarian intervention under the “responsibility to protect” doctrine. Although the specifics of these cases, the issues raised, and the key actors vary substantially from economic regulation (or “low politics”) cases, the core elements of our framework—the strategic use and resulting antagonistic interaction of hard and soft legal provisions—are present in the area of international security law as well.

Part I presents our core theoretical arguments regarding the use of hard and soft law as alternatives, complements, and antagonists.⁹ It begins with a brief overview of the turn from customary international law to treaties and other written instruments in Section I.A, noting the gradual codification and “progressive development” of international law as articulated in the United Nations (UN) Charter.¹⁰ One can usefully characterize the resulting instruments as “hard” or “soft” in terms of different dimensions. In Section I.B, we then examine critically the leading definitions of hard and soft law, recognizing the current rift in the scholarship on this question.¹¹ Rather than focusing exclusively on the binding or nonbinding nature of an instrument, we instead adopt a nuanced view of an instrument’s hard or soft properties along the additional dimensions of precision and enforceability via a third-party decision maker. Section I.C next presents the existing literature regarding the relative advantages of hard and soft law as alternatives, and the ways in which hard- and soft-law instruments interact as complements in the progressive development of international law.¹² It then explains our argument regarding the scope conditions under which hard and soft law interact as antagonists rather than as complements, and concludes in Section I.D by setting forth four hypotheses for assessment in the area of international security law.¹³

Part II turns to our first international security case, the decades-long dispute over the legality of the use, or threat of use, of nuclear weapons.¹⁴ Nuclear powers including the United States, the United Kingdom, and the Soviet Union fostered a hard-law legal regime in the postwar period that placed some restrictions on the development, testing, deployment, and proliferation of nuclear weapons, but did not question the legality of their possession, threat, or use by existing nu-

⁹ See *infra* notes 25–193 and accompanying text.

¹⁰ See *infra* notes 25–58 and accompanying text.

¹¹ See *infra* notes 59–74 and accompanying text.

¹² See *infra* notes 75–154 and accompanying text.

¹³ See *infra* notes 155–193 and accompanying text.

¹⁴ See *infra* notes 194–325 and accompanying text.

clear weapons states.¹⁵ From the 1970s, however, a coalition of nonnuclear states and nongovernmental organizations (NGOs) challenged this body of hard law, seeking to undermine existing law through the use, if available, of hard-law conventions and, failing that, of soft-law instruments, including a long series of General Assembly (“GA”) resolutions,¹⁶ as well as a General Assembly request for an advisory opinion from the International Court of Justice on the legality of the use of nuclear weapons.¹⁷ In this case, states and non-state actors deployed soft-law provisions not to elaborate or clarify existing hard law, but rather in a deliberate effort to undermine and change existing international law in fundamental ways.

Part III examines a second security case, namely the debate over humanitarian intervention and the “responsibility to protect” individuals from harm suffered at the hands of their own governments.¹⁸ Here again, an existing body of hard law, including, most notably, provisions of the UN Charter, provided a nearly absolute defense of national sovereignty, placing legal limits on the right of the international community to intervene in states’ internal affairs.¹⁹ Faced with a growing series of humanitarian crises in the 1990s, culminating with the bitterly disputed 1999 North American Treaty Organization (NATO) intervention in Kosovo, a coalition of Western states, NGOs, and the UN Secretary General, began a decade-long campaign in various soft-law fora to develop new principles and new criteria justifying humanitarian intervention through a responsibility to protect doctrine.²⁰ These fora included a series of international committees and a soft-law General Assembly resolution adopted as part of the 2005 UN summit meeting to commemorate the organization’s sixtieth anniversary. Although this case involved very different coalitions of contending states and non-state actors, all of these actors engaged in the strategic and antagonistic use of hard and soft law.

The results of both case studies strongly support our hypotheses about the antagonistic interaction of hard and soft law. Such interaction emerges as a generic feature of international security lawmaking as well as international economic regulation. In a world characterized by multiple international fora, the traditional narrative of hard and soft

¹⁵ See *infra* notes 195–218 and accompanying text.

¹⁶ See *infra* notes 219–220 and accompanying text.

¹⁷ See *infra* notes 234–258 and accompanying text.

¹⁸ See *infra* notes 326–452 and accompanying text.

¹⁹ See *infra* notes 326–358 and accompanying text.

²⁰ See *infra* notes 359–408 and accompanying text.

law as complements or alternatives does not tell the whole story. Rather, in both the economic and security spheres, actors deploy hard and soft international legal instruments in light of their perceived interests and the distributive consequences at stake. Whether the antagonistic interaction of hard and soft law is normatively desirable or undesirable depends both on one's substantive values with respect to the issues in dispute, and on the value one assigns to uniformity or pluralism in the international legal order. Regardless, it is clear that the strategic use of hard and soft law has profound implications for the international legal order.

I. THEORETICAL FRAMEWORK

This Part begins by tracing the historical origins of hard and soft law and their role in the development of international law.²¹ It then proceeds to further define and clarify the terms hard law and soft law, addressing the current divide in the existing scholarship.²² Rather than adopting a binary definition of hard and soft law as binding or non-binding, we employ a more nuanced social-science approach, considering instead the manners in which instruments can be harder or softer along a number of different dimensions. Section I.C elaborates the conventional depictions of hard and soft law's respective advantages and complementary interaction, then sets forth the scope conditions under which actors deploy hard and soft law as alternatives, as complements, or as antagonists.²³ Finally, Section I.D summarizes our hypotheses about how such interactions will shape transnational interactions in the context of the international security case studies that follow in Parts II and III.²⁴

A. *Hard Law, Soft Law, and the Progressive Development of International Law*

Before delving into our modern analysis, it is useful to consider the historical origins of international law and how they shape our understanding of its contemporary application through hard- and soft-law instruments. The purpose of international law, conventionally viewed, is to reduce interstate conflict and facilitate interstate cooperation to address transnational and global problems, including by enhancing the

²¹ See *infra* notes 25–58 and accompanying text.

²² See *infra* notes 59–74 and accompanying text.

²³ See *infra* notes 75–154 and accompanying text.

²⁴ See *infra* notes 155–193 and accompanying text.

credibility of commitments and resolving disputes through law and legal institutions.²⁵ For most of its history, international law was not codified.²⁶ It rather grew out of natural law and Roman law.²⁷ As the understanding of international law became more positivist, scholars viewed international law in terms of custom, consisting of state practice arising out of a sense of legal obligation (*opinio juris*).²⁸ Customary international law remains an important source of international law as reflected in Article 38 of the Statute of the International Court of Justice (ICJ) and the judgments of international tribunals, which continue today.²⁹

The existence and scope of customary international law addressing particular issues, however, is often contested. Moreover, customary international law is backward looking, whereas communities need to

²⁵ Alternatives to this functionalist view focus on law as an instantiation and institutionalization of power, such as that of states (international relations realism) or of transnational capital (Marxism). For an overview of different perspectives in relation to global governance, see generally POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).

²⁶ L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 315 (1908) ("The rules of the present international law are to a great extent not written rules, but based on custom."); *id.* at 349 (recognizing, however, that "[t]he future of international law belongs to conventional and not to customary law. But custom will always remain at the background of international law . . .").

²⁷ See, e.g., Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26, 29 (1952) (noting that public international law "had been enriched by borrowings and adaptations from the Roman Law"); Joseph L. Kunz, Editorial Comment, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951, 951 (1961); Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 681 (1952); Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547, 547-48 (1909) (describing the influence of natural rights theory on international law). See generally THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS (Benedict Kingsbury & Benjamin Straumann eds., 2010).

²⁸ William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 26 (2007), <http://www.harvardlawreview.org/media/pdf/dodge.pdf> ("Under the positivist theory that has prevailed since the nineteenth century, customary international law must be based upon 'a general and consistent practice of states followed by them from a sense of legal obligation.'") (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987)); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 660 (2000) ("The positivist account requires the discovery of a widespread state practice that nations follow from *opinio juris*.").

²⁹ Statute of the International Court of Justice, art. 38, June 26, 1945, 59 STAT. 1055, 1060 (1945); see, e.g., Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 78 (July 9) (referencing customary international law); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 71 (Feb. 20) (noting the possibility that customary international law may develop from unwritten norms).

develop law to adapt to new circumstances.³⁰ As interstate and transnational exchange deepened in the nineteenth and twentieth centuries, a movement toward the codification and development of international law arose to enhance legal clarity and legal certainty.³¹ The concept took hold in legal circles in the 1850s and 1860s as prominent academics, such as David Dudley Field in the United States, proposed the compilation of a code for presentation to “the governments, in the hope of its receiving, at some time, their sanction.”³² In 1873, leading private lawyers established two associations to promote the codification of international law: the International Law Association and the Institut de Droit International.³³

Governments followed suit.³⁴ At the intergovernmental Hague Peace Conferences in 1899 and 1907, states codified aspects of the international law of war, although only the 1907 conference was attended by a significant number of non-Western states.³⁵ Following World War I, states through the League of Nations continued the push toward codification, with a focus on international law’s development. The League Assembly began to adopt resolutions in 1924 that advocated “progres-

³⁰ Arthur Watts, *Codification and Progressive Development of International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed., 2006).

³¹ Jeremy Bentham—credited with coining the term “codification”—offered to codify the laws of many countries, including the United States, in the late eighteenth and early nineteenth centuries. See Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1, 19 (2011). Bentham sketched the first proposal for a code of international law in the 1780s, though these writings were not published until later. See *Report of Sub-Committee upon the History and Status of Codification*, 4 AM. SOC’Y INT’L L. PROC. 208, 214–18 (1910) [hereinafter *ASIL Proceedings*] (reviewing Bentham’s writings on international codification); see also Watts, *supra* note 30, ¶ 4.

³² *ASIL Proceedings*, *supra* note 31, at 219; *id.* at 221 (labeling Alphonse de Domin-Petrushevecz’s 1861 *Précis d’un Code du Droit International*, which included 236 articles and purported to comprise a comprehensive summary of international law, as the “first attempted codification worthy of the subject”); *id.* at 220 (identifying Francis Lieber’s famous *Instructions for the Government of Armies of the United States in the Field*, compiled at President Abraham Lincoln’s request in the throes of the U.S. Civil War as “the starting point of the modern movement in favor of the codification of the Law of Nations”); see also LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 36 & n.69 (3d ed. 2008) (identifying the Lieber Code as the “first modern attempt to draw up a binding code for the conduct of an armed force in the field”); GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter *LIEBER CODE*], reprinted in JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 497, 497 (3d ed. 2010)).

³³ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 163–64 (2007). The ILA was initially named the Association for the Reform and Codification of the Law of Nations. *Id.* at 164.

³⁴ See Watts, *supra* note 30, ¶¶ 5–6.

³⁵ See BOYLE & CHINKIN, *supra* note 33, at 165.

sive codification' in order to 'define, improve and develop' international law."³⁶ "The spirit of codification," the Assembly declared, "should not confine itself to the mere registration of existing rules, but should aim at adapting them as far as possible to contemporary conditions of life."³⁷ The League organized a "Conference for the Codification of International Law" in 1930 in Geneva, Switzerland but the agreement reached fell short of any comprehensive codifications.³⁸

After World War II, states incorporated the goals of the codification and progressive development of international law into the UN Charter. Article 13(1)(a) charges the General Assembly with "initiat[ing] studies and mak[ing] recommendations for the purpose of . . . encouraging the progressive development of international law and its codification."³⁹ Among the General Assembly's early acts was the creation of the International Law Commission ("ILC") in 1947, the first standing international public body charged with international law's codification and progressive development.⁴⁰ Article 15 of the Statute of the International Law Commission identifies the "progressive development of international law" as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."⁴¹ Other agencies, commissions and organizations,

³⁶ *Id.* at 165–66 (quoting League of Nations Assembly Resolutions adopted in Sept. 22, 1924; Sept. 27, 1927; and Sept. 25, 1931). The League of Nations established a Committee of Experts for the Progressive Codification of International Law in 1924, which can be viewed as the predecessor of the International Law Commission. *See id.* at 166; MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 69–70 (2d ed. 1997).

³⁷ BOYLE & CHINKIN, *supra* note 33, at 165–66 (citing *Resolution Adopted by the Assembly of the League of Nations*, League of Nations Doc. Spec. Supp. No. 53 ¶ 6(d) (1927)).

³⁸ *See* VILLIGER, *supra* note 36, at 71–72 (describing reasons for this failure).

³⁹ U.N. Charter art. 13, para. 1a.

⁴⁰ BOYLE & CHINKIN, *supra* note 33, at 171–76.

⁴¹ Statute of the International Law Commission, G.A. Res. 174 (II), art. 15, U.N. Doc. A/RES/174(II) (Nov. 21, 1947). In contrast, the ILC's Statute formally defines "codification of international law" as "the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine." *Id.* The Statute defines the concepts of "codification" and "progressive development" distinctly, but in practice they overlap, since the existing state of customary international law is not always clear. *See id.* In practice, "if codification by the ILC necessarily entails progressive development, it seems that progressive development by the ILC generally entails some element of codification." BOYLE & CHINKIN, *supra* note 33, at 175; *see also* R.Y. Jennings, *The Progressive Development of International Law and Its Codification*, 24 BRIT. Y.B. INT'L L. 301, 309 (1947); H. Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 35 (1955) (noting that with respect to codification "drafts as finally put before governments and the General Assembly should express . . . the views

whether within or outside of the UN system, have served as the locus for codifying and developing international law in specialized fields.⁴²

The aim of the ILC's efforts tends to be the creation of treaties, but in many cases, ILC drafts are not ratified.⁴³ In these cases, the ILC's work toward "progressive development" of international law remains, essentially, a soft law document, although it may have persuasive force insofar as international courts may refer to it as evidence of emerging customary international law.⁴⁴ Alan Boyle and Christine Chinkin point to this use of ILC instruments as an example of international law's development through the interaction of different processes.⁴⁵ The work of the ILC, in other words, can be viewed in terms of the complementary interaction of soft and hard law, which we further examine below.⁴⁶

There is a third conception of international legal instruments in addition to that of codification and progressive development: new lawmaking.⁴⁷ With the proliferation of international initiatives in recent decades resulting in a vast array of new legal instruments, scholars have developed the terminology of hard and soft law to capture this lawmaking process.⁴⁸ No longer do international law scholars focus solely on the interaction of customary international law and treaties in international law's progressive development. Rather, legal scholarship has increasingly addressed the hard and soft law characteristics of new international instruments, the relative advantages and disadvantages of these characteristics in different contexts, and how these instruments can be used progressively as complements.⁴⁹

Much of this literature focuses on the claim that the progressive development of international law works increasingly through the complementary interaction of hard and soft legal instruments. This process plays out in two ways. First, soft law may develop over time and harden into hard law, just as customary international law has been codified and

of the codifying agency as to the solution which is accurate *de lege lata* and desirable *de lege ferenda*).

⁴² BOYLE & CHINKIN, *supra* note 33, at 167.

⁴³ See Watts, *supra* note 30, ¶ 29.

⁴⁴ See BOYLE & CHINKIN, *supra* note 33, at 190.

⁴⁵ See *id.* ("[I]t is the interaction of the ILC, the diplomatic conferences, subsequent practice and judicial decisions" that has "shaped the modern law of treaties.").

⁴⁶ See *infra* notes 95–106 and accompanying text.

⁴⁷ Watts, *supra* note 30, ¶ 22.

⁴⁸ See *infra* notes 77–94 and accompanying text.

⁴⁹ See *infra* notes 95–106 and accompanying text.

progressively developed in treaty law.⁵⁰ Second, hard law may be elaborated, extended, and progressively developed through soft law.⁵¹ One might understand this process as a contemporary manifestation of the “progressive development” concept described above.⁵² That is, non-binding soft-law instruments help pave the way into binding hard-law instruments, just as discrete state practices can aggregate and give rise over time to a consensus regarding general binding customary international law. As one writer frames it, “progressive” is viewed “in the sense of an evolution from a ‘soft law’ to a ‘hard law’ instrument.”⁵³ Similarly, another author writes:

The pattern . . . is one in which so-called “soft law” crystallizes into hard law. This evolution proceeds as follows: operational activities occur against the backdrop of widely acknowledged but not well-specified norms; in carrying out those activities, international organizations do not seek to enforce the norms *per se* but typically act in a manner that conforms to them; these activities generate friction, triggering bouts of legal argumentation; the reaction of affected governments—and the discourse that surrounds the action and reaction—can cause the law to harden.⁵⁴

This view of soft law as crystallizing into hard law has its parallels in the view of state practice evolving into customary international law. But now the process takes place in a world in which written international law has proliferated and somewhat displaced the role of customary international law.⁵⁵ Similarly, moving from hard treaty law as a starting

⁵⁰ See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 30–31 (Dinah Shelton ed., 2000).

⁵¹ See *id.*

⁵² See Jennings, *supra* note 41, at 309.

⁵³ Cynthia Day Wallace, *The Legal Framework for Regulating the Global Enterprise Going into the New WTO Trade Round—A Backward and a Forward Glance*, 16 TRANSNAT'L L. 141, 142 (2002).

⁵⁴ Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT'L L. REV. 87, 88 (2008).

⁵⁵ See, e.g., Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1, 30 (2010) (stating that “multilateral treaty-making has displaced some of the traditional functions of CIL”); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 208–09 (2010) (noting that “there has since been a proliferation of treaties, both in quantity and range of subject matter, especially after the establishment of the United Nations system” such that “most of the major issue areas that were historically covered by CIL are now covered, to one degree or another, by treaties”); J. Patrick Kelly, *The Twilight of Customary International*

point, we shall see below that both scholars and advocates of specific causes, such as humanitarian intervention, have depicted soft law instruments as supplementing, elaborating, and progressively developing existing hard law. Soft law, in this sense, represents a modern variant of the “law to be made,” *lex ferenda*, which reflects the aspiration of law’s progressive development.⁵⁶

This Article aims to deepen our understanding of the interaction of international legal instruments in a world of fragmented international legal fora and regimes in which legal instruments have varied distributive consequences for different states. Our framework has its predecessor in legal realist analysis of the development of customary international law—that of the New Haven School of international law.⁵⁷ As Myres McDougal classically wrote in respect of customary international law, it develops through

a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers . . . weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimant, and ultimately accept or reject them.⁵⁸

Law, 40 VA. J. INT’L L. 449 *passim* (2000). Nonetheless, treaties and customary international law can overlap and exist in parallel. *See, e.g.*, BOYLE & CHINKIN, *supra* note 33, at 234–38; José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 72–74 (2009) (noting that, at least in the context of international investment law, “the move to investment treaties does not displace resort to CIL or general principles”).

⁵⁶ *See* BOYLE & CHINKIN, *supra* note 33, at 212. The term *de lege ferenda* (or *lex ferenda*) can be translated as “what the law should be,” “future law,” or “the law to be made,” in contrast to “what the law is” (*de lege lata*). *See id.*; Lauterpacht, *supra* note 41, at 35.

⁵⁷ *See* W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 120–24 (1992) (setting forth the defining features of the New Haven School).

⁵⁸ Myres S. McDougal, Editorial Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT’L L. 356, 357 (1955); *see also* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pt. 1), 19 J. LEGAL EDUC. 253, 257–58 (1967); Myres S. McDougal, Harold D. Lasswell & Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pt. 2), 19 J. LEGAL EDUC. 403, 430–31 (1967); W. Michael Reisman, Editorial Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 82 (2003) (representing a more recent articulation of the perspective of “a ceaseless dialectic” in the production of international law); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1, 9 (1984); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 105 (1981).

International law in this view is a process of making claims and responding to them. In our contemporary world of written instruments, the interaction of hard and soft law should be viewed in this light.

With this background, we now turn to clarify the definition of hard and soft law, and elaborate the conventional depictions of their respective advantages and complementary interaction. We then turn to address the scope conditions under which states and other actors deploy hard and soft law as complements or antagonists, and the hypotheses derived from our theoretical framework.

B. *Defining Hard and Soft Law Along a Spectrum*

In our previous scholarship, we have demonstrated the complexities inherent in defining hard and soft law.⁵⁹ The definitions applied in the existing literature have tended to split across positivist–realist lines.⁶⁰ Many positivist legal scholars, for instance, frame the distinction between hard and soft law using a simple, binary binding/non-binding divide.⁶¹ Some such scholars take this further still, finding the very concept of soft law to be illogical because law by definition cannot be “more or less binding.”⁶²

In the world of practice, however, actors are faced not with a binary choice, but with a range of legal options to structure their interactions. It is well documented that actors’ use of international agreements has proliferated over the last decades, representing a legalization of international relations.⁶³ These actors use different types of international agreements with distinct characteristics to further their particular

⁵⁹ See Shaffer & Pollack, *supra* note 2, at 712–17.

⁶⁰ See *id.*

⁶¹ See COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 2–5 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE], for a leading study that settles on this distinction.

⁶² See Shaffer & Pollack, *supra* note 2, at 712–13 & n.10 (quoting Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167, 168, 181 (1996)); see also Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 581–82 (2005) (distinguishing between form and substance in international agreements, as opposed to “hard law” and “soft law”).

⁶³ See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401–03 (2000); John King Gamble et al., *Human-Centric International Law: A Model and a Search for Empirical Indicators*, 14 TUL. J. INT’L & COMP. L. 61, 72 (2005) (“[T]here has been a significant expansion in the range of activities governed by multilateral treaties, with the greatest increase occurring in the economic sphere. The metaphor of a rising tide seems appropriate.”); Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 753, 754–56 (Peter Cane & Herbert M. Kritzer eds., 2010).

aims. Kenneth Abbott and Duncan Snidal advance a concept of legalization that provides a useful tool for understanding actors' choices in terms of an agreement's characteristics.⁶⁴ International agreements, they maintain, can be usefully viewed as varying across three dimensions: (1) obligation, (2) precision of rules, and (3) delegation to a third-party decision-maker. Taken together, these characteristics can give an agreement a "harder" or "softer" legal character.⁶⁵

Hard and soft law can thus be distinguished in terms of variation along a spectrum. Hard law, as an ideal type, "refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."⁶⁶ By contrast, "[t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation."⁶⁷ Because international agreements almost invariably exhibit different weaknesses along one or more of these dimensions, they can be viewed in terms of having harder or softer law characteristics. For instance, if an agreement is not formally binding on the parties, it is softer in this first sense. If a formally binding agreement is vague, however, it exhibits softer characteristics along the precision dimension because it enables the parties to exercise almost complete discretion as to its implementation.⁶⁸ Finally, if an agreement fails to provide a monitoring or enforcement mechanism, then the agreement is softer along this third dimension because there is no third-party to resolve interpretive disputes arising out of the agreement's implementation.⁶⁹ Without a third-party interpreting the legal provisions which govern a dispute, the parties to the dispute can discursively justify their acts more easily in legalistic terms, and with less consequence, whether in terms of reputational

⁶⁴ Shaffer & Pollack, *supra* note 2, at 714.

⁶⁵ Abbott, *supra* note 63, at 401–06; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422–24 (2001) (working within the "rational design" approach to international institutions described in Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001)); Shaffer & Pollack, *supra* note 2, at 714; *see also* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 581–82 (2005). For an almost simultaneous use of these three attributes to differentiate harder from softer international law, *see* A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901, 901–13 (1999).

⁶⁶ Abbott & Snidal, *supra* note 65, at 421.

⁶⁷ *See id.* at 422; Shaffer & Pollack, *supra* note 2, at 714.

⁶⁸ Shaffer & Pollack, *supra* note 2, at 715.

⁶⁹ *Id.*

costs or other sanctions.⁷⁰ Such a third party could, at a minimum, provide a “focal point” around which parties can reassess their positions.⁷¹

Although some scholars have questioned this characterization of law in terms of these three attributes,⁷² we believe that this framework provides a clear, nuanced, and theoretically neutral framework for operationalizing the hard- and soft-law distinction in terms of international law’s development.⁷³ Their conceptualization presents a spectrum of choices facing state and non-state actors, as opposed to a binary one, and it does not prejudge the value or effectiveness of these choices, all of which renders it particularly useful for our analyses of how hard and soft law *interact*.⁷⁴

C. *Hard and Soft Law as Alternatives, Complements, and Antagonists*

This Section summarizes our existing argument about the three manners in which actors may deploy hard and soft law.⁷⁵ First, we examine how these two forms of law may exist as alternatives, exploring the relative advantages and weaknesses of both hard and soft law.⁷⁶ We next explore the use of hard and soft law as complements, whereby soft law either evolves into hard law or is used to fill gaps in hard-law instruments.⁷⁷ Finally, we consider a scenario commonly overlooked by

⁷⁰ *Id.*; see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1236 (2004).

⁷¹ See Ginsburg & McAdams, *supra* note 70, at 1236 (addressing how international litigation can “construct[] a focal point around which parties coordinate,” such that “third-party signals cause players to update their beliefs about the state of the world”); Shaffer & Pollack, *supra* note 2, at 715.

⁷² See, e.g., Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”: Richer Views of Law and Politics*, 55 INT’L ORG. 743, 744–46 (2001).

⁷³ See Abbott & Snidal, *supra* note 65, at 421–23.

⁷⁴ *Id.*; Shaffer & Pollack, *supra* note 2, at 717. Positivist definitions of hard law that focus on formal obligation and constructivist definitions that focus on effective obedience preclude (or at least do not facilitate) analysis of the interaction of hard and soft law as antagonists. See Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT’L L. REV. 87, 89 (2008) (writing that “[t]he term soft law describes norms that are formally non-binding but habitually obeyed”). Yet if soft law means habitually obeyed non-binding norms, we cannot assess the impact of such norms because the impact falls within the very definition. See *id.* For an earlier view of the conception of hard and soft law as lying along a continuum, see Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 135, 138 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

⁷⁵ See Shaffer & Pollack, *supra* note 2, at 717–41.

⁷⁶ See *infra* notes 79–96 and accompanying text.

⁷⁷ See *infra* notes 97–108 and accompanying text.

other scholars in the field: the deliberate use of hard and soft law as antagonists.⁷⁸

1. As Alternatives

To effect specific policy goals, state and private actors increasingly turn to legal instruments that are harder or softer in manners that best align with such proposals.⁷⁹ These variations in precision, obligation, and third-party delegation can be used strategically to advance both international and domestic policy goals. Much of the existing literature examines the relative strengths and weaknesses of hard and soft law for the states that make it. It is important, for our purposes, to address these purported advantages in order to assess the implications of the interaction of hard and soft law on each other.

Hard law as an institutional form features a number of advantages.⁸⁰ Hard law instruments, for example, allow states to commit themselves more credibly to international agreements by increasing the costs of reneging. They do so by imposing legal sanctions or by raising the costs to a state's reputation where the state has acted in violation of its legal commitments.⁸¹ In addition, hard law treaties may have the advantage of creating direct legal effects in national jurisdictions, again increasing the incentives for compliance.⁸² They may solve problems of incomplete contracting by creating mechanisms for the interpretation and elaboration of legal commitments over time,⁸³ including through the use of dispute settlement bodies such as courts.⁸⁴ In different ways, they thus permit states to monitor, clarify, and enforce their commitments. Hard law, as a result, can create more legal certainty. States, as well as private actors working with and through state representatives,

⁷⁸ See Shaffer & Pollack, *supra* note 2, at 723 (charting the theories of hard and soft law and illustrating the theoretical void surrounding their potential antagonistic interaction); *infra* notes 109–154 and accompanying text.

⁷⁹ See Shaffer & Pollack, *supra* note 2, at 717.

⁸⁰ For a more detailed examination of these advantages and disadvantages, see Shaffer & Pollack, *supra* note 2, at 717–21.

⁸¹ Guzman, *supra* note 65, at 581–82, 595–97; see also Abbott & Snidal, *supra* note 65, at 425; Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 508 (1991) (“The more formal and public the agreement, the higher the reputational costs of noncompliance.”).

⁸² Abbott & Snidal, *supra* note 65, at 436–40. In the United States, such treaties are called “self-executing.” See *id.* at 438.

⁸³ *Id.*

⁸⁴ *Id.*

should use hard law where “the benefits of cooperation are great but the potential for opportunism and its costs are high.”⁸⁵

The advantages of hard law, however, come at a significant cost.⁸⁶ Because hard law creates formal commitments that restrict the behavior of states, infringing on national sovereignty in potentially sensitive areas, states may bargain fiercely and at length over hard-law agreements. Hard-law agreements also can be more difficult to amend to adapt to changing circumstances.⁸⁷ As a result, according to sociolegal scholars, hard law is most problematic where it: (1) presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment, (2) requires uniformity when a tolerance of national diversity is needed, or (3) is difficult to change when frequent change may be essential.⁸⁸

Soft law instruments can thus offer significant offsetting advantages over hard law because they are less costly to negotiate and come with lower “sovereignty costs.”⁸⁹ Moreover, they provide greater flexibility for states to cope with uncertainty and learn over time. Thus, they allow states to be more ambitious and engage in “deeper” cooperation than they would if they had to worry about enforcement.⁹⁰ Soft law, scholars argue, can “facilitate constitutive processes such as persuasion, learning, argumentation, and socialisation.”⁹¹ In other words, without the constraint of being bound in the future by binding agreements, states and other actors may engage in open-ended deliberation over the nature of particular challenges and the relative merits of alternative courses of

⁸⁵ *Id.* at 429.

⁸⁶ Shaffer & Pollack, *supra* note 2, at 718–19.

⁸⁷ See Abbott & Snidal, *supra* note 65, at 433.

⁸⁸ See, e.g., David M. Trubek et al., ‘Soft Law,’ *Hard Law’ and EU Integration*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 65, 66–67 (Gráinne de Búrca & Joanne Scott eds., 2006); see also Joanne Scott & Gráinne de Búrca, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra*, at 1.

⁸⁹ Shaffer & Pollack, *supra* note 2, at 718–19.

⁹⁰ For good discussions on the purported strengths of soft law, see HARD CHOICES, *supra* note 1, at 4–5; Abbott & Snidal, *supra* note 65, at 444–47; Lipson, *supra* note 81, at 500–01, 514–27 (discussing the strengths of “informal agreements”); Francesco Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, 19 LEIDEN J. INT’L L. 829, 832 (2006) (reviewing HARD CHOICES, *supra* note 1); and Trubek, *supra* note 88, at 66–67.

⁹¹ Trubek, *supra* note 88, at 75; David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L.J. 343, 353 (2005) (noting how the proponents of soft law find that its use is particularly appropriate when there is uncertainty and a vast amount of diversity among participants, requiring a need for experimentation, flexibility, and revisability in transnational processes of cooperation and coordination).

action.⁹² Given these potential advantages, Abbott and Snidal maintain that states may rationally choose soft-law instruments where contracting costs increase, whether because of the number of parties involved, factual uncertainty, domestic ratification challenges, or the politically charged nature of the issue.⁹³ On the other hand, of course, soft law also has disadvantages, notably in that the credibility of commitments and the costs of renegeing are reduced, thus reducing legal certainty.⁹⁴

In sum, depending on the context, hard- and soft-law instruments may afford different advantages.⁹⁵ This conclusion has led a growing number of scholars in law and political science to advocate a pragmatic approach to the choice of one form of instrument over another, selecting alternative hard- or soft-law approaches depending on the characteristics of the issue and the negotiating and institutional context in question.⁹⁶

2. As Complements

In the face of this ongoing debate about the relative merits of hard and soft law, a growing number of scholars have reframed the issue, concluding that hard and soft law can instead “interact and build upon each other as complementary tools for international problem-solving.”⁹⁷ These scholars contend that hard- and soft-law mechanisms can build

⁹² See Abbott & Snidal, *supra* note 65, at 446–47; Trubek, *supra* note 88, at 75.

⁹³ Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 50, 54, 62, 70 (Eyal Benvenisti & Moshe Hirsch eds., 2004); Shaffer & Pollack, *supra* note 2, at 720.

⁹⁴ See, e.g., Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381, 381–91 (1998); Sindico, *supra* note 90, at 846; Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414–16 (1983). Positivist legal scholars, for example, find that soft law is inferior to hard law because it lacks formally binding obligations that can be interpreted and enforced by courts. See Klabbers, *supra*, at 382, 387–88 (speculating that soft-law arguments fail to persuade courts, and are instead analyzed under a binding/nonbinding framework). For this reason, these scholars view soft law as a second-best alternative to hard law, either as a way-station on the way to hard law, or as a fall-back when hard law approaches fail. See Sindico, *supra* note 90, at 846 (concluding that “[s]oft law, and voluntary standards in particular, are a stage in the creation of international legal norms”).

⁹⁵ Shaffer & Pollack, *supra* note 2, at 720.

⁹⁶ See, e.g., Abbott & Snidal, *supra* note 65, at 423 (noting that although “soft law is sometimes designed as a way station to harder legalization, . . . [it is] often . . . preferable on its own terms”).

⁹⁷ Shaffer & Pollack, *supra* note 2, at 721 (emphasis added); see, e.g., Bane, *supra* note 1, at 347; Dinah Shelton, *Multilateral Arms Control*, in COMMITMENT AND COMPLIANCE, *supra* note 61, at 465, 466.

upon each other in two primary ways.⁹⁸ First, non-binding soft law can lead the way to binding hard law.⁹⁹ Second, soft-law instruments can subsequently elaborate existing hard law.¹⁰⁰ In both cases, hard international law is progressively developed.¹⁰¹

Existing international law and international relations scholarship commonly takes this approach. For example, in addition to clarifying the definition of hard and soft law, Abbott and Snidal have identified different “pathways to cooperation” which explicitly involve the progressive hardening of soft law.¹⁰² They observe, first, how states may sometimes start with a framework convention which subsequently deepens in the precision of its coverage.¹⁰³ Second, they note how non-binding soft-law instruments can lead to normative consensus which gives rise to new, binding hard-law commitments.¹⁰⁴ Christine Chinkin likewise explains how soft law can be both “elaborative” of hard law (by providing guidance to the interpretation of existing hard law), and subsequently accepted as “emergent hard law” (by facilitating the building of hard customary international law).¹⁰⁵ Likewise, David Trubek and his co-authors contend that soft-law instruments can help to generate knowledge, develop shared ideas, build trust, and establish “non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.”¹⁰⁶

In sum, where a body of hard law already exists, soft law is often considered to provide a low-cost and flexible way to elaborate and fill in

⁹⁸ See Dinah Shelton, *Multilateral Arms Control*, in COMMITMENT AND COMPLIANCE, *supra* note 61, at 466.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See Shaffer & Pollack, *supra* note 2, at 721.

¹⁰² See Abbott & Snidal, *supra* note 93, at 54–55 (“[T]hree pathways are: (1) the use of a framework convention which subsequently deepens in the precision of its coverage, (2) the use of a plurilateral agreement which subsequently broadens in its membership, and (3) the use of a soft-law instrument which subsequently leads to binding legal commitments.”).

¹⁰³ Abbott & Snidal, *supra* note 93, at 55–57.

¹⁰⁴ *Id.* at 59–60.

¹⁰⁵ Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE, *supra* note 61, at 30–31 (making the point specifically as regards to international security law as well); see Shelton, *supra* note 97, at 466 (“In such a system [regarding international security], it might be expected that non-binding norms would have little role to play, but the reality is that they serve both as precursors to binding agreements and as subsequent norms to fill in the technical gaps where complex technical regulation is required.”).

¹⁰⁶ Trubek, *supra* note 88, at 89; see also Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT’L L.J. 65, 132–41 (2004); Trubek & Trubek, *supra* note 91, at 355–59.

the gaps that form when a standing body of hard law encounters new and unforeseen circumstances.¹⁰⁷ Where a body of hard law does not yet exist, on the other hand, states and other actors can use soft-law instruments until these actors develop greater comfort and consensus regarding the merits and advisability of an approach. Legal scholars thus view hard- and soft-law instruments not only as providing alternative tools for cooperation. They show how these instruments serve as complements in “dynamic processes of legalization,” leading to the progressive development of international law over time.¹⁰⁸ What these and other studies do not systematically address, however, is how—and under what conditions—actors can, and do, deploy hard- and soft-law instruments to undercut each other.

3. As Antagonists

As we have observed in our previous scholarship, the existing analyses of hard and soft law tend to begin by assuming that mutual gains from cooperation among states are achievable.¹⁰⁹ These analyses then proceed to explore the advantages and disadvantages, the choice, and the effectiveness of hard- and soft- law approaches to achieve these gains. Some of this literature certainly recognizes that soft law can be used in an antagonistic fashion.¹¹⁰ For example, in an early article on soft law, Christine Chinkin acknowledges that soft law “has both a legitimising and delegitimising direct effect. . . . While there is no doctrine of desuetude in international law, the legitimacy of a previously existing norm of international law may be undermined by emerging principles of soft law.”¹¹¹ Similarly, Michael Reisman of the New Haven School early noted the challenge of the rise of soft law in terms of generating an “inconsistent normativity to the point where, in critical matters, international law has become like a camera whose every shot is a double exposure.”¹¹²

Yet the literature has yet to assess systematically the conditions under which actors are likely to deploy hard and soft law as antagonists

¹⁰⁷ See COMMITMENT AND COMPLIANCE, *supra* note 61, at 466.

¹⁰⁸ *Id.*; Shaffer & Pollack, *supra* note 2, at 722; *see, e.g.*, Chinkin, *supra* note 1, at 856–59.

¹⁰⁹ See Shaffer & Pollack, *supra* note 2, at 722.

¹¹⁰ *E.g.*, Chinkin, *supra* note 1, at 866; Reisman, *supra* note 74, at 144.

¹¹¹ Chinkin, *supra* note 1, at 866.

¹¹² Reisman, *supra* note 74, at 144 (referencing in particular the developing country push in the UN GA for a new international economic order).

instead of complements. What we need, in this respect, is to build a conditional theory of international law.¹¹³

The perception of mutual gain is certainly an important prerequisite for international cooperation. Yet the harmonious, complementary interaction of hard- and soft-law approaches to international cooperation relies on a hitherto unspecified set of scope conditions. By scope conditions, we refer to the conditions under which a particular event or class of events is likely to occur.¹¹⁴ In the case of the interaction of hard and soft law as complements, the primary scope condition is a low level of distributive conflict among states, and in particular among powerful states. Second, the proliferation of international organizations in distinct functional areas of international law gives rise to legal fragmentation and “regime complexes.”¹¹⁵ Existing accounts of complementary interaction of hard and soft law appear to implicitly assume that distributive conflict among states, and hence the incentive to engage in forum shopping and strategic inconsistency, are low.¹¹⁶ These conditions may hold in certain areas, but variation in distributive conflict and the opportunities offered by regimes and fora with overlapping jurisdiction should result in actors using hard- and soft-law instruments in different ways, including sometimes as antagonists. Under conditions of high distributive conflict and high regime complexity, we are likely to see hard and soft law often interacting as antagonists.

a. *Distributive Conflict*

Despite the general promise of international law and international regimes in fostering international cooperation to achieve mutual gains, international relations scholars have identified a number of potential obstacles to successful international cooperation.¹¹⁷ International law

¹¹³ See Ginsburg & Shaffer, *supra* note 63, at 780–81.

¹¹⁴ See Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT’L ORG. 801, 803 (2005) (defining scope conditions as “when and under what conditions a particular . . . outcome is more likely”).

¹¹⁵ Shaffer & Pollack, *supra* note 2, at 722; see Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004); Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 6, 15, 490, 493, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *Fragmentation of International Law*] (finalized by Martti Koskenniemi).

¹¹⁶ Raustiala & Victor, *supra* note 115, at 298 (using the term “strategic inconsistency” to describe “explicit efforts to create conflicts to force change in another regime”).

¹¹⁷ See ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* 113–35 (1997) (providing a nuanced analysis attempting to reconcile Grieco with his critics); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 487 (1988); Shaffer & Pollack, *supra* note 2, at 730

theorists have often drawn from regime theory in international relations to assess the role of international law in fostering cooperation. They most frequently point to the Prisoner's Dilemma ("PD") game, from game theory, in assessing the role of international law to facilitate mutually beneficial outcomes.¹¹⁸ In the classic PD model, states are assumed to have a common interest in reaching a cooperative outcome, but fear that the other state may cheat on the agreement impedes such mutually-beneficial cooperation.¹¹⁹ To address such problems, PD models of international relations typically provide for monitoring and sanctioning mechanisms to ensure compliance with the terms of the agreement.¹²⁰ If PD is an accurate description of the situation facing states, then international hard and soft law should indeed facilitate cooperation by clarifying understandings, by creating institutions to monitor compliance with them, and (in some cases) by providing for legal enforcement.¹²¹

The Prisoner's Dilemma game, however, ignores another important obstacle to successful cooperation, namely conflicts over the *distribution* of the costs and benefits of cooperation.¹²² The distributive conflict to which we are referring relates not only to the problem of relative gains in relation to the balance of state power, but also to the distribu-

("The realist literature, for example, emphasizes the dual challenges of (1) cheating and (2) relative gains as the primary obstacles to successful cooperation, focusing on concerns over national security and the balance of power."). See generally NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE (David A. Baldwin ed., 1993) (presenting the competing neorealist and neoliberal views on international politics with respect to focal points including anarchy, international cooperation, and relative versus absolute gains). Subsequent work by neoliberal institutionalists, however, has found that international regimes can mitigate concerns about cheating, while concerns over relative gains operate only under certain restrictive conditions. Shaffer & Pollack, *supra* note 2, at 730 n.64; see, e.g., Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303, 1305–06, 1309–15 (1991); Duncan Snidal, *International Cooperation Among Relative Gains Maximizers*, 35 INT'L STUD. Q. 387, 388–89, 400–02 (1991).

¹¹⁸ See, e.g., ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 29–33 (2008); Shaffer & Pollack, *supra* note 2, at 731; Snidal, *supra* note 117, at 390–91.

¹¹⁹ See GUZMAN, *supra* note 118, at 30–31 ("[T]he parties can maximize their total joint payoff through mutual cooperation . . . but the dominant strategy for each side was to cheat.").

¹²⁰ See LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 29–32 (2000).

¹²¹ See *id.*

¹²² Shaffer & Pollack, *supra* note 2, at 731–32; see, e.g., GRUBER, *supra* note 120, at 33–38; Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 336 (1991).

tion of absolute gains from cooperation among two or more states.¹²³ When states cooperate in international politics, they are not faced with a binary choice between “cooperation” and “defection” as in PD games.¹²⁴ Instead, states choose among specific *terms* of cooperation, which can raise distributive concerns.¹²⁵

International relations scholars such as Stephen Krasner thus argue that efforts at international cooperation do not reflect a PD game, but rather more closely approximate a Battle of the Sexes game from a game theoretic perspective.¹²⁶ In the Battle of the Sexes game, states have clear preferences for different international rules and standards.¹²⁷ Thus, even though a common rule or standard would raise the prospect of joint gains among all states, states may nevertheless disagree on the specific standard to be chosen, because it would affect the distribution of those gains. Put in law and economics terms, there are many points along a “Pareto frontier” on which states can cooperate.¹²⁸ The primary

¹²³ See Shaffer & Pollack, *supra* note 2, at 730–31 & n.65. “In other words,” as we noted earlier, “the existence of distributive conflict—that is, conflict over the distribution of the gains of cooperation—should *not* be confused with a zero-sum game, in which one player’s gain is necessarily another’s loss. Instead, the game-theoretic models discussed below, such as Battle of the Sexes, are generally mixed-motive games where joint gains are possible, but states disagree about the distribution of those gains.” *Id.* at 730 n.65. For a range of views on the challenge of distributive conflict in international cooperation, see, for example, Krasner, *supra* 122, at 336, finding that “[g]lobal communications have been characterized not by Nash equilibria that are Pareto suboptimal but rather by disagreements over which point along the Pareto frontier should be chosen, that is, by distributional conflicts rather than by market failure.” See also GRUBER, *supra* note 120, at 20–32, 275–78 (2000); DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* 51–59 (2007); James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT’L ORG. 269, 276–77, 296–99 (1998); Koremenos et al., *supra* note 65, at 761–62; Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1, 18–22 (2003); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT’L ORG. 387, 388–89 (1994).

¹²⁴ See Shaffer & Pollack, *supra* note 2, at 732.

¹²⁵ *E.g.*, Morrow, *supra* note 123, at 395 (“There is only one way to cooperate in prisoners’ dilemma; there are many ways to cooperate in the real world.”).

¹²⁶ Shaffer & Pollack, *supra* note 2, at 733–34; see Krasner, *supra* note 122, at 339.

¹²⁷ Krasner, *supra* note 122, at 339; Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT’L ORG. 299, 309–13, 324 (1982).

¹²⁸ Krasner, *supra* note 122, at 336. In game-theoretic terms, a Pareto-optimal outcome is one in which no player can be made better off without another being made worse off, and the Pareto frontier is defined as the collection of such points. See *id.* In a PD game, the starting point is assumed to be Pareto-suboptimal, in the sense that both players could be made better off by cooperating, but only a single cooperative equilibrium is defined, obscuring potential distributional conflicts between the players. See *id.* In Battle, by contrast, there are multiple cooperative equilibria along the Pareto frontier, with different distributive implications, and the central question is which point will be chosen. See, *e.g.*, HASENCLEVER, *supra* note 117, at 104–13.

question becomes “not whether to move toward the ‘Pareto frontier’ of mutually beneficial cooperation, but rather *which point* on the Pareto frontier will be chosen.”¹²⁹ Some international relations scholars have generalized this insight, showing that distributive conflict is not unique to Battle of the Sexes games, but rather emerges as a “generic and nearly ubiquitous feature of all international cooperation.”¹³⁰

The role of state power thus becomes salient in the assessment of struggles over the terms of international cooperation.¹³¹ Put bluntly, acknowledgement of power and its significance is no longer (if it ever was) the exclusive province of realist international relations theory, but is increasingly an element in other approaches to international relations and international law.¹³² As we have argued previously, “the emerging picture of international . . . cooperation is one in which differences in power matter greatly in the adoption and implementation of international legal rules” and standards.¹³³ For our purposes in this Article, we expect the interaction of hard and soft law to be shaped significantly by the preferences of powerful states, and to a lesser extent by groups of other states that “attempt to thwart the aims of powerful countries through the strategic deployment of international legal instruments.”¹³⁴

¹²⁹ Shaffer & Pollack, *supra* note 2, at 734.

¹³⁰ *Id.* at 735 (citing Fearon, *supra* note 123, at 270).

¹³¹ Krasner, *supra* note 122, at 340.

¹³² Shaffer & Pollack, *supra* note 2, at 729; *see, e.g.*, JOHN BRAITHWAITE & PETER DRACHOS, *GLOBAL BUSINESS REGULATION* 564–71 (2000); DREZNER, *supra* note 123, at 55–59; Michael Barnett & Raymond Duvall, *Power in Global Governance*, in *POWER IN GLOBAL GOVERNANCE*, *supra* note 25, at 1–4; Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUR. J. INT’L L.* 369, 370–71 (2005); Mattli & Büthe, *supra* note 123, at 18–22, 40–42.

¹³³ Shaffer & Pollack, *supra* note 2, at 729. Ours and others’ previous work regarding international economic law, for example, have emphasized potential distributive conflict among states that stand to gain differentially from various proposed standards, and have suggested that differences in power resources tend to determine substantive standards and distributive outcomes. *See* Mattli & Büthe, *supra* note 123, at 4; Pollack & Shaffer, *The Future of Transatlantic Economic Relations: Continuity Amid Discord*, in *THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS* 3, 5–7 (David M. Andrews, Mark A. Pollack, Gregory C. Shaffer, & Helen Wallace eds., 2005). Daniel Drezner goes further, arguing that agreement among economically powerful states—and in particular between the United States and the European Union, the dominant economic players on the world stage—is a necessary condition for any successful regulatory regime. DREZNER, *supra* note 123, at 5.

¹³⁴ Shaffer & Pollack, *supra* note 2, at 730.

b. *Regime Complexity and Legal Fragmentation*

Regime theory in its earliest iterations tended not to address the problem of multiple, overlapping regimes.¹³⁵ Krasner's formulation of the classic definition of regimes, for example, identifies regimes as "principals, norms, rules, and decision-making procedures around which actor expectations converge *in a given issue-area*."¹³⁶ Real-world problems, however, are increasingly unlikely to fall neatly within the jurisdiction of a single regime, but rather lie at the intersection of multiple regimes, which results in a *regime complex*.¹³⁷

As we explain in our related earlier work, decision making in these regime complexes is characterized by several distinctive features. These most notably include: (1) a negotiation framework within a given regime that begins not with a blank slate but rather by considering developments in related international regimes,¹³⁸ (2) a tendency for individual states to engage in "forum shopping" by selecting particular regimes that are most likely to support their preferred outcomes,¹³⁹ and (3) a tendency for states to engage in "strategic inconsistency" by attempting to use one regime to create conflict or inconsistency with an-

¹³⁵ *Id.* at 737.

¹³⁶ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 1 (Stephen D. Krasner ed., 1983) (emphasis added); Shaffer & Pollack, *supra* note 2, at 737.

¹³⁷ Raustiala & Victor, *supra* note 115, at 279. *Regime complex* has been defined as "an array of partially overlapping and nonhierarchical institutions governing a particular issue-area." *Id.* For important related work, see generally Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) and Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006).

¹³⁸ Shaffer & Pollack, *supra* note 2, at 738.

¹³⁹ *Id.* at 738. We further noted,

[S]tates will select regimes based on characteristics such as [the regime's] membership (e.g., bilateral, restricted, or universal), voting rules, (e.g., one-state-one-vote vs. weighted voting or consensus vs. majority voting), institutional characteristics (e.g., presence or absence of dispute-settlement procedures), substantive focus (e.g., trade finance, environment, or food safety), and predominant functional representation (e.g., by trade, finance, environment, or agricultural ministries)

Id.

For an excellent discussion of forum-shopping in international relations, see generally Joseph Jupille & Duncan Snidal, *The Choice of International Institutions: Cooperation, Alternatives and Strategies* (July 7, 2006) (unpublished manuscript), available at <http://sobek.colorado.edu/~jupille/research/20060707-Jupille-Snidal.pdf>. Powerful states are likely to be particularly adept at such forum shopping. See DREZNER, *supra* note 123, at 5, 58–59; Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 599–600 (2007).

other.¹⁴⁰ In this way, states can aim to shift the understanding or adaptation of rules in that other regime in a particular direction.

The growing legal literature about the “fragmentation” of international law, as identified in a long report of the International Law Commission complements this political science analysis of overlapping regimes.¹⁴¹ Legal scholars have noted how the result of such fragmentation is potential conflict between international legal regimes.¹⁴² From the perspective of hard and soft law interaction, the existence of legal fragmentation and regime complexity can create overlaps and inconsistencies among harder and softer forms of international law within a given regime complex.

c. Combining the Two Factors

The existence of distributive conflict and regime complexity are often linked. On the one hand, distributive conflict provides states with incentives to forum-shop among different regimes within a regime complex, and to create new regimes deliberately to support their own positions and undermine those of the other side.¹⁴³ On the other hand, although distributive conflict creates incentives for actors to use hard and soft law as antagonists, the existence of fragmented regime complexes provides opportunities and thus facilitates their ability to do so. It is precisely the effect of distributive conflicts among states, coupled with the existence of a regime complex, that is most likely to undermine the smooth and complementary interaction of hard and soft law depicted in so much of the literature.¹⁴⁴

In sum, under the condition of high distributive conflict over the terms of international law, states and other actors may deliberately use soft-law instruments to undermine hard-law rules to which they object

¹⁴⁰ Shaffer & Pollack, *supra* note 2, at 738.

¹⁴¹ *Id.* at 739; see, e.g., *Fragmentation of International Law*, *supra* note 115, ¶¶ 1, 9, 491–493. For related literature on legal pluralism in a fragmented international legal system, see Paul Shiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1164–69 (2007) and Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1004–07 (Michelle Everson trans., 2004).

¹⁴² See, e.g., MIREILLE DELMAS-MARTY, *TROIS DÉFIS POUR UN DROIT MONDIAL* 104 (1998); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791, 792, 796–98 (1999); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 557–58 (2002); Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 11–13 (2005).

¹⁴³ See *supra* note 139 and accompanying text.

¹⁴⁴ See Shaffer & Pollack, *supra* note 2, at 745–48.

or, vice-versa, to create an antagonistic relationship between these legal instruments. The existence of regime complexity facilitates the ability of states and other actors to do so.

In our previous scholarship, we distilled our argument about hard and soft law into the four possible combinations of distributive conflict and regime complexity, summarized in Table 1.¹⁴⁵

	Dist. Conflict Low	Dist. Conflict High
Single, Isolated Regime	Complementary interaction of hard and soft law, as per existing literature.	Possible antagonistic interaction of hard and soft law within the regime, although opportunities limited by invariant memberships, rules, and substantive content of regime.
Regime Complex	Possible complementary interaction of hard and soft law, although differing memberships, rules and substantive foci may render coordination difficult even in the absence of major distributive conflicts.	Likely antagonistic interaction of hard and soft law between regimes with different decision-making rules, memberships and substantive foci.

The existing literature has tended to focus on isolated regimes with low levels of distributive conflict, as depicted in the upper left-hand cell.¹⁴⁶ Under such circumstances, states likely lack any incentive to undermine existing law, and will use hard and soft law in complementary ways.¹⁴⁷ Where distributive conflict is again low, but regime complexes coexist with no hierarchical structure, as when an issue-area comprises multiple functional domains, one would not expect states to contest or undermine existing legal provisions, but would instead anticipate some coordination problems among regimes with different membership rules, substantive foci, and predominant functional representation.¹⁴⁸

¹⁴⁵ Shaffer & Pollack, *supra* note 2, at 746 (illustrating our expectations about the interaction of hard and soft law under different combinations of distributive conflict and regime complexity).

¹⁴⁶ *E.g.*, Krasner, *supra* note 122, at 337.

¹⁴⁷ *See id.*

¹⁴⁸ Shaffer & Pollack, *supra* note 2, at 746–47 & n.110.

By contrast, in the upper right-hand cell where distributive conflict is high and states engage in distributive conflict within a single, isolated regime, states will have an incentive to contest existing legal provisions, but will lack the opportunity to do so due to the decision-making rules under which most international organizations operate.¹⁴⁹ This scenario would likely occur infrequently, however, because distributive conflict among states furnishes a significant incentive for disadvantaged states to search for an alternative forum or, failing that, to press for the creation of another regime to compete with or undermine the existing regime.¹⁵⁰ The choice to forum shop or to create new regimes is thus, in part, endogenous to the presence of distributive conflict.¹⁵¹

We therefore expect this dynamic to push outcomes from the upper right-hand cell to the lower right-hand cell, because where distributive conflicts are present and multiple regimes overlap regarding a single issue-area, states enjoy both an incentive and an opportunity to forum shop.¹⁵² In doing so, states can use hard and soft law strategically to achieve their aims. In sum, where distributive conflict over the terms of international agreement is ubiquitous, and where a given issue falls under multiple regimes in the “ever-thickening web of international norms, rules, and institutions,” we expect actors to deploy hard and soft law so that they interact antagonistically.¹⁵³ Moreover, we expect to find this pattern across a broad range of issues in international law across sustained periods.¹⁵⁴

D. *Four Hypotheses*

Our theoretical framework from our previous scholarship leads to four general, testable hypotheses regarding the interaction of hard and soft law that are equally as applicable in the international security context as they were in the international trade context.¹⁵⁵ We briefly restate these hypotheses before exploring their application within the field of international security.

¹⁴⁹ *Id.* at 747 & n.111 (explaining that “most international organizations operate by consensus decision making so that any state benefitting from existing law could block adoption of countervailing legal instruments”).

¹⁵⁰ *Id.* at 747.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 748.

¹⁵⁴ Shaffer & Pollack, *supra* note 2, at 748.

¹⁵⁵ *Id.* at 765–98.

*Hypothesis 1. Where distributive conflict is low between powerful states, they are likely to deploy hard and soft law to work as complements in an evolutionary manner.*¹⁵⁶

Where powerful actors in the realm of international economic law, such as the United States and the European Union (EU), agree on a particular international policy or rule, scholars have commonly argued that it is much easier for them to promote it globally.¹⁵⁷ For instance, Daniel Drezner contends that, in general, agreement between the United States and the EU is both a “necessary and sufficient condition” for successful international regulation.¹⁵⁸ We hypothesize that “the interaction of hard and soft law as complements, presented as a general rule in much or all of the existing [international law] literature, in fact operates only under a restrictive set of conditions, namely a broad policy consensus among the most powerful actors within a given issue-area.”¹⁵⁹ In this sense, the existing literature is not so much incorrect as it is guilty of selection bias, focusing on the subset of cases most conducive to the complementary interaction of hard and soft law.

Examples of such complementary interaction are widespread in the literature, which often focuses on U.S. and European cooperative endeavors. Historically, the United States has played a leading role in the success of a number of international regulatory cooperation initiatives, ranging from international agreements to protect the ozone layer,¹⁶⁰ to anti-bribery conventions,¹⁶¹ to the Uruguay Round of trade negotiations.¹⁶² The initial instruments deployed in both the ozone and anti-bribery cases were of a soft-law nature, but the parties turned to hard-law agreements after EU members were convinced of the benefits of such an approach. The EU, however, has played an increasingly entrepreneurial role in global governance, from standard-setting to climate change to financial regulation, attributable in large part to the increased institutionalization and harmonization of European regula-

¹⁵⁶ *Id.* at 765.

¹⁵⁷ *Id.* at 765 & nn.194–95.

¹⁵⁸ DREZNER, *supra* note 123, at 5.

¹⁵⁹ Shaffer & Pollack, *supra* note 2, at 765.

¹⁶⁰ Vienna Convention for the Protection of the Ozone Layer art. 11, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 [hereinafter Vienna Convention].

¹⁶¹ Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

¹⁶² See generally Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

tion at the EU level.¹⁶³ Looking beyond these contemporary cases of international economic regulation, we can expect that, where great powers (which can vary over time and by issue-area) agree, soft law will both elaborate existing hard law and build over time into new hard law, as contemplated in the existing literature.

*Hypothesis 2. Where distributive conflict among powerful states is high, we are more likely to see them deploy hard and soft law in opposition to each other, often by working through different international regimes and fora. These overlapping hard- and soft-law regimes and fora, in turn, may come into conflict. When they do, the soft-law regimes and fora can lose some of their technocratic, flexible, and deliberative features, and the hard-law regimes and fora can become less clear and determinate in their requirements. Where distributive conflict is ongoing, international legal instruments will not simply converge into a new synthesis, but may remain in conflict for a prolonged period.*¹⁶⁴

Intense distributive conflict is likely to inhibit successful cooperation, as it undermines agreement among powerful states.¹⁶⁵ Powerful states engaged in distributive conflicts are likely to forum shop, advancing their interests by pressing for the adoption of legal provisions, both hard and soft, in fora that are most favorable to their respective positions. The resulting overlapping and incompatible regimes provide favorable conditions for the antagonistic interaction of hard and soft law.

Case studies of international economic regulation, in which the United States and the EU are the dominant powers, illustrate this prediction.¹⁶⁶ Because the United States and the EU possess relatively equal levels of economic power, each side can easily use its market power to counteract the other—and to seek out allies in existing or new fora—when the two sides disagree on a regulatory policy.¹⁶⁷ Under such circumstances, the resulting agreement likely will either contain

¹⁶³ See, e.g., BRAITHWAITE & DRAHOS, *supra* note 132, at 488–94; see also Elliot Posner, *Market Power Without a Single Market: The New Transatlantic Relations in Financial Services*, in THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS, *supra* note 133, at 233, 233–36; cf. Andreas Nölke, *Transatlantic Regulatory Cooperation on Accounting Standards: A ‘Varieties of Capitalism’ Perspective*, in SYSTEMIC IMPLICATIONS OF TRANSATLANTIC REGULATORY COOPERATION AND COMPETITION 287, 287–90 (Simon J. Evenett & Robert M. Stern eds., 2011).

¹⁶⁴ Shaffer & Pollack, *supra* note 2, at 767.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 768–73.

¹⁶⁷ See *id.* at 768.

vague terms, or will set in opposition competing international hard- and soft-law instruments.¹⁶⁸

We have earlier shown how the World Trade Organization (WTO) lies at the center of many of these inter-regime regulatory conflicts, given the WTO's broad scope of coverage and its implications because of its hard-law dispute settlement system.¹⁶⁹ For example, the United States and the EU have taken distinctive and sharply opposed approaches to the regulation of genetically modified organisms (GMOs), with the United States pursuing a more liberal and, what it calls, a "science-based" approach to risks from GMOs, whereas the EU, reflecting prevailing European social norms, adopted a more precautionary system requiring an onerous prior approval procedure for each genetically modified food or crop.¹⁷⁰ Over the past two decades, both sides have attempted to export or "upload" their respective approaches to the global level, and both sides have actively forum-shopped.¹⁷¹ The United States has favored the hard-law WTO with its rules on non-tariff barriers to trade and its powerful dispute settlement system. The EU has favored other regimes, including the Codex Alimentarius Commission, a soft-law body establishing non-binding food-safety standards, and the Convention on Biodiversity ("CBD"), which is empowered to adopt rules relating to the environmental aspects of GMOs.¹⁷² The EU, faced with existing hard-law rules in the WTO that could be changed only by consensus, has attempted to constrain the impact of WTO rules by pressing for the adoption of more precautionary food-safety standards in the Codex Alimentarius Commission, and for a restrictive Biodiversity Protocol to the CBD.¹⁷³ The result has not been a complementary relationship of hard and soft law, but one in which each side seeks deliberately to upload its own views as international law and to undermine or curtail competing international rules and standards.

¹⁶⁸ *See id.*

¹⁶⁹ MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 113–76 (2009); Shaffer & Pollack, *supra* note 2, at 752–65, 768–73; *see also* Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79, 80–81 (2006).

¹⁷⁰ POLLACK & SHAFFER, *supra* note 169, at 150–52; Shaffer & Pollack, *supra* note 2, at 752–65.

¹⁷¹ POLLACK & SHAFFER, *supra* note 169, at 150–66; Shaffer & Pollack, *supra* note 2, at 752–53.

¹⁷² POLLACK & SHAFFER, *supra* note 169, at 158, 162–66.

¹⁷³ *See id.*

This interaction of competing international hard and soft law has, in turn, affected the purported advantages of the hard and soft legal regimes in question. The soft-law Codex Alimentarius Commission, for example, normally meets at a technical level to deliberate about non-binding food safety standards, but it has been politicized as each side has grasped the implications of Codex rules on the application of WTO hard law in WTO litigation.¹⁷⁴ By contrast, there has been pressure on the quintessential hard-law regime of the WTO dispute-settlement system to accommodate the norms set forth in neighboring international regimes. In WTO litigation over the EU's regulation of GMOs, the EU pressed the WTO panel to take into account the neighboring international regimes. The end result, we noted, was not a gradual clarification and elaboration of international law, as per the existing literature, but a deliberate and persistent muddying of the international legal waters.¹⁷⁵

*Hypothesis 3. Even where powerful states agree on a common approach, smaller states that are adversely affected can use international hard- and soft-law strategies to attempt to thwart powerful states' aims, again choosing regimes more favorable to their positions in a fragmented international law system. The result, once again, is hard and soft law acting as antagonists. Such interaction can potentially lead to less flexibility and deliberation in the soft-law regimes and fora, and less legal certainty provided by the hard-law ones. Powerful states nonetheless have significant advantages in these situations.*¹⁷⁶

The strategic use of hard and soft law is not exclusively the province of powerful states.¹⁷⁷ For less-developed countries and powerful countries alike, international law has important distributive implications.¹⁷⁸ Intellectual property law is a prime example.¹⁷⁹ These distributive implications create incentives for developing countries to use new

¹⁷⁴ *Id.* at 171–76.

¹⁷⁵ *See id.*; Shaffer & Pollack, *supra* note 2, at 752–65.

¹⁷⁶ Shaffer & Pollack, *supra* note 2, at 774.

¹⁷⁷ *See* Abbott & Snidal, *supra* note 65, at 447–50; Shaffer & Pollack, *supra* note 2, at 774.

¹⁷⁸ *See* Abbott & Snidal, *supra* note 65, at 447–50; Shaffer & Pollack, *supra* note 2, at 774.

¹⁷⁹ *See generally* TRIPS Agreement, *supra* note 162. The Agreement on Trade-Related Aspects of International Property Rights (“TRIPS”) requirements, for example, could result in higher prices for goods, restricted access to vital resources, and job losses in strong underground economies—without generating offsetting sources of revenue. *See* KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 235–41 (2000); Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 *CASE W. RES. J. INT’L L.* 471, 478–88 (2000).

hard- or soft-law instruments to counter the less favorable existing international law.¹⁸⁰ In practice, the relative weakness of developing countries, coupled with their large numbers in forums such as the UN General Assembly, generally leads these states to adopt counter-norms in the form of soft-law provisions aimed at undermining or curtailing the effect of existing hard law.¹⁸¹

Laurence Helfer, in particular, has explored how developing countries can “engage in regime shifting,” adopting “the tools of soft lawmaking.”¹⁸² Such countries often align themselves with sympathetic non-governmental groups who help generate counter norms that are development-oriented.¹⁸³ As Helfer further demonstrated in the intellectual property context, developing countries sought to counter the creation of hard intellectual property rights under the Agreement on Trade-Related Aspects of International Property Rights (“TRIPS Agreement”) and bilateral TRIPS-plus agreements,¹⁸⁴ which were closely modeled on U.S. and EU law, through forum-shifting tactics involving the CBD, World Intellectual Property Organization (“WIPO”), and the World Health Organization (WHO).¹⁸⁵ These countries have sought to do so with respect to a number of issues involving biodiversity, plant genetic resources for food and agriculture, public health, and human rights, and they seek to generate “new principles, norms, and rules of intellectual property protection” within these institutions that “are more closely aligned with these countries’ interests.”¹⁸⁶

Hypothesis 4. There is a spectrum from which states may choose in using hard- and soft-law instruments to counter existing international law. They will favor instruments with harder law characteristics (in terms of precision, obligation, and delegation) when their interests are certain and when they can obtain sufficient support from third countries. Where their interests are less clear, or where other states are able to block the adoption of hard-law provisions, states are more likely to op-

¹⁸⁰ See Shaffer & Pollack, *supra* note 2, at 774.

¹⁸¹ See *id.*

¹⁸² Helfer, *supra* note 137, at 17, 32. See generally Raustiala & Victor, *supra* note 115 (regarding the efforts of developing countries to undermine the hard-law provisions of the TRIPS Agreement through the adoption of the 2002 Treaty on Plant Genetic Resources).

¹⁸³ Shaffer & Pollack, *supra* note 2, at 774; see Helfer, *supra* note 137, at 32, 53–54.

¹⁸⁴ See Helfer, *supra* note 137, at 4–5 n.10 (explaining that “[t]hese bilateral treaties are referred to by the appellation ‘TRIPS-plus’ because they contain intellectual property protection standards more stringent than those found in TRIPS”).

¹⁸⁵ Helfer, *supra* note 137, at 58–61; Shaffer & Pollack, *supra* note 2, at 774.

¹⁸⁶ Helfer, *supra* note 137, at 6, 61–62; Shaffer & Pollack, *supra* note 2, at 776.

*pose existing international law provisions with new soft-law agreements.*¹⁸⁷

The existing literature provides relatively clear arguments about why states choose among the alternatives of hard and soft law in light of their respective strengths and weaknesses. The focus here, in contrast, is on the choice of hard- and soft-law instruments in the context of ongoing distributive struggles among states seeking to influence outcomes in settings of legal fragmentation and regime complexity.

For a state that is certain of its interests and intent on either shaping or undermining an existing regime, new hard-law provisions would most likely be preferable because they entail a legal obligation, *ceteris paribus*. Yet despite the advantages of hard law in promoting a state's policy choices, states tend to choose instruments of a relatively softer law nature to counter existing hard law as an antagonist in practice.¹⁸⁸ They do so for two primary reasons. First, states may not wish to counter existing hard law with new conflicting hard law for systemic reasons, preferring instead to soften existing hard law indirectly by altering the interpretation of the existing law, and thus its precision and clarity.¹⁸⁹ Second, revisionist states, dissatisfied with existing regimes, may indeed press for conflicting hard-law provisions, but be unable to secure the agreement of other (status-quo) parties on such provisions.¹⁹⁰ Consequently, they may fall back on soft-law agreements as a second-best alternative. Non-state actors, moreover, rely on soft law because it is the exclusive form of international lawmaking directly available to them without state allies.¹⁹¹

Against this theoretical backdrop, and in an effort to complement our earlier work on international economic regulation, this Article examines the interaction of specific hard- and soft-law instruments to test our hypotheses with respect to two critical questions of international security law, that of: (1) the legality of the threat or use of nuclear weapons,¹⁹² and (2) the legality of humanitarian intervention under the

¹⁸⁷ Shaffer & Pollack, *supra* note 2, at 788 (listed therein as Hypothesis 5).

¹⁸⁸ *Id.* at 789.

¹⁸⁹ *Id.* at 790 (“[The] existing hard law may be of a broad scope of coverage, such as the rules of the WTO, so that states do not wish to undermine the overall agreement (or set of agreements), but merely want to affect the operation of particular issue-specific legal provisions within it.”).

¹⁹⁰ *Id.* at 789–90.

¹⁹¹ *Id.* at 790.

¹⁹² See *infra* notes 194–325 and accompanying text.

“responsibility to protect” doctrine.¹⁹³ In both cases, the UN Charter and other existing hard-law treaties have come under challenge from coalitions of states eager to undermine the purported legality of nuclear weapons and the absolute protection of state sovereignty, respectively. In both cases, these coalitions—of less-developed countries in the first instance, of Western interventionist states in the second—sought to develop various legal instruments to undermine the pre-existing legal consensus on these questions. The remainder of this Article shows how the resulting antagonistic interaction of hard and soft law is consistent with the hypotheses we have laid out.

II. THE LEGALITY OF NUCLEAR WEAPONS

Nuclear weapons occupy a special place in international law. Introduced in 1945 during the final stages of World War II and never used in battle since the end of that conflict, nuclear weapons have nevertheless proliferated in terms of both the number of weapons and the number of states in possession of them.¹⁹⁴ For the five original nuclear powers—the United States, Great Britain, France, Russia, and China—nuclear weapons became the central element in the policy of nuclear deterrence that has been widely credited with preserving peace during the decades of the Cold War. Nevertheless, the devastating effects of nuclear weapons, the prospects of a full-scale nuclear exchange, and the proliferation of nuclear weapons to other countries such as India, Pakistan, Israel, and North Korea, have raised fundamental questions about whether and how the use, or threat of use, of nuclear weapons can be reconciled with the basic principles of the UN Charter, international humanitarian law, and other substantive areas of international law.

A. *Early Legal Provisions on Nuclear Weapons*

In the period immediately following World War II, the international legal approach to nuclear weapons was shaped largely by the small group of nuclear powers, including the United States and Great Britain (together with their nonnuclear NATO allies who relied on the extended deterrent of the American nuclear arsenal) and the Soviet Union (and its successor state, Russia), joined later by France and Chi-

¹⁹³ See *infra* notes 326–452 and accompanying text.

¹⁹⁴ See VED P. NANDA & DAVID KRIEGER, *NUCLEAR WEAPONS AND THE WORLD COURT* 25, 40–50 (1998).

na.¹⁹⁵ During the first several decades following the war, these powers generally asserted their legal right to create, acquire, and possess nuclear weapons, and to threaten their use as part of the strategy of deterrence, while at the same time accepting some binding legal limits on their nuclear arsenals through a series of bilateral, plurilateral, and multilateral agreements.¹⁹⁶ Three bodies of international law are particularly relevant here, namely (1) the regime on nuclear testing, (2) a second series of primarily bilateral agreements on nuclear arms control, and (3) the nuclear nonproliferation regime.

With regard to the first of these bodies of law, in 1963 the United States, the Soviet Union, and Great Britain negotiated the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, also known as the Partial Test Ban Treaty ("PTBT"), which was later opened for signature by other states.¹⁹⁷ As its name implied, the PTBT limited its signatories to underground testing, which continued apace into the 1990s as the United States, the Soviet Union, Britain, and later France and China proceeded to develop, test, and modernize their nuclear arsenals.¹⁹⁸

Complementing this nuclear testing regime, the United States and the Soviet Union engaged in a second series of mostly bilateral arms control agreements, including most notably the 1972 Strategic Arms Limitation Treaty ("SALT I")¹⁹⁹ and Anti-Ballistic Missile ("ABM") Treaty²⁰⁰; the 1979 Strategic Arms Limitation Treaty ("SALT II") (never ratified by the United States, but honored in practice by both sides)²⁰¹; the

¹⁹⁵ See generally Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14.2 U.S.T. 1963 [hereinafter PTBT].

¹⁹⁶ See, e.g., Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. 1, May 26, 1972, 23.4 U.S.T. 3435 [hereinafter ABM]; Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., art. 1, May 26, 1972, 23.4 U.S.T. 3426 [hereinafter SALT I]; PTBT, *supra* note 195, art. 1.

¹⁹⁷ See PTBT, *supra* note 195, art. 3. As of 2010, the Treaty had some 108 signatories, not including the nuclear powers of China and France. See *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, U.S. DEP'T OF STATE, <http://www.state.gov/t/isn/4797.htm> (last visited July 25, 2011).

¹⁹⁸ See PTBT, *supra* note 195, art. 1. As we shall see, the PTBT was followed up in 1996 by a Comprehensive Test Ban Treaty, whose signatories agreed to a complete cessation of nuclear testing, although the Treaty has yet to come into force.

¹⁹⁹ SALT I, *supra* note 196.

²⁰⁰ ABM, *supra* note 196.

²⁰¹ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., June 18, 1979, 18 I.L.M. 1138 [hereinafter SALT II]; Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 NONPROLIFERATION REV.

1987 plurilateral Intermediate-Range Nuclear Forces (“INF”) Treaty²⁰²; the Strategic Arms Reduction Treaties, START I²⁰³ and START II²⁰⁴, in 1991 and 1993 respectively; and the 2002 Strategic Offensive Reductions Treaty (“SORT”), also known as the Moscow Treaty.²⁰⁵ In April 2010, U.S. President Barack Obama and Russian President Dmitry Medvedev signed the “New START,” a treaty which will further reduce limits on U.S. and Russian nuclear arsenals, requiring both sides to limit their nuclear arsenals to 1550 warheads each; this new treaty was ratified by the U.S. Senate in December 2010, and by the Russian Duma in January 2011.²⁰⁶ Through this gradual process, accelerating after the end of the Cold War, the two largest nuclear powers have accepted significant hard-law limitations on the numbers and types of weapons deployed.²⁰⁷ Yet none of these agreements called into question the fundamental right of each state to possess and deploy nuclear weapons, to threaten their use as part of a policy of deterrence, or, ultimately, to use them in self-defense.²⁰⁸

Finally, a third leg of the nuclear weapons regime was constituted by the multilateral Nuclear Non-Proliferation Treaty (“NPT”).²⁰⁹ The Treaty, which was opened for signature in 1968 and later extended for an indefinite period at a 1995 review conference, was originally conceived as a grand bargain between the officially recognized nuclear

401, 415 (2007) (noting that although SALT II was never ratified for political reasons, the parties nevertheless adhered to its terms).

²⁰² Treaty on the Elimination of their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, 1657 U.N.T.S. 2 [hereinafter INF Treaty].

²⁰³ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., July 31, 1991, 2 Supp. U.S. Dep’t of State Dispatch 1 [hereinafter START I].

²⁰⁴ Treaty on Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Jan. 3, 1993, 103-1 S. TREATY DOC. 1 [hereinafter START II].

²⁰⁵ Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, S. TREATY DOC. 107-8 [hereinafter SORT], *superseded by* Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, S. EXEC. DOC. 111-6 (2010).

²⁰⁶ Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ. FED., art. II, Apr. 8, 2010, S. EXEC. DOC. 111-6, *available at* <http://www.state.gov/documents/organization/140035.pdf> [hereinafter New START]; *see also Key Facts About the New Start Treaty*, THE WHITE HOUSE OFFICE OF THE PRESS SEC’y (Mar. 26, 2010), <http://www.whitehouse.gov/the-press-office/key-facts-about-new-start-treaty>.

²⁰⁷ *See supra* notes 197–205 and accompanying text.

²⁰⁸ *Cf. supra* note 205 and accompanying text.

²⁰⁹ *See generally* Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

weapon states (“NWS” —originally the United States, the Soviet Union and Great Britain, later joined by France and China) on the one hand, and the much larger group of nonnuclear weapon states (“NNWS”) on the other.²¹⁰ According to the terms of the treaty, nonnuclear weapon states agree not to receive, manufacture, or acquire nuclear weapons²¹¹ and also to accept safeguards and verification inspections conducted by the International Atomic Energy Agency (“IAEA”) to confirm that nuclear technology is not diverted from peaceful energy use to weapons manufacturing.²¹² Although many critics have interpreted these provisions as cementing “second-class” status for NNWS, these states gain the benefits of preventing nuclear proliferation to potential rivals, as well as a recognized “inalienable right” to the peaceful use of nuclear energy, and a series of treaty-based concessions by the NWS.²¹³

For their part, the United States and other nuclear weapon states agree not to transfer nuclear weapons or to otherwise assist any NNWS in acquiring or developing nuclear weapons.²¹⁴ Just as importantly, nuclear weapon states accept certain responsibilities toward non-nuclear weapon states, including assisting NNWS in developing their peaceful nuclear industries.²¹⁵ Perhaps most significantly for our purposes, Article VI of the treaty imposes obligations on all states-parties to the treaty, including nuclear weapon states, “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”²¹⁶ These latter provisions constitute hard law in terms of *obligation* through their placement in a legally binding treaty with 189 states-parties, yet unlike the provisions applying to non-nuclear weapons states’ policies and inspections, Article VI in particular lacks both *precision* (the parties are required to negotiate “in good faith,” but not to reach any specific outcome by any specific date) and *third-party dispute resolution*.²¹⁷ The interpretation of Article VI, and the obligations

²¹⁰ See *id.* art. X.

²¹¹ *Id.* art. II.

²¹² *Id.* art. III.

²¹³ *Id.* art. IV.

²¹⁴ *Id.* art. I.

²¹⁵ NPT, *supra* note 209, art. V.

²¹⁶ *Id.* art. VI.

²¹⁷ See *id.*

that it imposes on recognized nuclear-weapon states, would be the subject of significant dispute in the coming years.²¹⁸

For the first three decades following the Second World War, these regimes placed modest restrictions on the nuclear powers with respect to nuclear testing, deployment of certain types of weapons, and proliferation of nuclear weapons to non-nuclear weapon states. Significantly, moreover, most of these treaties were legally binding, hard-law agreements—often very precise, and with some degree of third-party delegation to the IAEA in particular. Yet, reflecting the interests of the nuclear powers, who were also the five permanent members of the Security Council and who took the lead in drafting these treaties, *none of these treaties called into question the fundamental right of these states to possess, threaten, or even ultimately use nuclear weapons in self-defense.* The most far-reaching provisions that might question the legality of nuclear weapons could be found in Article VI of the NPT regarding disarmament negotiations among the extant nuclear powers, yet these provisions were also among the “softest” or least precise, stating a general goal of nuclear disarmament but imposing no concrete obligations or timelines on the nuclear powers.

B. Challenges to the Legality of Nuclear Weapons

From the 1960s through the 1990s, a sizable coalition of states corresponding roughly with the Non-Aligned Movement (“NAM”), joined by a growing number of anti-nuclear non-governmental organizations (NGOs), sought to challenge the legality of the threat or use of nuclear weapons by the nuclear powers.²¹⁹ These actors pointed to the enor-

²¹⁸ For a good analysis of Article VI, see Ford, *supra* note 201, at 407: Ford, who served until September 2008 as United States Special Representative for Nuclear Nonproliferation, argues that the article requires only “good faith negotiations” and not “specific disarmament steps.” In addition to the five recognized NWS, three additional de facto nuclear powers—India, Pakistan, and Israel—remained non-signatories to the treaty, while a fourth, North Korea, withdrew from the Treaty in 2003 and tested its first nuclear weapon in 2006. See John Simpson, *The Future of the NPT*, in *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY* 45, 59–61 (Nathan E. Busch & Daniel H. Joyner eds., 2009) [hereinafter *COMBATING WEAPONS*]. In addition to these countries, other NPT signatories such as Iraq (before 2003) and Iran have been accused of secretly developing nuclear weapons technology. See *id.* For good discussions of the NPT and the international nonproliferation regime, see generally the essays in *COMBATING WEAPONS*, *supra*.

²¹⁹ See NANDA & KRIEGER, *supra* note 194, at 69–86; *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 9 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) [hereinafter *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE*].

mous destructive potential of nuclear weapons, the growing number of such weapons, the inequity built into the NPT regime with its two classes of nuclear and non-nuclear weapon states, and, above all, the failure of the nuclear weapon states to make progress toward comprehensive nuclear disarmament as called for in Article VI of the NPT. Unable, however, to secure changes to the NPT or to other binding arms-control treaties governing the use of nuclear weapons, these states concentrated much of their effort on another forum, a soft-law forum: the General Assembly of the United Nations.²²⁰

In a series of deeply disputed resolutions, often introduced and supported largely by members of the NAM, the General Assembly repeatedly declared the use, or threat of use, of nuclear weapons to be contrary to the principles of the UN Charter and of international humanitarian law.²²¹ The first of these declarations, General Assembly Resolution 1653, was adopted in 1961, and declared that “[t]he use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.”²²² The heyday of anti-nuclear resolutions in the General Assembly, however, began in the late 1970s, corresponding to the ascendance of the newly independent, less-developed countries (“LDCs”).²²³ These states generally caucused in the context of the NAM for the purposes of international security and other matters. During this period, LDCs were regularly able to summon lopsided majorities critical of the United States and other advanced industrialized countries, calling both for a “New International Economic Order” and for a new security order in which the recognized nuclear powers would more vigorously pursue the NPT provisions relating to nuclear disarmament as well as the transfer of civilian nuclear technology.²²⁴

The first of these resolutions, which were to pass regularly through the General Assembly from the late 1970s to the present, was adopted

²²⁰ *E.g.*, G.A. Res. 33/71B, ¶ 1, U.N. Doc. A/RES/33/71B (Dec. 14, 1978); G.A. Res. 34/83A, ¶¶ 1–5, U.N. Doc. A/RES/34/83 (Dec. 11, 1979); G.A. Res. 1653 (XVI), ¶ 1, U.N. Doc. A/RES/16/1653 (Nov. 24, 1961).

²²¹ *See, e.g.*, G.A. Res. 34/83A, ¶¶ 1–5, U.N. Doc. A/RES/34/83 (Dec. 11, 1979); G.A. Res. 1653 (XVI), ¶ 1, U.N. Doc. A/RES/16/1653 (Nov. 24, 1961); G.A. Res. 33/71B, ¶ 1, U.N. Doc. A/RES/33/71B (Dec. 14, 1978).

²²² G.A. Res. 1653 (XVI), ¶ 1, U.N. Doc. A/RES/16/1653 (Nov. 24, 1961).

²²³ *E.g.*, G.A. Res. 34/83A, ¶¶ 1–5, U.N. Doc. A/RES/34/83 (Dec. 11, 1979); G.A. Res. 33/71B, ¶ 1, U.N. Doc. A/RES/33/71B (Dec. 14, 1978).

²²⁴ For good general discussions of the UN GA during this period, and of the efforts of LDC groupings such as the NAM and the G-77, see generally STEPHEN D. KRASNER, *STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* (1985) and DANIEL PATRICK MOYNIHAN, *A DANGEROUS PLACE* (1978).

in December 1978 over the opposition or abstention of the United States, its allies, and the other nuclear powers.²²⁵ The resolution declared unequivocally that: (1) the use of nuclear weapons will be a violation of the UN Charter and a crime against humanity and (2) the use of nuclear weapons should therefore be prohibited, pending nuclear disarmament.²²⁶

Subsequent resolutions introduced by the Non-Aligned Movement sought further to criminalize the use of nuclear weapons, in a series of stages. Following nearly identical resolutions in 1979²²⁷ and 1980²²⁸ declaring the threat of use of nuclear weapons to be illegal, the General Assembly in 1981 urged “consideration . . . of an international convention on the non-use of nuclear weapons and prevention of nuclear war or some other agreement on the subject.”²²⁹ This call for a hard-law instrument outlawing the threat or use of nuclear weapons became far more specific in 1990, when the NAM, encouraged and aided by a growing coalition of “abolitionist” NGOs, secured the adoption of a new Resolution 45/59B, reiterating the (soft-law) claim that use of nuclear weapons constituted a crime against humanity, and calling explicitly for a hard-law “Convention on the Prohibition of the Use of Nuclear Weapons.”²³⁰ The annex to the resolution contained a brief, four-article draft convention, the first article of which stated that, “The States Parties to this Convention solemnly undertake not to use or threaten to use nuclear weapons under any circumstances.”²³¹ The resolution was adopted by a vote of 125 mostly less-developed countries in favor, with seventeen states opposed and ten abstentions primarily from the ranks of the nuclear powers and military allies of the United States.²³² This resolution was again followed by similar General Assembly resolutions in the following years, reiterating the demand for a convention outlawing nuclear weapons and regretting the unwillingness of nuclear weapons states to engage in such negotiations.²³³

²²⁵ G.A. Res. 33/71B, ¶ 1, U.N. Doc. A/RES/33/71B (Dec. 14, 1978).

²²⁶ *Id.*

²²⁷ G.A. Res. 34/83A, ¶¶ 1–5, U.N. Doc. A/RES/34/83 (Dec. 11, 1979).

²²⁸ G.A. Res. 35/152D, ¶ 1, U.N. Doc. A/RES/35/152D (Dec. 12, 1980).

²²⁹ G.A. Res. 36/92I, Annex, U.N. Doc. A/RES/36/92I (Dec. 9, 1981).

²³⁰ G.A. Res. 45/59B, ¶ 1, U.N. Doc. A/RES/45/59B (Dec. 4, 1990).

²³¹ G.A. Res. 45/59B, Annex, U.N. Doc. A/RES/45/59B (Dec. 4, 1990).

²³² *See id.*

²³³ *See, e.g.*, G.A. Res. 46/37D, ¶¶ 1–2, U.N. Doc. A/RES/46/37D (Dec. 6, 1991) (reiterating the same demand, and adopted by a similar vote of 122–16–22).

C. *The ICJ Nuclear Weapons Case*

In the mid-1990s, spurred by a coalition of anti-nuclear NGOs cooperating under the rubric of the World Court Project, opponents of nuclear weapons undertook efforts in yet another legal avenue, encouraging majorities in both the General Assembly and the Assembly of the World Health Organization (WHO) to request an opinion from the International Court of Justice regarding the legality of nuclear weapons.²³⁴ Both requests were submitted pursuant to Article 96 of the UN Charter, which authorizes both the Security Council and the General Assembly to request the Court to give an advisory opinion on any legal question, while other UN organs and specialized agencies may request advisory opinions on legal questions “arising within the scope of their activities.”²³⁵ Requests for advisory opinions of the ICJ had been made sparingly prior to the two nuclear weapons cases, and typically on relatively narrow issues of law arising in the context of the activities of a UN organ.²³⁶ The WHO and General Assembly requests for opinions were therefore controversial among the member governments of the two bodies,²³⁷ as well as in the legal community.²³⁸ In the case of the WHO request, the Court controversially decided, by eleven to three votes, to decline the WHO request for an advisory opinion, ruling that the

²³⁴ See, e.g., NANDA & KRIEGER, *supra* note 194, at 69–86. The ICJ decision has given rise to a huge body of literature exploring multiple aspects of the decision and its consequences for international law and politics. For excellent discussions, see generally NANDA & KRIEGER, *supra* note 194, the essays in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, and Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT’L L. 417 (1997) (writing while Principal Deputy Legal Adviser of the U.S. Department of State, reflecting a U.S. perspective).

²³⁵ U.N. Charter art. 96, paras. 1–2.

²³⁶ See NANDA & KRIEGER, *supra* note 194, at 54–56.

²³⁷ See UN GAOR, 49th Sess., 90th mtg. at 35–36, U.N. Doc. A/49/PV.90 (Dec. 14, 1994). The GA request, for example, was adopted on December 15, 1994 by a simple majority vote of seventy-eight in favor, forty-three against, and thirty-eight abstaining; while the WHO request was adopted the previous year by a vote of seventy-three in favor, forty against, and ten abstentions. See UN GAOR, 49th Sess., 90th mtg. at 35–36, U.N. Doc. A/49/PV.90 (Dec. 14, 1994); WHO, *Health and Environmental Effects of Nuclear Weapons*, at 43–44, WHA46.40 (May 14, 1993). In the General Assembly vote, the Non-aligned Movement spearheaded the “yes” vote, joined by advanced industrialized countries such New Zealand and San Marino, while the United States, most of its NATO allies, and Russia voted against the resolution. China did not vote. Canada, Norway, Japan, Australia, Ireland, Sweden, and Australia were among the countries that abstained. See NANDA & KRIEGER, *supra* note 194, at 57–58, 82.

²³⁸ See NANDA & KRIEGER, *supra* note 194, at 51–68 (providing a general discussion of ICJ jurisdiction for advisory opinions).

WHO request did not relate to an issue within the scope of the WHO's activities.²³⁹

The UN General Assembly made the second, and successful, request for an ICJ opinion. On December 15, 1994, the General Assembly adopted—by a vote of seventy-eight in favor to forty-three against and with thirty-eight abstaining—a resolution requesting an advisory opinion from the International Court of Justice on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”²⁴⁰ The case became one of the most bitterly contested decisions in the history of the ICJ, with twenty-eight states filing written statements and twenty-two states taking part in oral proceedings before the court.²⁴¹ The United States, other nuclear weapon states, and U.S. allies, furthermore, raised jurisdictional objections to the General Assembly request, urging the ICJ to rule that it lacked jurisdiction to hear the case, or that it should use its discretion not to give an opinion.²⁴² The ICJ, however, rejected these arguments by a vote of

²³⁹ See *id.* at 56. The minimum jurisdictional requirements for advisory opinions under the UN Charter and the ICJ Statute are three-fold: (1) a legal question; (2) a proper requesting body; and (3) in the case of an authorized organ or specialized agency, a legal question “within the scope of its activities.” *Id.* In the case of the WHO request, the Court ruled that although the first two criteria were met, the third was not. See Michael Bothe, *The WHO Request*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 103, 103–04. For good discussions of the WHO request, the ICJ's opinion, and the dissenting and separate opinions of three of the judges, see NANDA & KRIEGER, *supra* note 194, at 87–104; Bothe, *supra*, at 103–11; and Virginia Leary, *The WHO Case: Implications for Specialized Agencies*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 112, 112–27.

²⁴⁰ G.A. Res. 49/75K, ¶¶ 15–16, U.N. Doc. A/RES/49/75K (Dec. 15, 1994); U.N. GAOR, 49th Sess., 90th mtg. at 35–36, U.N. Doc. A/49/PV.90 (Dec. 14, 1994).

²⁴¹ NANDA & KRIEGER, *supra* note 194, at 106.

²⁴² See, e.g., *Letter Dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America*, INT'L COURT OF JUSTICE 14 (June 20, 1995), <http://www.icj-cij.org/docket/files/95/8700.pdf> [hereinafter U.S. Letter of June 20, 1995] (filed in Legality of the Threat or Use of Nuclear Weapons); *Letter Dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, Together with Written Comments of the United Kingdom*, INT'L COURT OF JUSTICE ¶¶ 2.25–27 (June 16, 1995), <http://www.icj-cij.org/docket/files/95/8802.pdf> [hereinafter U.K. Letter of June 16, 1995] (filed in Legality of the Threat or Use of Nuclear Weapons). On the merits, the United States maintained:

On the contrary, the possible use of these weapons is an important factor in the structure of their [the Permanent Members of the Security Council's] military establishments, the development of their security doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense.

13–1, ruling that the General Assembly request did indeed raise a “legal question,” and that it had the right to request an opinion under Article 96 of the UN Charter.²⁴³ The Court also rejected arguments, raised by the United States and its allies, that the request was unacceptably vague and abstract, that an opinion would adversely affect disarmament negotiations and that in offering its opinion the court would go beyond its judicial function and assert a lawmaking role.²⁴⁴

The ICJ’s opinion in response to the General Assembly request was one of the most complex and carefully scrutinized in the history of the court, and can be analyzed only briefly here.²⁴⁵ The court’s forty-two page opinion was equivocal on the central question of the legality of nuclear weapons.²⁴⁶ After one of the court’s members died during the proceedings, the court’s central finding was decided by a 7–7 vote, with the court President’s affirmative vote breaking the tie.²⁴⁷ The decision itself was followed by 307 pages of separate and dissenting opinions by all fourteen of the judges in the case.²⁴⁸

See U.S. Letter of June 20, 1995, at 14. Similarly, the United Kingdom maintained on the merits that

[i]n any event, there is no incompatibility between the two propositions (i) that States do not have an unlimited choice of the methods and means of warfare and (ii) that States may use nuclear weapons where this is consistent with their right of self-defence. There is no suggestion that self-defence is “unlimited”.

See U.K. Letter of June 16, 1995, ¶ 3.56.

²⁴³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 12 (July 8).

²⁴⁴ NANDA & KRIEGER, *supra* note 194, at 106–11.

²⁴⁵ See, e.g., NANDA & KRIEGER, *supra* note 194, at 110–47; Hugh Thirlway, *The Nuclear Weapons Advisory Opinions: The Declarations and Separate and Dissenting Opinions*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 390, 390–434 (providing a thorough analysis of the various separate and dissenting opinions in the case).

²⁴⁶ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶ 105 (2) (E) (July 8).

²⁴⁷ *Id.*; see NANDA & KRIEGER, *supra* note 194, at 88. Judge Mawdsley of Venezuela, one of the court’s fifteen judges, died just prior to oral testimony in the two cases, leaving fourteen judges to render opinions. NANDA & KRIEGER, *supra* note 194, at 88.

²⁴⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). One interesting question is whether the ICJ judges were systematically biased in favor of the states that appointed them or—as would seem relevant in this case—biased in terms of their own states’ status as a nuclear or nonnuclear weapon state or as an ally of the United States or the Soviet Union. See Eric A. Posner & Michael F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEG. STUD. 599, 600–02 (2005). In this context, it is striking that the three judges from the United States, Britain, and France (Schwebel, Higgins, and Guillaume, respectively) adopted dissenting or separate opinions, arguing for the legality of nuclear weapons, and that the three strongest dissents opposing legality came from judges native to countries in the NAM (Judge Weeramantry of Sri Lanka, Judge

In its opinion, the court first asked whether there existed any specific authorization or comprehensive prohibition of the threat or use of nuclear weapons in international law. The judges unanimously ruled that neither customary nor treaty law specifically *authorized* the threat or use of nuclear weapons. But the question of whether the threat or use of nuclear weapons is *prohibited* was more difficult. Crucially for our purposes, the court examined the long stream of General Assembly resolutions reviewed above, most of which had asserted explicitly that the threat or use of nuclear weapons was illegal under international law and indeed constituted a crime against humanity. If the court had found that these resolutions constituted customary international law, then the Non-Aligned Movement's strategic use of soft law could have legally bound the nuclear powers to a policy of non-use. The court pointed to a state practice of non-use, noting that nuclear weapons had not been used in combat since 1945, but ultimately rejected the argument of some states that the various General Assembly resolutions constituted *opinio juris*:

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited[.]" . . . [H]owever, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.²⁴⁹

The court therefore ruled by an 11–3 vote, in paragraph 105 (2)B of its opinion, that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."²⁵⁰

Shahabuddeen of Guyana, and Judge Koroma of Sierra Leone, all of whom offered dissents asserting the illegality of nuclear threat or use). See NANDA & KRIEGER, *supra* note 194, at 122–47; Thirlway, *supra* note 245, at 390–434.

²⁴⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 71 (July 8); see also Roger S. Clark, *Treaty and Custom*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 171, 171–80 (examining the Court's treatment of customary international law).

²⁵⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2)(B) (July 8). Three judges—Shahabuddeen, Weeramantry, and Koroma—

Having ruled that existing international law neither directly authorized nor prohibited the use of nuclear weapons *per se*, the court turned to analyzing the consistency of nuclear threat or use with other bodies of law, including human rights law, environmental law, the law of neutrality, and humanitarian law. Despite efforts by some nonnuclear weapons states to apply human rights law and environmental law to the question of nuclear weapons, the court adopted a narrower approach (*lex specialis*), focusing primarily on the application of international law relating to the use of force.²⁵¹ Paragraphs 105 (2)C and (2)D, in this context, asserted that any use of nuclear weapons would have to conform with articles 2(4) and 51 of the UN Charter (the latter regarding the use of armed force in self-defense) and with international humanitarian law.²⁵²

Having concluded that the threat or use of nuclear weapons must conform to international humanitarian law, the ICJ was equally divided, in paragraph 105 (2)E, as to whether the threat or use of nuclear weapons could be justified “in any circumstance” under international law.²⁵³ The court noted the views expressed by certain states, which argued that

recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, . . . and their effects, largely uncontrollable, could not be restricted, either in time or space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any cir-

dissented from this view, arguing that a general prohibition on nuclear use could be found in the corpus of international humanitarian law. See NANDA & KRIEGER, *supra* note 194, at 123–32.

²⁵¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2) (C)-(D) (July 8).

²⁵² See *id.*; U.N. Charter art. 2, paras. 4, 51.

²⁵³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2) (E) (July 8).

cumstance, notwithstanding the absence of any explicit conventional prohibition.²⁵⁴

“Nevertheless,” the opinion continued, “the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”²⁵⁵

The result of this reasoning was the court’s widely cited paragraph 105 (2)E, decided by a vote of 7–7 with President Bedjaoui casting the deciding vote, in which the court found that

the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.²⁵⁶

In effect, the ICJ came very close to the position of abolitionist NGOs and the NAM, holding that the threat or use of nuclear weapons would “generally” be contrary to established humanitarian law, yet the court refused to rule out the legality of such threat or use in “extreme circumstances of self-defense,” and thus left an opening for the nuclear powers.²⁵⁷ Finally, in paragraph 2(F), agreed upon unanimously, the court reaffirmed the basic principles of Article VI of the NPT, ruling that “[t]here exists an obligation to pursue in good faith and bring to a

²⁵⁴ *Id.* ¶ 92.

²⁵⁵ *Id.* ¶ 95.

²⁵⁶ *Id.* ¶ 105(2)(E).

²⁵⁷ See *id.* On the court’s findings in this paragraph, see, e.g., NANDA & KRIEGER, *supra* note 194, at 114, 120–22; Daniel Bodansky, Non Liqueur and the Incompleteness of International Law, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 153–70; Marcelo G. Kohen, *The Notion of ‘State Survival’ in International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 293–314; and Matheson, *supra* note 234, at 427–34. Among the dissenting votes, three of the judges (Schwebel, Higgins, and Guillaume) argued explicitly for legality, while three others (Weeramantry, Shahabuddeen, and Koroma) argued for illegality in all circumstances. See NANDA & KRIEGER, *supra* note 194, at 122–45.

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”²⁵⁸

D. *The Struggle Continues*

Given the equivocal nature of the decision and the proliferation of dissents and separate opinions by the judges, the decision was a legal “Rorschach test,” open to multiple interpretations.²⁵⁹ Among the nuclear powers, the United States, Britain, France, and Russia all interpreted the decision as allowing the threat and use of nuclear weapons in the cause of self-defense, and as consistent with their ongoing policy of nuclear deterrence. In its statement on the decision, for example, the U.S. government noted explicitly that “[w]e do not believe that the [c]ourt’s opinions provide reasons to alter the common defense policy of the United States and its allies” and Britain and France issued similar statements.²⁶⁰ Just as importantly for our purposes here, the United States and several of its allies noted that the court’s advisory opinion was not legally binding on UN member states—hence a soft-law rather than a hard-law decision.²⁶¹ In sum, for nuclear weapons states, the ICJ ruling

²⁵⁸ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶ 105(2)(F) (July 8); NPT, *supra* note 209, art. VI.

²⁵⁹ See Paul Szasz, *Book Review*, 9 REV. EUR. COMM. & INT’L ENVTL. L. 83, 83 (2000) (reviewing INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219). For a diverse set of scholarly responses, see, e.g., David Kennedy, *The Nuclear Weapons Case, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 462, 462–72; Martti Koskenniemi, *The Silence of Law/The Voice of Justice, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 488, 488–510; and W. Michael Reisman, *The Political Consequences of the General Assembly Advisory Opinion, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, *supra* note 219, at 473, 473–87.

²⁶⁰ NANDA & KRIEGER, *supra* note 194, at 155 (quoting U.S. statement); *see id.* at 153–58 (reviewing the responses of the declared nuclear weapons states).

²⁶¹ *See id.* at 153–58. The United States asserted that “[t]hese are advisory opinions of the Court. Advisory opinions state the Court’s views on legal questions asked by international organizations. They are not binding on governments.” NANDA & KRIEGER, *supra* note 194, at 155 (quoting the United States in reaction to *Legality of the Threat or Use of Nuclear Weapons*). Great Britain’s Attorney General, Sir Nicholas Lyell, similarly noted that “[t]he International Court’s Opinion is a response to a request from the UN General Assembly for advice, and is not a legally binding document,” while the French response to the decision was that “[t]hese opinions, which are not acts of jurisprudence, have no compulsory force.” NANDA & KRIEGER, *supra* note 194, at 155–56. The Russian position was similar to that of the British and French. China took a more conciliatory tone, noting that it had declared that it would “never be the first to use nuclear weapons” and that China had “undertaken unconditionally not to use or threaten to use nuclear weapons against non-nuclear states or nuclear weapon-free zones.” *Id.* Even the Chinese position, however, did not abjure the possible threat or use of nuclear weapons in a second strike. *See id.* at 157–58.

retained some room for the threat and potential use of nuclear weapons for deterrence, and in any event imposed no legally binding, hard-law obligations on UN member states to undertake nuclear disarmament.

By contrast with these positions, nonnuclear states and anti-nuclear NGOs emphasized the court's statement about the "general" illegality of nuclear weapons, as well as the obligations of nuclear powers to engage in good-faith disarmament negotiations.²⁶² After the ICJ judgment as before it, the nonnuclear states continued their effort to create new legal norms and rules outlawing the threat or use of nuclear weapons.²⁶³ Once again, these states and their NGO allies actively sought to entrench these rules in hard-law treaties or conventions, settling for soft-law resolutions when hard-law provisions were blocked by nuclear powers and their allies.²⁶⁴ Hence, soon after the ICJ issued its opinion in July 1996, Malaysia introduced a resolution in the UN General Assembly, adopted in December of that year.²⁶⁵ The decision took note of the ICJ ruling and underlined "the unanimous conclusion of the [c]ourt that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects."²⁶⁶ The resolution also revived the prospect of a binding convention,

Call[ing] upon all States to fulfill that obligation immediately by commencing multilateral negotiations in 1997 leading to an early conclusion of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.²⁶⁷

As in the past, the General Assembly was sharply divided on the resolution, which was adopted by a vote of 115 in favor, with twenty-two opposed and thirty-two abstentions.²⁶⁸

The following year, in April 1997, anti-nuclear NGOs brought together a group of lawyers, scientists, diplomats and disarmament experts to draft a model Nuclear Weapons Convention ("NWC"), designed to demonstrate the feasibility of such an instrument and to serve

²⁶² See NANDA & KRIEGER, *supra* note 194, at 158–64 (reviewing the reactions of NNWS, NGOs, and the World Court Project).

²⁶³ See, e.g., G.A. Res. 51/45M, ¶¶ 1–6, U.N. Doc. A/RES/51/45 M (Dec. 10, 1996); see also NANDA & KRIEGER, *supra* note 194, at 158–59.

²⁶⁴ See G.A. Res. 51/45M, ¶¶ 3–6, U.N. Doc. A/RES/51/45 M (Dec. 10, 1996).

²⁶⁵ *Id.*

²⁶⁶ *Id.*; see also NANDA & KRIEGER, *supra* note 194, at 158–59.

²⁶⁷ G.A. Res. 51/45M, ¶ 4, U.N. Doc. A/RES/51/45 M (Dec. 10, 1996).

²⁶⁸ See generally G.A. Res. 51/45, U.N. Doc. A/RES/51/45 (Jan. 10, 1997).

as the basis for an eventual negotiation.²⁶⁹ The model convention would—if adopted—be a hard-law agreement prohibiting the use, threat of use, possession, development, testing, deployment, and transfer of nuclear weapons, and providing a phased program for their elimination.²⁷⁰ It would also provide for verification procedures and create a standing secretariat to oversee them.²⁷¹ Costa Rica formally introduced the draft NWC as a document for discussion in the General Assembly later that year.²⁷²

As the vote on the December 1996 resolution indicates, however, the ICJ decision had essentially left the fault lines in the General Assembly unaffected, with most of the nonnuclear allies of the United States joining the established nuclear powers in opposing any effort to declare nuclear threat or use illegal, as well as opposing the opening of any negotiations on the proposed NWC.²⁷³ Instead, the ensuing decade witnessed a continuation of the long-standing struggle between the two sides, with the Non-Aligned Movement and its allies continuing their call to outlaw or criminalize the threat or use of nuclear weapons and to press the nuclear powers to pursue comprehensive nuclear disarmament pursuant to Article VI of the NPT.²⁷⁴ These efforts can be illustrated through a brief discussion of three sets of negotiations: (1) the hard-fought 1995 extension of the NPT and the subsequent review conferences in 2000 and 2005, (2) the negotiation of the Treaty establishing the International Criminal Court, and (3) the debate and adoption of resolutions in the UN General Assembly, which remains engaged.

With regard to the first of these negotiations, the United States and many of its allies were forced to engage in a protracted and often bitter struggle to secure the indefinite extension of the Non-Proliferation

²⁶⁹ See NANDA & KRIEGER, *supra* note 194, at 158–59, 176.

²⁷⁰ See Chargé d’Affaires of Costa Rica to the U.N., Letter dated Oct. 31, 1997 from the Chargé d’Affaires of Costa Rica to the United Nations addressed to the Secretary-General, Annex, UN Doc. A/C.1/52/7 (Nov. 17, 1997) [hereinafter Costa Rica Letter]; MERAV DATAN ET AL., SECURING OUR SURVIVAL (SOS): THE CASE FOR A NUCLEAR WEAPONS CONVENTION 42 (2007), available at <http://www.icanw.org/securing-our-survival>.

²⁷¹ Costa Rica Letter, *supra* note 270, Annex, § V; DATAN, *supra* note 270, at 42.

²⁷² Costa Rica Letter, *supra* note 270, at 1–2. The draft was compiled and published by three groups: International Physicians for the Prevention of Nuclear War, the International Association of Lawyers Against Nuclear Arms, and the International Network of Engineers and Scientists Against Proliferation. See DATAN, *supra* note 270.

²⁷³ See G.A. Res. 51/45M, ¶¶ 3–6, U.N. Doc. A/RES/51/45 M (Dec. 10, 1996); NANDA & KRIEGER, *supra* note 194, at 183–84.

²⁷⁴ NANDA & KRIEGER, *supra* note 194, at 158–68.

Treaty in 1995.²⁷⁵ The NPT entered into force in 1970, and was scheduled for a review in 1995, at which point a majority of the signatories could choose to let the treaty lapse, renew it for a fixed period of time (such as ten or twenty-five years), or renew the treaty indefinitely.²⁷⁶ The United States, then under the Clinton Administration, took the lead in campaigning for an unconditional and indefinite extension of the treaty, with strong support from Great Britain, France, and Russia.²⁷⁷

Not surprisingly, a number of non-nuclear weapon states, drawn largely from the ranks of the Non-Aligned Movement, sought to use the leverage of the 1995 extension decision to force concessions from the United States and the other nuclear powers.²⁷⁸ Specifically, countries such as Indonesia, Egypt, Mexico, Venezuela, North Korea, and Iran all initially opposed an indefinite extension, seeking instead to make any extension conditional on various concessions by the nuclear powers. Indonesian Ambassador Makarim Wibisono summarized this view, arguing that “[a]lthough a quarter century has elapsed since the treaty came into force, no serious efforts have been made . . . to attain the [disarmament] objectives that were clearly stipulated” in the NPT.²⁷⁹ Hence,

²⁷⁵ For excellent overviews of the 1995 NPT extension negotiations, see JAYANTHA DHANAPALA WITH RANDY RYDELL, *MULTILATERAL DIPLOMACY AND THE NPT: AN INSIDER'S ACCOUNT* 29–74 (2005); Rebecca Johnson, *Advocates and Activists: Conflicting Approaches on Nonproliferation and the Test Ban Treaty*, in *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* 49, 49–81 (Ann M. Florini ed., 2000); see also David B. Ottaway & Steve Coll, *A Hard Sell for Treaty Renewal; U.S. Campaign for Indefinite Extension Met with Skepticism*, WASH. POST, Apr. 14, 1995, at A1. NGOs were profoundly divided over the NPT extension, with some arms-control groups seeking an unconditional and indefinite extension, while abolitionist groups sought to use the NPT extension as leverage to secure disarmament agreements by the nuclear powers. Johnson, *supra*, at 64–65.

²⁷⁶ See Johnson, *supra* note 275, at 50. See generally NPT, *supra* note 209.

²⁷⁷ See Johnson, *supra* note 275, at 67, 71–72.

²⁷⁸ See, e.g., Julia Preston, *Egypt Opposes Indefinitely Extending Non-Proliferation Treaty*, WASH. POST., Apr. 21, 1995, at A35; R. Jeffrey Smith, *U.S. Move to Extend Non-Proliferation Treaty Meets Strong Opposition*, WASH. POST, Apr. 19, 1995, at A24; Jeffrey Smith & David B. Ottaway, *U.S. Wages Last-Ditch Campaign for Permanent Nonproliferation Pact*, WASH. POST, Mar. 1, 1995, at A4.

²⁷⁹ Smith & Ottaway, *supra* note 278, at A4 (alterations in original).

As a result, key developing nations want to link the NPT's extension to specific new steps by the nuclear powers toward disarmament. While they have yet to agree on a specific proposal, their overall strategy is to exert leverage on the nuclear powers by extending the treaty only for a limited period, or a series of periods. That would deliberately create uncertainty about whether the treaty was permanent, leaving open the possibility that Third World nations would obtain nuclear weapons in the future.

Id. Miguel Marin-Bosch, Mexico's chief representative at the talks, took a similarly hard-line position throughout most of the negotiations, arguing of the nuclear powers that “[t]hey continue to rely on nuclear weapons and do not seem prepared to give them up

Indonesia, Mexico, and other countries issued a series of demands for the nuclear powers to engage in specific commitments on nuclear disarmament, including most notably the conclusion of a Comprehensive Test Ban Treaty ("CTBT"), a ban on the production of fissionable materials for nuclear weapons, security guarantees from nuclear powers to nonnuclear states, and the establishment of a nuclear weapon-free zone in Southeast Asia.²⁸⁰ Egypt, together with other Arab states, focused on the fact that Israel, a de facto nuclear power, was not a signatory of the NPT, and urged the United States to put pressure on Israel to accede to the treaty.²⁸¹ Iran, under U.S. sanctions and accused by the United States of attempting to develop nuclear weapons technology, sought commitments on the sharing of peaceful nuclear technology.²⁸² On the eve of the final conference, eleven NAM members, including Indonesia, Malaysia, Thailand, and North Korea, sponsored a resolution calling for a twenty-five-year extension, with further extensions to occur automatically unless a majority of states-parties were opposed.²⁸³

The Clinton Administration, supported by Britain, France, Russia, Japan, and all the members of the Organization for Security and Cooperation in Europe ("OSCE"), sought an unconditional and indefinite extension of the treaty, and engaged in a months-long lobbying effort to win over votes from the rest of the NPT membership.²⁸⁴ Facing a di-

. . . . Quite the contrary, they are looking for ways to freeze the NPT's dichotomy between the nuclear haves and the nuclear have-nots." Ottaway & Coll, *supra* note 275, at A1 (alterations in original).

²⁸⁰ See Permanent Rep. of Australia to the U.N., Letter dated Aug. 22, 1996 from the Permanent Rep. of Australia to the United Nations addressed to the Secretary General, U.N. Doc. A/50/1027 (Aug. 26, 1996) (introducing as an annex the Comprehensive Nuclear-Test-Ban Treaty); Johnson, *supra* note 275, at 54-58 (emphasizing the inextricable linkage of the NPT to the CTBT and the strong pressure by nonaligned states and by anti-nuclear NGOs to achieve agreement on the CTBT as a precondition for NPT extension); Smith, *supra* note 278, at A24.

²⁸¹ Preston, *supra* note 278, at A35. U.S. officials, however, took a "hands off" approach to Israel's nuclear policy, saying that it was "a waste of time to urge Israel to back the NPT because the country long has relied on its nuclear arsenal as the ultimate security guarantee and is highly unlikely to sign the treaty." See Smith & Ottaway, *supra* note 278, at A1.

²⁸² See Ottaway & Coll, *supra* note 275, at A1.

²⁸³ R. Jeffrey Smith, *Permanent Nuclear Treaty Extension May Be Approved by Consensus Vote; Most Nations on Record in Support After Effort by U.S. and Allies*, WASH. POST, May 8, 1995, at A7.

²⁸⁴ Smith & Ottaway, *supra* note 278, at A4. Among the nuclear powers, China once again sought to depict itself as sympathetic to the concerns of the NAM, breaking with the other four official nuclear powers by indicating that it could accept either an indefinite extension or an interim extension for a fixed period of perhaps twenty-five years. Barbara Crossette, *China Breaks Ranks with Other Nuclear Nations on Treaty*, N.Y. TIMES, Apr. 19, 1995, at A16. By contrast with the U.S. moratorium on nuclear testing and with the demands of

vided Non-Aligned Movement with diverse preferences, the United States used both carrots and sticks in its campaign, putting intense pressure on a number of governments while offering compromises on specific issues.²⁸⁵ In the end, the conference adopted a resolution, based on a South African compromise proposal, that extended the NPT indefinitely and unconditionally, with only non-binding language regarding the principles and review procedures for future disarmament negotiations by nuclear weapon states. The five nuclear powers agreed to make “systematic and progressive efforts” to reduce nuclear stockpiles, and agreed to the “immediate commencement and early conclusion” of a convention to halt the production of fissile material used to make bombs, as well as of the pending CTBT. Yet these provisions, like Article VI of the NPT, were vague, and included no substantive obligations or calendar for completion. Eight delegations reportedly spoke against the compromise (Syria, Jordan, Iran, Libya, Iraq, Egypt, Malaysia, and Nigeria), but did not object when the conference president, Jayantha Dhanpala of Sri Lanka, declared a consensus in favor of extension.²⁸⁶ The result was a decision that took symbolic note of the concerns of the NAM states and abolitionist NGOs, but was substantively very close to the priorities of the United States and other nuclear weapon states.

The same basic themes ran through the negotiation of the 1996 CTBT and the 2000 and 2005 NPT review conferences.²⁸⁷ As promised

the NAM, however, China continued to test nuclear weapons in 1995, and conducted a nuclear test on May 15, 1995, just two days after the final vote on the NPT extension. Steven Mufson, *China Holds Nuclear Test; U.S., Japan Join Protests; Underground Blast Follows Backing of Treaty*, WASH. POST, May 16, 1995, at A13.

²⁸⁵ See, e.g., R. Jeffrey Smith & Julia Preston, *U.S.-Egypt Accord Paves Way for Renewal of Arms Curbs*, WASH. POST, May 11, 1995, at A36. In response to Egypt's concern about Israeli nonparticipation, for example, the United States offered a compromise text that included a general appeal to all nations with uninspected nuclear programs—a category including India and Pakistan as well as Israel—to adhere to the provisions of the Treaty. *Id.* Although it did not single out Israel as Egypt had hoped, the compromise language was sufficient to bring Egypt over in support of the agreement. *Id.*

²⁸⁶ Julia Preston, *Nations Make Nuclear Pact Permanent; U.S. Scores Victory at Global Conference*, WASH. POST, May 12, 1995, at A1. The continuing discord among nuclear and nonnuclear states was nevertheless underlined again the following day, when the states-parties were unable to agree on a final declaration characterizing progress in nuclear disarmament since the last review conference in 1990. Julia Preston, *Nuclear Talks End in Discord; Delegations Unable to Agree on How to Evaluate Arms Control Efforts*, WASH. POST, May 13, 1995, at A23.

²⁸⁷ See, e.g., Rebecca Johnson, *Politics and Protection: Why the 2005 NPT Review Conference Failed*, DISARMAMENT DIPL. (Autumn 2005) <http://www.acronym.org.uk/dd/dd80/80npt.htm>; Ernie Regehr, *From Abolition to Retention? The Morning After the Failed NPT Review Conference*, PLOUGHSHARES MONITOR, Summer 2005, at 2–7.

during the 1995 NPT review conference, the CTBT was agreed to and opened for signature in September 1996, following the declaration of unilateral testing moratoria by each of the five official nuclear weapon states.²⁸⁸ Yet the Treaty had not come into force as of February 2010, pending ratification by two of the official nuclear-weapon states (United States and China) and four de facto nuclear powers (India, Pakistan, Israel, and North Korea).²⁸⁹

In the next two NPT review conferences, the central debates were similar, although the outcomes were very different. This owed in large part to the transition from the Clinton to the Bush Administration in the United States. In the 2000 conference, the NAM states pressed for, and the nuclear-weapon states accepted, far-reaching although non-binding language on nuclear disarmament, including a planned series of “13 Practical Steps” such as the ratification of the CTBT, a moratorium on testing pending such ratification, adoption of a new treaty banning the production of fissile materials for nuclear weapons, and an irreversible shift of national and alliance defense doctrines away from reliance on nuclear weapons (the principle of “irreversibility”).²⁹⁰ This declaration, although it imposed no substantive hard-law requirements on NWCs, was sufficient to gain widespread support in the conference.²⁹¹

By 2005, however, the context had changed dramatically, with growing concern about the North Korean withdrawal from the NPT (in 2003) and about nuclear terrorism, which had been a marginal issue five years earlier. Just as significantly, the Bush Administration brought a new set of policy priorities to the NPT negotiations, focusing its attention on North Korea and Iran and strongly resisting arms-control demands such as the U.S. ratification of the CTBT, the negotiation of a verifiable ban on production of fissile materials for weapons use, or any change in U.S. defense doctrine away from use of nuclear weapons.²⁹²

²⁸⁸ See generally Comprehensive Nuclear-Test-Ban Treaty, G.A. Res. 50/245, U.N. Doc. A/RES/50/245 (Sept. 17, 1996).

²⁸⁹ The United States Senate rejected the CTBT in a vote on October 13, 1999, and the new Bush Administration then indicated its opposition to ratification. See 145 CONG. REC. 25, 143 (1999) (defeating the CBTB by a vote of 48–51, with one “present” vote); Jack Mendelsohn, *The Bush Presidency: Reconsidering the CTBT*, DISARMAMENT DIPL. (Dec. 2000/Jan. 2001), <http://www.acronym.org.uk/dd/dd53/53ctbt.htm>.

²⁹⁰ For an assessment of the follow-up on the “13 Practical Steps” and the implications for the subsequent 2005 conference, see Regehr, *supra* note 287, at 2–7.

²⁹¹ See *id.*

²⁹² See *id.* at 6 (“A significant factor in the failure of the Review Conference is the fear that the Bush Administration no longer considers the NPT to be the primary or even a significant bulwark against proliferation.”).

With the NAM states continuing to demand significant progress toward disarmament, the United States sought to omit any reference to the “13 Steps” of the 2000 conference document, and the conference broke up amid recriminations with no substantive declaration of the parties.²⁹³ Hence, while the NPT regime has been indefinitely extended, largely in favor of NWS interests, the basic principles of the regime—particularly those relating to nuclear use and disarmament—remain fundamentally contested to the present day.²⁹⁴

The issue of the legality of nuclear weapons also spilled over beyond the arms-control regime and into a second area, namely international criminal law. In 1998, during the negotiation of the treaty establishing the International Criminal Court (ICC), a number of parties to the negotiations called for the use of nuclear weapons to be included in the list of war crimes over which the court would have jurisdiction.²⁹⁵ Such a draft provision was formally introduced by India (a nuclear power but a non-signatory to the NPT) during the final negotiations, but was rejected when Norway, supported by Malawi and Chile, introduced a “no-action” motion, which was adopted by a vote of 114 to sixteen with twenty abstentions.²⁹⁶ Although a number of delegations indicated their disappointment with the omission of nuclear use from the list of war crimes, most delegations reportedly feared that such a provision would doom the treaty and therefore backed the Norwegian motion.²⁹⁷ Although the United States would ultimately refuse to sign the

²⁹³ See Johnson, *supra* note 287 (providing an account and analysis of the meeting); see also Regehr, *supra* note 287, at 5 (noting that, while abolitionists welcomed the steep nuclear reductions in the U.S./Russian SORT Treaty, they saw several elements of the Treaty—weakness of verification, the use of decommissioning rather than destruction of warheads, and the expiration of the treaty in 2012—as violations of the principle of “irreversibility” in nuclear disarmament), 6–7 (critiquing the continuing reliance on nuclear weapons in U.S. and NATO defense doctrine).

²⁹⁴ For up-to-date analyses of developments in the NPT regime, see the website of THE ACRONYM INSTITUTE FOR DISARMAMENT DIPLOMACY, <http://www.acronym.org.uk/npt/> (last visited July 25, 2011).

²⁹⁵ See, e.g., Press Release, Use of Weapons of Mass Destruction Should Be Included in Criminal Court’s Definition of War Crimes, Say Several Conference Speakers, U.N. Press Release L/ROM/14 (June 18, 1998), available at <http://www.un.org/icc/pressrel/lrom14.htm>.

²⁹⁶ See Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 81–85 (Roy S. Lee ed., 1999); Philippe Kirsch & Valerie Oosterveld, *Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court*, 46 MCGILL L.J. 1141, 1155 n.60 (2001).

²⁹⁷ See, e.g., Press Release, UN Diplomatic Conference Concludes with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/ROM/22 (July 17, 1998), available at <http://www.un.org/icc/pressrel/lrom22.htm>.

treaty, opposition from the United States and other nuclear and allied countries was effective in keeping the proposed provisions out of the hard-law ICC Treaty.²⁹⁸

Third and finally, the issue of the legality or illegality of nuclear weapons continues to bitterly divide the UN General Assembly and its First Committee on disarmament and international security, where the lines remain drawn almost exactly as they were before and immediately after the ICJ decision. In April 2007, nongovernmental organizations drafted a revised Model Nuclear Weapons Convention, which was then submitted by Costa Rica and Malaysia for discussion by the General Assembly.²⁹⁹ Later that year, in December 2007, the General Assembly adopted Resolution 62/39, “Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*.”³⁰⁰ Like its predecessors over the previous decade,³⁰¹ the Resolution recalled the original ICJ decision, “*underlin[ing] once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”³⁰² The Resolution proceeded to cite the 1995 NPT extension, the 1996 CTBT, and the “unequivocal undertaking by the nuclear weapon States [at the 2000 NPT review conference] to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament.”³⁰³ The resolution also expressed “regret” over the failure to reach agreement at the 2005 NPT review conference, and “deep concern” at the lack of progress in implementing Article VI of the NPT. Furthermore, in language virtually identical to resolutions adopted a decade earlier, the Resolution:

Calls once again upon all States immediately to fulfill that obligation by commencing multilateral negotiations leading to an

²⁹⁸ See Kirsch & Oosterveld, *supra* note 296, at 1155 n.60; David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute*, 98 J. CRIM. L. & CRIMINOLOGY 983, 990–91 (2008).

²⁹⁹ Permanent Reps. of Costa Rica & Malaysia to the U.N., Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations addressed to the Secretary-General, U.N. Doc. A/62/650 (Jan. 18, 2008). The revised Model NWC was also published, with accompanying commentary and responses and a forward by Judge C.G. Weeramantry (who had participated in the original ICJ decision). See DATAN, *supra* note 270, at i.

³⁰⁰ G.A. Res. 62/39, ¶ 4, U.N. Doc. A/RES/62/39 (Dec. 5, 2007) (emphasis added).

³⁰¹ See *id.* The first paragraph of the resolution recalls similar resolutions in 1996–1998 and 2000–2006. See *id.*

³⁰² *Id.* ¶ 1 (emphasis added).

³⁰³ *Id.* at Preamble.

early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.³⁰⁴

The most striking evidence of continuity was the vote on the resolution, which was adopted by 127 votes in favor, with twenty-seven opposed and twenty-seven abstentions.³⁰⁵ Support for UN resolutions condemning the threat or use of nuclear weapons remains widespread in the GA, particularly among nonnuclear states of the NAM (often supported by the official or de facto nuclear powers of China, India, Pakistan, and North Korea), which regularly summon upwards of 125 votes for such resolutions. Opposition remained similarly constant and entrenched, and continues to be led by the United States, Britain, France, Russia, and most of the European countries.³⁰⁶

E. Change with the Obama Administration?

In January 2009, the Obama administration took office in the United States, resulting in a change of tone and substance in U.S. nuclear policy, with a particularly strong focus on Obama's long-standing concerns about nuclear nonproliferation and the security of nuclear materials, and a corresponding willingness by the President to reduce U.S. reliance on nuclear weapons and engage in additional steps towards nuclear arms control and disarmament. Following an April 2009 speech in Prague envisioning a world without nuclear weapons,³⁰⁷ the new administration proceeded on multiple fronts, culminating in the so-called "nuclear spring" of 2010.³⁰⁸ In April 2010, the administration released a revised "Nuclear Posture Review," reducing reliance on nuclear weapons in U.S. military strategy and pledging not to use nuclear weapons against any nonnuclear state in compliance with the NPT.³⁰⁹

³⁰⁴ *Id.* ¶ 2 (emphasis added).

³⁰⁵ U.N. GAOR, 62nd Sess., 61st plen. mtg. at 20, U.N. Doc. A/62/PV.61 (Dec. 5, 2007).

³⁰⁶ *Id.*

³⁰⁷ President Barack Obama, Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), available at http://www.whitehouse.gov/the_press_office/RemarksBy-President-Barack-Obama-In-Prague-As-Delivered.

³⁰⁸ See, e.g., Ellen Tauscher, Undersec'y of State for Arms Control & Int'l Sec., Remarks at the Center for American Progress: Previewing the NPT Review Conference (Apr. 29, 2010) [hereinafter Remarks of Ellen Tauscher].

³⁰⁹ U.S. DEP'T OF DEFENSE, 2010 NUCLEAR POSTURE REVIEW (NPR) FACT SHEET (2010), available at <http://www.defense.gov/npr/>. This position, which went beyond what previous administrations had been willing to consider, nevertheless pointedly excluded

Two days later, the United States and the Russian Federation signed the New START treaty, replacing both the previous START treaty, which had expired in December 2009, and the SORT treaty, and further reducing the size of the U.S. and Russian active nuclear arsenals to 1550 warheads.³¹⁰ Also in April 2010, with great fanfare, the administration hosted a Nuclear Security Summit in which some forty-seven heads of state and government met to discuss the security of their nuclear stockpiles and announce steps to prevent nuclear materials from falling into the hands of terrorists.³¹¹

Finally, on May 3, 2010, U.S. Secretary of State Hillary Clinton led the U.S. Delegation at the opening of the 2010 NPT Review Conference, at which the administration sought support for a strengthening of the regime, including by promoting widespread acceptance of the Additional Protocol on International Atomic Energy Agency inspections and by seeking diplomatic support for a new round of sanctions against Iran for failure to cooperate with IAEA inspectors.³¹² By contrast with the more hard-line approach of the Bush Administration, the Obama Administration sought to portray itself as serious about the disarmament provisions of NPT, thereby increasing its credibility among non-nuclear weapons states, in an effort to secure concessions on the non-proliferation issues most important to the administration.³¹³ Neverthe-

countries like North Korea and Iran, which were either nonparties to the NPT or were considered to be failing to comply with its provisions.

³¹⁰ Article XIV(4) of New START provides that “[a]s of the date of its entry into force, this Treaty shall supersede the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions of May 24, 2002, which shall terminate as of that date.” See New START, *supra* note 206, art. XIV(4). This treaty was subsequently ratified by the U.S. Senate and by the Russian Duma and it went into effect in February 2011.

³¹¹ *Nuclear Security Summit*, U.S. DEP’T OF STATE, <http://www.state.gov/nuclearsummit/> (last visited July 27, 2011).

³¹² Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the Review Conference of Nuclear Nonproliferation Treaty (May 3, 2010) [hereinafter Clinton Remarks], *available at* <http://www.state.gov/secretary/rm/2010/05/141424.htm>.

³¹³ See, e.g. Neil MacFarquhar, *Iran Opens Arms Talks with Blame and Defiance; Speaking at U.N. Forum, Ahmadinejad Sharply Criticizes U.S. and Israel*, INT’L HERALD TRIB., May 4, 2010, at 4.

The United States had engendered widespread hostility by playing down disarmament issues, diplomats and analysts said. This time, they noted, the Obama administration has created a better atmosphere by pressing ahead with disarmament, curbing the scope of when American weapons might be used and convening a summit meeting on security for nuclear materials in April.

Id.

less, despite the new tone of the Obama Administration and its commitment to eventual nuclear disarmament, the administration also “made clear the United States will retain a nuclear deterrent for as long as nuclear weapons exist, one that can protect our country and our allies,” and implicitly retained the option to use nuclear weapons against states outside or in contravention of the NPT—thereby reasserting the long-standing U.S. position on the U.S. legal right to use and to threaten to use nuclear weapons.³¹⁴ Hence, notwithstanding the substantial change of tone and substance from the Bush to Obama administrations on nuclear issues, the U.S. position on the central question of the legality of nuclear use remained similar to those of previous administrations, and far removed from those of its critics.

F. *Hard and Soft Law Interaction and the Legalization of Nuclear Weapons*

Although far removed in subject matter from the transatlantic economic disputes that we examined earlier, the ICJ/nuclear weapons case provides substantial support for our hypotheses. In this case, notwithstanding the considerable tensions of the Cold War, the most powerful countries of the world were largely in agreement that international law, while regulating the acquisition, deployment, and testing of nuclear weapons, did not prohibit their use or threat of use.³¹⁵ Consistent with this view, the body of international law—and especially hard law—addressing nuclear weapons did not call into question the nuclear powers’ right to threaten or use these weapons. For the first several

There are things we hope to accomplish. First, we want to make it clear that the United States is living up to its obligations under the Treaty. President Obama has jump started arms control as a goal and as a process—everyone in this room has read his speech in Prague last year. Not only is this good for our own security interests, it gives us leverage to ask more of other states to strengthen the Treaty’s nonproliferation obligations at the Review Conference. So we’re not going to shy away from claiming credit from taking these steps to point out that we follow through on our NPT obligations.

Remarks of Ellen Tauscher, *supra* note 308. Similarly, in an effort to increase the transparency of U.S. nuclear policy and build confidence, the administration made public, for the first time, the number of nuclear warheads in its arsenal (5113), prompting praise from arms control advocates and scorn from conservative critics. See André de Nesnera, *Experts Debate Pros, Cons of US Disclosing Size of Nuclear Arsenal*, VOICE OF AM. (May 13, 2010), <http://www.voanews.com/english/news/usa/Experts-Debate-Pros-Cons-of-US-Disclosing-Size-of-Nuclear-Arsenal-93700834.html>. Unlike in 2005, the parties agreed on a consensus document. *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT’L L. 520, 521–22 (John R. Crook ed., 2010).

³¹⁴ Clinton Remarks, *supra* note 312.

³¹⁵ See *supra* notes 195–218 and accompanying text.

decades of the post-war era, therefore, and consistent with Hypothesis 1, hard and soft law were largely complementary on the question of the legality of nuclear weapons.³¹⁶

Over the course of the 1970s, however, a coalition of smaller and weaker states led by the Non-Aligned Movement sought to challenge the legal order and understanding accepted by the coalition of the five original nuclear powers and their NATO allies.³¹⁷ In these circumstances, and consistent with Hypothesis 3, dissatisfied states and their NGO allies sought both hard- and soft-law instruments to undermine powerful states' interpretation of the NPT and other relevant treaties, declaring the threat and use of nuclear weapons to be illegal. Consistent with Hypotheses 4, moreover, these states actively sought the adoption of new hard-law treaties and conventions, including a draft Convention on the Prohibition of the Use of Nuclear Weapons, a model Nuclear Weapons Convention, stronger restrictions on nuclear weapons in the 1995 NPT extension and the 1996 Comprehensive Test Ban Treaty, and a proposed criminalization of nuclear use in the ICC Treaty.³¹⁸ Given the strong negotiating position of the nuclear weapons states (including all of the P-5) and their allies, however, all of these efforts failed.³¹⁹

Confronted with these obstacles to hard-law creation, the coalition of anti-nuclear states and NGOs concentrated their attention on available institutions that could develop soft law, where they could enjoy greater success.³²⁰ These institutions included the UN General Assembly where they passed a series of soft-law resolutions over the objections of the nuclear powers.³²¹ Through the General Assembly and the Assembly of the World Health Organization (where superior numbers again allowed them to outvote the nuclear weapons states and their allies), this coalition of anti-nuclear states requested an advisory opinion (judicial, but non-compulsory) from the ICJ.³²² Faced with the firm opposition of the nuclear weapon states and their allies, however, and consistent with Hypothesis 3, anti-nuclear states and NGOs enjoyed at

³¹⁶ See *supra* notes 195–218 and accompanying text.

³¹⁷ See *supra* notes 219–233 and accompanying text.

³¹⁸ See *supra* notes 219–233 and accompanying text.

³¹⁹ See *supra* notes 219–233 and accompanying text.

³²⁰ See *supra* notes 219–233 and accompanying text.

³²¹ See *supra* notes 219–233 and accompanying text.

³²² See *supra* notes 234–240 and accompanying text.

best limited success in their effort to change existing understandings of hard law.³²³

Finally, and again consistent with Hypothesis 3, the antagonistic interaction of hard- and soft-law provisions resulted in some softening of hard law regarding the legitimacy of the use and threat to use nuclear weapons, based on an ICJ decision that was vague, profoundly contested, and whose legally binding character was explicitly denied by powerful nuclear states.³²⁴ It also gave rise to hard bargaining in soft-law fora, particularly in the General Assembly where soft-law resolutions were bitterly contested among the member states. To be sure, the softening of hard law in the ICJ nuclear weapons opinion was determined by multiple factors. The court was in a difficult position both legally (interpreting and weighing contradictory provisions of multiple sources of both hard and soft law) and politically (coming between status-quo nuclear powers and a GA majority of challenging states and NGOs), and individual judges on the court appear to have argued in ways that were broadly consistent with the views of their country of origin.³²⁵ Nevertheless, the soft-law nature of the General Assembly challenge shaped the decision in distinctive ways, leading the judges to reject arguments from the anti-nuclear states about customary international law on the one hand, while seeking to validate concerns expressed in General Assembly resolutions on the other hand.

For our purposes, then, the lessons of the ICJ nuclear weapons dispute are clear. In this case, states and non-state actors used hard- and soft-law provisions as antagonists. As a result of the interaction of these instruments, hard law was arguably made less certain and less precise in light of the ICJ's divided and vague decision. Moreover, soft lawmaking

³²³ See *supra* notes 241–258 and accompanying text.

³²⁴ See *supra* notes 241–258 and accompanying text.

³²⁵ See, e.g., Szasz, *supra* note 259, at 84–85. “From a purely juridical point of view, a definitive answer, either for or against the legality of the threat or use of nuclear weapons, would have implied a much greater clarity in the law than actually exists.” *Id.* at 84.

From a political point of view, the trilemma was as severe. An affirmation of the legality of nuclear weapons would have so clearly disappointed the majority of states (and the great popular NGO-fuelled movement behind them) that had twice approached the Court, that the latter would have risked being once more marginalized. . . . An unambiguous statement of illegality would have been clearly rejected by the nuclear powers and those that militarily depend on them, and would thus have exaggerated the impotence of the Court. Finally, a failure to reply at all would have suggested the irrelevance of the institution.

Id. Hence, “[t]o steer a safe course, crucial aspects of the opinion *had to be fudged.*” *Id.* at 85.

fora involved few of the purported advantages of soft law, such as an enhancement of deliberation and the curtailment of hard bargaining, because of concerns over the implications for existing hard law. Less powerful states enjoyed at best partial success against the entrenched views of powerful nuclear weapon states. The legal outcome, far from being clarified and progressively developed by the complementary interaction of hard and soft law, remains deeply disputed and uncertain.

III. SOVEREIGNTY, INTERVENTION, AND THE RESPONSIBILITY TO PROTECT DOCTRINE

Our hypotheses about hard and soft law interaction are further supported by the example of the responsibility to protect doctrine. In September 2005, the member states of the United Nations, meeting at a special summit to commemorate the UN's 60th anniversary, adopted by consensus a landmark declaration on "the responsibility to protect."³²⁶ The responsibility to protect doctrine (or "R2P" as it is commonly abbreviated) has been variously defined over the years, but as the heads of state conceived it at the UN summit, the term indicated that every state government bore the primary responsibility for protecting the well-being of its citizens, and that, should a particular state "manifestly fail[]" in its responsibility, the international community could step in to exercise its secondary responsibility, including if necessary through military intervention.³²⁷ Over the previous decade, UN members, and in particular those in the Security Council, had confronted a series of humanitarian crises, including in Haiti, Somalia, and the Balkans, and the Security Council had responded by authorizing a series of international interventions to protect individuals from massacres or ethnic cleansing.³²⁸ Yet these authorizations had not addressed the apparent contradiction between the interventions and the Charter's bedrock principle of state sovereignty spelled out most clearly in Articles 2(4)³²⁹ and 2(7).³³⁰ Moreover, they did not provide a clear set

³²⁶ 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–140, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome].

³²⁷ *Id.*

³²⁸ See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 127–60 (2001); see also SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 145–46 (1996).

³²⁹ U.N. Charter art. 2, para. 4. ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

³³⁰ U.N. Charter art. 2, para. 7.

of principles or criteria governing the choice of whether and when to intervene. Remarkably, given its apparent contradiction or at least significant qualification of the language of sovereignty in the Charter, the soft-law declaration on the responsibility to protect was adopted by consensus among all UN members, apparently heralding a fundamental shift in one of the cornerstone governing principles of international law.³³¹

The UN summit's consensual endorsement of the responsibility to protect doctrine would seem at first glance to be very different in character from the bitterly disputed UN General Assembly resolutions on nuclear weapons, which were invariably adopted with large blocks of dissenting votes. Indeed, the endorsement of R2P by the UN membership could appear at least initially to be a case of soft and hard law acting as complements, with the soft-law R2P resolution elaborating and progressively developing the hard-law provisions of the Charter as well as legally binding resolutions of the Security Council over the previous decade.³³²

Looking more deeply into the development, declaration, and subsequent implementation (or non-implementation) of the responsibility to protect, however, we argue that the real story of the R2P story is again one of antagonism, in two senses. First, notwithstanding the protests of R2P champions who argue that the responsibility to protect simply elaborates or progressively develops the Charter-based recognition of state sovereignty, the soft-law UN declaration—like other previous articulations of R2P in a series of commissioned reports—does indeed contradict (or, at a minimum, is in serious tension with) the plain language of Article 2(7) and other provisions of the UN Charter.³³³ Second, the debate over R2P revealed a fundamental antagonism between two coalitions of states and non-state actors. One coalition, consisting of mostly Western states, non-governmental organizations, and

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

³³¹ See 2005 World Summit Outcome, *supra* note 326, ¶¶ 138–140.

³³² See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 AM. J. INT'L L. 99, 115–16 (2007) (conceptualizing the soft-law resolution in terms of the “progressive development of the law”).

³³³ CHESTERMAN, *supra* note 328, at 45–53 (analyzing the tension between R2P and Article 2(4)).

successive UN Secretaries-General, sought explicit and legally binding authorization for and criteria governing humanitarian intervention by the UN or by individual states or regional organizations. The other coalition, consisting of Russia and China within the UN Security Council, supported by a large coalition of mostly nonaligned states in the General Assembly, sought to oppose or at least water down any language on R2P that would imply a weakening of state sovereignty and a right to intervene in their internal affairs. In other words, the soft-law provisions on R2P and the hard-law Charter provisions on state sovereignty both *acted as antagonists* in legal terms, and *were employed strategically as antagonists* in political terms by states seeking to advance conflicting conceptions of intervention and state sovereignty.

This section reviews the legal and political history of the responsibility to protect doctrine, showing how a coalition of mostly Western states such as Canada and the EU countries, as well as the UN Secretary-General and humanitarian NGOs, formulated and elaborated the concept of the responsibility to protect in a series of soft-law documents, hoping to weaken the principle of absolute state sovereignty and to overcome resistance to humanitarian intervention in the UN Security Council.³³⁴ The section begins with a brief review of the hard-law provisions of the Charter establishing a strong presumption in favor of state sovereignty and against intervention in the internal affairs of states, before examining a series of humanitarian interventions endorsed during the course of the 1990s by the UN Security Council under the rubric of threats to international peace and security. Throughout this period, the decision to intervene was controversial, both within the legal community and among the member states in the Security Council. The Security Council's Chapter VII resolutions during this period evaded the fundamental controversy by basing intervention decisions on threats to international peace and security rather than human rights claims, even though observers recognized that it was human rights concerns that spurred the interventions.³³⁵ Fundamental divisions on this issue, however, were brought out clearly in the 1999 debate over Kosovo, when NATO countries intervened collectively in the

³³⁴ The United States's position in this debate was complicated; it endorsed R2P as an enabling provision justifying U.S. intervention, but resisted any suggestion that the United States or the Security Council might be legally *obligated* to intervene militarily to protect individuals against their own states. See *infra* notes 414–415 and accompanying text.

³³⁵ See CHESTERMAN, *supra* note 328, at 121–62.

Yugoslav autonomous region without the authorization of a divided Security Council, prompting an ICJ legal challenge by Yugoslavia.³³⁶

The Kosovo intervention crystallized the debate over whether states could, individually or collectively, intervene legally for humanitarian purposes without authorization from the UN Security Council. In the wake of the Kosovo case, UN Secretary-General Kofi Annan called for explicit criteria governing humanitarian intervention, leading to a series of soft-law reports by international committees and organizations calling explicitly for an internationally recognized responsibility to protect. We examine the adoption and language of these documents (reports respectively of the International Committee on Intervention and State Sovereignty in 2001;³³⁷ the High-Level Panel on Threats, Challenges, and Change in 2004;³³⁸ and the Secretary-General, entitled *In Larger Freedom*, in early 2005).³³⁹ Building from these reports, a coalition of states and non-state actors pressed successfully for the endorsement of R2P at the 2005 UN summit as a UN General Assembly Resolution.³⁴⁰ Yet the text of that Resolution differed in important ways from the original formulation, remaining silent on fundamental issues such as the criteria for intervention and the possibility of a state or coalition of states engaging in humanitarian intervention where the Security Council is deadlocked. Opponents of a strong right of humanitarian intervention succeeded in watering down the original language to a sort of R2P “lite” in the final declaration, and have since attempted to limit the impact of the doctrine in hard law and in practice.

³³⁶ See *id.* at 206–17.

³³⁷ See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS], available at www.iciss.ca/pdf/CommissionReport.pdf.

³³⁸ See generally SEC’Y GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (2004) [hereinafter HIGH-LEVEL PANEL REPORT], available at <http://www.un.org/secureworld/report2.pdf>.

³³⁹ See generally U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

³⁴⁰ See generally 2005 World Summit Outcome, *supra* note 326.

A. *The UN Charter and State Sovereignty*

The issue of “humanitarian intervention” is not a new one.³⁴¹ For centuries, states have undertaken military interventions in the internal affairs of other states for what they purport to be humanitarian reasons. Examples include 19th century European interventions in support of Christian communities under Muslim control in Greece and Syria, as well as the 1971 Indian invasion of East Pakistan (later Bangladesh), the 1978 Vietnamese invasion of Cambodia, and the 1979 Tanzanian invasion of Uganda, although the invaders in the latter cases legally justified their invasions on the ground of self-defense as authorized under the UN Charter.³⁴² From a legal perspective, these interventions have been deeply controversial, particularly in the post-1945 era when they appear to violate the black-letter law of Articles 2(4) and 2(7) and other provisions of the UN Charter. Although supporters of humanitarian intervention claim that humanitarian intervention should not be deemed contrary to Article 2(4) because it is not directed against a state’s territorial integrity or political sovereignty, the dominant attitude toward humanitarian intervention has been cautious, with many legal scholars fearing that any purported right of humanitarian intervention would undermine not only state sovereignty but also the tight restrictions on the use of force in the UN Charter, and thereby provide a pretext for self-interested interventions by powerful states.³⁴³ In practice,

³⁴¹ The legal, political, and philosophical literature on humanitarian intervention is voluminous. Excellent introductions include SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2003); and NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 55–136 (2000) (writing from a constructivist/English school perspective of international relations regarding the construction and power of shared norms, including through international law).

³⁴² For a good discussion of the historical precedent for humanitarian intervention, see generally GARY J. BASS, *FREEDOM’S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* (2008), which examines 19th century interventions on humanitarian grounds in Greece, Syria, Bulgaria, and Armenia. For a discussion of post-World War II interventions, see WHEELER, *supra* note 341, at 55–138, which examines the case studies of East Pakistan, Cambodia, and Uganda.

³⁴³ See CHESTERMAN, *supra* note 328, at 48–52 (providing an overview and assessment of the arguments made regarding the breadth of Article 2(4)’s “territorial integrity” prong); see also Michael Reisman with Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177, 179 n.42 (Richard B. Lillich ed., 1973) (stating that “[s]ince a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved,” it is not precluded by Article 2(4)); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 *AM. J. INT’L L.* 645, 649 (1984) (maintaining that those who contend that a humanitarian war would not violate a country’s territorial integrity or political independence to require an “Orwellian construction” of these terms in the Charter).

for much of the UN's history through the end of the Cold War, states occasionally claimed humanitarian motives for their military actions, but the UN Security Council, largely paralyzed by the U.S.-Soviet conflict, took no position on the question.

The end of the Cold War, however, brought with it a series of humanitarian crises as well as a thawing of relations within the Security Council that brought the issue of humanitarian intervention to the forefront of international relations and international law. During the 1990s, beginning with the U.S.-led interventions to support of the Iraqi Kurds in 1991 and to restore order and provide humanitarian aid in Somalia in 1992, the Security Council authorized a series of military interventions in the internal affairs of various states, including in Haiti and in the successor states of the former Yugoslavia.³⁴⁴

Although the Security Council failed to act in the case of the 1994 genocide in Rwanda, it was to the shame of the UN and such failure strengthened calls for international intervention on humanitarian grounds.³⁴⁵ Advocates of this new doctrine of humanitarian intervention, such as Doctors Without Borders' co-founder (and later French Foreign Minister) Bernard Kouchner, hailed these developments, proclaiming that the international community had a "right to intervene"—or in some cases a "duty to intervene"—to prevent large scale massacres and genocide.³⁴⁶ In effect, a soft and contested legal norm of humanitarian intervention appeared to be emerging, potentially challenging the existing hard-law prohibition on intervention in the UN Charter.

Within the Security Council, its members—and in particular the five permanent members: the United States, Britain, France, the Soviet Union (later Russia), and China—sought to sidestep this fundamental legal question in an effort to gain consensus for individual interventions. In Iraq, Somalia, Haiti, the Balkans, and other humanitarian crises, the Council members based their Chapter VII resolutions on purported threats to international peace and security—as, for example, from the international movement of refugees fleeing civil conflict—rather than on any purported right of humanitarian intervention.³⁴⁷

³⁴⁴ See CHESTERMAN, *supra* note 328, at 130–55.

³⁴⁵ See *id.* at 145.

³⁴⁶ Bernard Kouchner, *A Call for Humanitarian Intervention*, REFUGEES, Dec. 1992, at 14, 14–15 (advocating humanitarian intervention as a duty “wherever victims are calling out for help”); Bernard Kouchner, *Establish a Right to Intervene Against War, Oppression*, L.A. TIMES, Oct. 18, 1999, at B7; James Traub, *A Statesman Without Borders*, N.Y. TIMES, Feb. 3, 2008 (Magazine), at 44, 50–51 (stating that Kouchner, who was foreign minister of France at the time, continues to advocate for intervention).

³⁴⁷ See CHESTERMAN, *supra* note 328, at 126–28.

During this period, lasting roughly from 1991 through early 1999, the Security Council acted on a case-by-case basis, authorizing timely and forceful interventions in some cases, and temporizing or failing to act at all in other cases (most dramatically and tragically with respect to the 1994 Rwandan genocide).³⁴⁸ In each case it remained silent on the central legal question of whether humanitarian intervention as such was justified by the terms of the UN Charter or other international legal provisions.

The weakness of this approach, and the fragility of the consensus in the Security Council of the 1990s, were revealed in early 1999, when the Yugoslav government of President Slobodan Milosevic, following the breakdown of diplomatic talks, began a campaign of reprisals and ethnic cleansing against ethnic Albanian insurgents and civilians in Kosovo, which was then an autonomous province within the Republic of Serbia.³⁴⁹ Among the UN Security Council's permanent members, the United States, Great Britain, and France all favored a military intervention to prevent an impending humanitarian disaster and to enforce the provisions of previous Chapter VII resolutions. Faced, however, with fundamental opposition from Russia (which was broadly supportive of Milosevic's Serbian nationalist position) and China (opposed, as always, to any undermining of the principle of sovereignty), these countries did not bring the issue to a vote in the UN Security Council, but instead chose to intervene through a regional organization, the NATO alliance.³⁵⁰ On March 24, 1999, NATO forces began an aerial bombardment of targets in Kosovo and Serbia, which continued for several months.³⁵¹ Finally, in June, Milosevic's government agreed to a peace agreement and a related Security Council resolution providing guarantees to ethnic Albanians and providing for provisional UN control of the province as well as the presence of NATO peacekeepers.³⁵²

NATO's intervention in Kosovo, more than any other intervention over the previous decade, precipitated a fundamental debate over the

³⁴⁸ See *id.* at 145.

³⁴⁹ Richard A. Falk, Editorial Comment, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 847-57 (1999) (summarizing briefly the events in the former republic of Yugoslavia that prompted NATO intervention).

³⁵⁰ Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1325 (2010) (explaining why NATO countries chose to avoid a Security Council vote); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 153 (2003) (noting opposition to UN intervention from China, Russia, India, and Namibia).

³⁵¹ See Mohamed, *supra* note 350, at 1288 & n.36.

³⁵² See CHESTERMAN, *supra* note 328, at 210-11.

legitimacy of humanitarian intervention in general, as well as over the legal right of a regional organization such as NATO to undertake a military intervention in the absence of Security Council authorization. Critics of the intervention argued, among other matters, that humanitarian intervention was prohibited by Articles 2(4) and 2(7), and contended further that only the Security Council, acting under Chapter VII of the UN Charter, could legally order a military intervention.³⁵³ Defenders of the NATO intervention, including the United States, other alliance members, as well as some legal scholars, made various arguments in favor of its legality, pointing to the adoption of previous Security Council Resolutions ordering Yugoslavia to cease hostilities, to the emerging legal norm of humanitarian intervention, to the defense of fundamental legal principles (such as the prohibition against torture) that are *jus cogens*, and to the multilateral character of the NATO intervention (albeit in the absence of Security Council authorization).³⁵⁴ These arguments were put forward not only in the debate

³⁵³ See, e.g., Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 834 (1999) ("Indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and international law."); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 842 (1999).

But assertions of legality require a leap of faith. It does not need repeating that the international prohibition on the use of force is subject only to the right to self-defense (which was not in issue) and the primary (not exclusive) responsibility of the Security Council for international peace and security.

Chinkin, *supra*, at 842; see also, e.g., Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 824 (1999) ("In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful."); Cases Concerning Legality of Use of Force (Yugoslavia, Belgium, Ger., It., Neth., Port., Spain, U.K., U.S.), Oral Pleadings, 33–40 (May, 20 1999), <http://www.icj-cij.org/docket/files/105/4473.pdf> (argument of Ian Brownlie).

³⁵⁴ Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597, 602 (2002); Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT'L L. 97, 104 (2007) (stating that legal scholars argued that Security Council resolutions justified the Kosovo intervention).

The legal justifications officially employed to legitimize the Kosovo intervention centered on two main legal arguments: first, that previous UN Security Council resolutions could be construed to lend some authority to NATO's actions; and, secondly, that principles of general international law provided for a right of intervention on the grounds of "overwhelming humanitarian necessity."

Joyner, *supra*, at 602; see also Thomas M. Franck, *Humanitarian and Other Interventions*, 43 COLUM. J. TRANSNAT'L L. 321, 326–27 (2005) (stating that NATO acted to prevent impending genocide); Alain Pellet, *Brief Remarks on the Unilateral Use of Force*, 11 EUR. J. INT'L L. 385, 387 (2000) ("As aptly noted by Ruth Wedgwood in a recent article, 'A NATO decision

leading to the NATO intervention, but also in a series of subsequent Council debates and resolutions, including in response to a draft resolution put forward by Russia on March 26, 1999 condemning the attack as a “threat to international peace” and a “flagrant violation” of the UN Charter.³⁵⁵ Significantly, this proposed resolution was rejected by a vote of twelve (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, United States) to three (Russia, China, and Namibia), suggesting substantial support for the pro-intervention position.³⁵⁶ The legal debate continued before the International Court of Justice, where the Federal Republic of Yugoslavia filed applications against the United States and nine other NATO member states for “breach of [their] obligation not to use force against another State.”³⁵⁷ Here again, the outcome was inconclusive, with the ICJ ruling unanimously in December 2004 that it lacked jurisdiction because the Federal Republic of Yugoslavia had not been a party to the statute of the court at the time it instituted the proceedings.³⁵⁸ The ICJ thus avoided taking a position on this difficult issue.

B. *The Campaign for R2P and Redefining Sovereignty*

The debate over the Kosovo intervention revealed the lack of an agreed-upon legal basis and criteria for humanitarian intervention. It also highlighted the political opposition to intervention among the Chinese and Russian governments in the Security Council and a sizable number of developing countries in the General Assembly. Faced with this dual legal and political challenge, proponents of humanitarian intervention took a new route after 1999. They sought to establish a new doctrinal basis and criteria for humanitarian intervention by building from a series of soft-law instruments.

deserves greater deference than purely unilateral action’. This is persuasive: NATO’s intervention in Serbia is an illustration of ‘regional or collective unilateralism’, not of purely ‘state unilateralism’”) (quoting Ruth Wedgwood, Editorial Comment, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 833 (1999)) (footnote omitted). See generally CHESTERMAN, *supra* note 328, 211–15.

³⁵⁵ See Permanent Rep. of Russ. Fed’n to the U.N., Letter dated 24 March 1999 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council U.N. Doc. S/1999/320 (Mar. 26, 1999) (rejected by U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 [hereinafter Security Council, 3989th Meeting]).

³⁵⁶ See Security Council, 3989th Meeting, *supra* note 355, at 6.

³⁵⁷ Legality of Use of Force (Serb. & Mont. v. Belg.), Preliminary Objections, 2004 I.C.J. 279, ¶ 22 (Dec. 15).

³⁵⁸ *Id.* ¶ 129.

The first and most influential call came from then Secretary-General Kofi Annan, in his September 1999 report to the General Assembly. State sovereignty, Annan argued, was being “redefined,” with “the State . . . now widely understood to be the servant of its people, not vice versa.”³⁵⁹ Against the backdrop of recent experiences in areas such as the Balkans, Sudan, Cambodia, and especially Rwanda, Annan declared his clear support for the “developing international norm in favour of intervention to protect civilians from wholesale slaughter,” the implementation of which, he acknowledged, remained difficult and controversial.³⁶⁰ Just as significantly, Annan continued, the NATO intervention in Kosovo added a new element to the debate over humanitarian intervention:

It has cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences.

The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy.³⁶¹

Noting both the dangers of inaction in the face of Security Council paralysis (as in Rwanda) and the setting of “dangerous precedents” for future interventions without clear criteria or Council authorization (as in Kosovo), Annan called on the international community to “think anew,” to find “common ground” on intervention within the Council, and to broaden the definition of “intervention” to include preventive action, post-conflict reconstruction, and military action.³⁶²

Annan’s call was supported by the government of the United Kingdom, which, in late 1999, introduced in the Security Council a draft proposal for a set of criteria or guidelines for future humanitarian interventions, including: “the existence of an extreme humanitarian

³⁵⁹ Kofi A. Annan, U.N. Sec’y General, Address Presenting His Annual Report to the General Assembly (Sept. 20, 1999), *available at* http://www.un.org/News/oss/sg/stories/statments_search_full.asp?statID=28.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

emergency; the exhaustion of all peaceful remedies; an ‘objective determination’ that force is the only means to avoid a humanitarian catastrophe; and conduct of a military operation so that it meets the requirement of proportionality and is in conformity with international humanitarian law.”³⁶³ Furthermore, as Nicholas Wheeler points out in an excellent discussion, the British proposal did *not* include an explicit requirement for Security Council authorization:

The whole rationale behind the UK initiative is to leave open the possibility that Western states might need to act outside of express SC [Security Council] authorisation in future cases. The goal of British diplomats was to secure agreement in the SC on the criteria that should govern the use of force in such cases, while leaving unresolved the question whether this required express SC authorisation. In the event that Western states intervened again without a UN mandate, the idea was that the intervening states could appeal to the previously agreed SC guidelines as a legitimating ground for action³⁶⁴

The British proposal was rejected in the Security Council, however, not only by China and Russia, but also by the United States.³⁶⁵ China opposed any discussion of criteria because it could provide a legitimization of the principle of humanitarian intervention which it opposed.³⁶⁶ Russia was prepared to back the British proposal only if it included an additional provision that any intervention to end a humanitarian emergency must have the express authorization of the Security Council (thereby retaining a Russian veto and forestalling the possible application of the Kosovo precedent to a Russian region such as Chechnya).³⁶⁷ In an early manifestation of concerns that would come to the fore during the George W. Bush administration, the Clinton Administration in the United States opposed criteria that could constrain its freedom of action and create a legal *obligation* for the United States to intervene where the proposed criteria were met.³⁶⁸

³⁶³ Nicholas J. Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELBOURNE J. INT’L L. 550, 564 (2001).

³⁶⁴ *Id.* at 564–65.

³⁶⁵ *Id.* at 552, 559, 564 (discussing the positions of the United States, China, and Russia).

³⁶⁶ *See id.* at 555–56.

³⁶⁷ *See id.*

³⁶⁸ *Id.* at 564.

C. *The Turn to Soft-Law Fora*

With the path to the Security Council blocked, the advocates of stronger legal provisions on humanitarian intervention sought other forums in which to elaborate and advocate new legal norms, taking a soft-law approach as a pathway to revising hard law. Some states, such as Egypt, advocated dealing with the issue in the General Assembly, on the model of the 1950 “Uniting for Peace” resolution in calling for the General Assembly to take up issues of international peace and security when the Security Council is blocked.³⁶⁹ Advocates of humanitarian intervention did not initially pursue this option, however, both because of their attachment to the veto power of the permanent members (in the case of the British, French, and U.S. governments), and because of a concern that opposition from the Non-Aligned Movement would result in the rejection or watering down of any proposed provisions.³⁷⁰

In practice, therefore, proponents of new rules governing humanitarian intervention proceeded via a series of international commissions and UN reports, which formulated new legal principles for consideration by the international community. To some extent, as Gareth Evans points out in an excellent intellectual history, this effort preceded the Kosovo intervention, dating back to a series of publications and reports over the course of the 1990s.³⁷¹ In addition to the purported “right to intervene” championed by non-governmental organizations like Doctors Without Borders, an important precursor to the responsibility to protect was the notion of “sovereignty as responsibility.” first put forward in a series of reports and books by Francis Deng, who served as the Representative of the UN Secretary-General on Internally Displaced Persons from 1992 to 2004, and by the writer Roberta Cohen, who argued as early as 1991 that “sovereignty carries with it a responsibility on the part of governments to protect their citizens.”³⁷² By and

³⁶⁹ Wheeler, *supra* note 363, at 565.

³⁷⁰ *See id.* at 565–66. Indeed, as we shall demonstrate below, the proposed language on the responsibility to protect would be substantially watered down in negotiations at the 2005 UN world summit and in the subsequent GA resolution. *See infra* notes 409–429 and accompanying text.

³⁷¹ *See* GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 32–38 (2008).

³⁷² *Id.* at 32–37. Significantly, in 2007 UN Secretary-General Ban Ki-moon appointed Deng as his Special Adviser for the Prevention of Genocide, placing a key figure in the development of R2P inside the Secretariat. Press Release, Secretary-General, Secretary-General Appoints Francis Deng of Sudan as Special Adviser for Prevention of Genocide, U.N. Press Release SG/A/1070 (May 29, 2007) (“On a related note, the Secretary-General

large, however, these notions remained at the margins of international law, and were generally not invoked in the resolutions adopted by the UN Security Council or other international organizations.

The most important step in this effort, by all accounts, was the creation, at the initiative of the Canadian government and its Foreign Minister Lloyd Axworthy, of an International Commission on Intervention and State Sovereignty (“ICISS”), designed “to wrestle with the whole range of questions—legal, moral, operational, and political—rolled up in this debate, to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground.”³⁷³ The Commission was co-chaired by former Australian foreign minister Gareth Evans and Algerian diplomat Mohamad Sahnoun and comprised a diverse group of diplomats and scholars from both the North and South, who crucially were serving in their personal capacities rather than representing their respective governments. The Commission first met in September 2000, and delivered its report, “The Responsibility to Protect,” just over a year later, in December 2001.³⁷⁴

As the report makes clear, the Commission sought to reframe the issue, moving away from the language of humanitarian intervention and the purported “right” of states to intervene, and toward the dual concepts of “sovereignty as responsibility,”³⁷⁵ and of a “responsibility to protect” individuals at grave risk.³⁷⁶ This shift, the committee believed, would address some of the suspicions of states in the South, who feared that humanitarian intervention could provide political and legal license for powerful states to intervene in the sovereign affairs of smaller and weaker countries. The primary responsibility to protect, according to

is also exploring ways to strengthen United Nations efforts on the responsibility to protect, which may include the appointment of a separate adviser.”).

³⁷³ ICISS, *supra* note 337, at vii.

³⁷⁴ *See id.*

³⁷⁵ *Id.* ¶¶ 2.14–15.

³⁷⁶ *See, e.g.,* Stahn, *supra* note 332, at 102.

The commission proposed dealing with this problem [the notion of humanitarian intervention as an assault on state sovereignty] . . . by conceiving of sovereignty as responsibility rather than control. The commission thus used a rhetorical trick: it flipped the coin, shifting the emphasis from a politically and legally undesirable right to intervene for humanitarian purposes to the less confrontational idea of a responsibility to protect.

Id.

the report, applied in the first instance to states themselves,³⁷⁷ with the international community having a secondary or “residual responsibility” to intervene where a state is unwilling or unable to protect its own citizens.³⁷⁸ The “guiding principle” of a responsibility to protect, the Commission stated, was

grounded in a miscellany of legal foundations (human rights treaty provisions, the Genocide Convention, Geneva Conventions, International Criminal Court Statute and the like), growing state practice—and the Security Council’s own practice. If such a reliance continues in the future, it may eventually be that a new rule of customary international law to this effect comes to be recognized, but . . . it would be quite premature to make any claim about the existence now of such a rule.³⁷⁹

In other words, the Commission was suggesting that the responsibility to protect was at best an emerging soft-law norm, coexisting alongside the hard-law protections of state sovereignty in existing treaty and customary international law.

In addition to reframing the debate from a right to intervene and toward a responsibility to protect, the Commission sought to enlarge the concept of intervention, often strictly framed in terms of military intervention to address current or impending humanitarian crises. Instead, the report spoke of a three-fold response to such crises: (1) a responsibility to *prevent* crises through building domestic capacity, addressing domestic conflicts, and promoting the rule of law; (2) a responsibility to *react* though diplomatic, economic, as well as military means where crises did arise; and (3) a responsibility to *rebuild* through post-conflict reconstruction.³⁸⁰ Furthermore, the committee made clear, the emphasis

³⁷⁷ See ICISS, *supra* note 337, ¶ 2.30 (“The Commission believes that responsibility to protect resides first and foremost with the state whose people are directly affected. This fact reflects not only international law and the modern state system, but also the practical realities of who is best placed to make a positive difference.”).

³⁷⁸ The Commission identified three conditions under which this residual responsibility of the international community would be activated: “when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect”; “when a particular state . . . is itself the actual perpetrator of crimes or atrocities”; and “where people living outside a particular state are directly threatened by actions taking place there.” *Id.* ¶ 2.31; see Stahn, *supra* note 332, at 104.

³⁷⁹ ICISS, *supra* note 337, ¶ 6.17.

³⁸⁰ *Id.* ¶¶ 2.29, 3.1–5.31.

should be placed on preventive action.³⁸¹ By thus expanding the repertoire of international actions, the Commission hoped both to address humanitarian disasters more effectively as well as to weaken opposition among states that associated humanitarian intervention with military action by powerful states.

With respect to military intervention—the most controversial aspect of R2P, and the one creating the most obvious conflicts with state sovereignty—the Commission formulated a set of six criteria, under three headings: (1) a “just cause threshold,” (2) four “precautionary principles,” and (3) a “right authority” principle. The first heading, “just cause,” raised the crucial question of what kinds of humanitarian crises or disasters might justify or trigger the “exceptional and extraordinary measure” of military response from the international community. The Committee began by acknowledging the existing, hard-law principle of non-intervention:

The starting point, here as elsewhere, should be the principle of non-intervention. This is the norm from which any departure has to be justified. All members of the United Nations have an interest in maintaining an order of sovereign, self-reliant, responsible, yet interdependent states. In most situations, this interest is best served if all states, large and small, abstain from intervening or interfering in the domestic affairs of other states. Most internal political or civil disagreements, even conflicts, within states do not require coercive intervention by external powers. The non-interference rule not only protects states and governments: it also protects peoples and cultures, enabling societies to maintain the religious, ethnic, and civilizational differences that they cherish.³⁸²

Given this starting point, the Commission set a high threshold for military intervention, ruling out the use of force for what one might call ordinary human rights abuses,³⁸³ and contemplating military inter-

³⁸¹ EVANS, *supra* note 371, at 43, 79–80; ICISS, *supra* note 337, at xi (“4(A) Prevention is the single most important dimension of the responsibility to protect.”).

³⁸² ICISS, *supra* note 337, ¶ 4.11.

³⁸³ *See id.* ¶ 4.25.

[T]he Commission has resisted any temptation to identify as a ground for military intervention human rights violations falling short of outright killing or ethnic cleansing, for example systematic racial discrimination, or the systematic imprisonment or other repression of political opponents. These may be eminently appropriate cases for considering the application of political,

vention only in “cases of violence which so genuinely ‘shock the conscience of mankind,’ or which present such a clear and present danger to international security, that they require coercive military intervention.”³⁸⁴ More concretely, the Commission foresaw the use of military intervention only under two extreme sets of circumstances: (a) large-scale loss of life or (b) large-scale ethnic cleansing.³⁸⁵ In doing so, the Commission opted for a relatively narrow, circumscribed scope for military intervention, triggered only by extreme cases. As we shall see, however, the international community would later opt to circumscribe R2P still further to a specific set of international crimes.³⁸⁶

Assuming that the just cause threshold was met, the Commission then laid down four “precautionary principles” which would guide the intervention and the choice of means: (1) “right intention,” which must be “to halt or avert human suffering”; (2) “last resort,” such that military intervention is justified only when “every non-military option,” including political, economic, and military sanctions, has been explored; (3) proportional means, which should be the “minimum necessary to secure the defined human protection objective”; and (4) “reasonable prospects” of success in halting or averting human suffering, “with the consequences of action not likely to be worse than the consequences of inaction.”³⁸⁷

Finally, and controversially, the Commission considered the question of “right authority,” namely which bodies should be empowered to authorize military intervention for humanitarian purposes.³⁸⁸ The Commission’s starting point was the claim that the Security Council enjoys the “primary,” but “not the sole or exclusive responsibility for

economic or military sanctions, but they do not in the Commission’s view justify military action for human protection purposes.

Id.

³⁸⁴ *Id.* ¶ 4.13.

³⁸⁵ *Id.* ¶ 4.19.

³⁸⁶ In the Commission’s view, these criteria were not limited to state-sponsored crimes, but also included “situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war,” as well as “overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.” *Id.* ¶ 4.20. These latter situations were excluded from subsequent formulations of the responsibility to protect, with implications for situations such as the 2006 cyclone in Myanmar, which might have been covered by the ICISS formulation but not by the narrower formulation of the UN GA. *See infra* notes 409–429 and accompanying text.

³⁸⁷ ICISS, *supra* note 337, at xii & ¶¶ 4.32–.43.

³⁸⁸ *See id.* at xii–xiii.

peace and security matters.”³⁸⁹ The Commission then noted that the Council had “too often . . . fallen short of its responsibilities, or failed to live up to expectations.”³⁹⁰ Accordingly, the Commission not only proposed that the Council should be the “first port of call” in seeking to approve any military intervention.³⁹¹ It also proposed that the Council adopt a “code of conduct” providing that “a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution.”³⁹² Where the Council failed to discharge its responsibility, the Commission went further. It considered the possibility of seeking support for military action in the GA, acting under the Uniting for Peace procedure,³⁹³ or alternatively of intervention by regional organizations.³⁹⁴ The ICISS report was therefore significant not only in putting forth a new norm of a responsibility to protect, together with criteria for its use, but also in suggesting that this new norm might be implemented by other bodies if and when the Security Council was paralyzed by a possible veto.³⁹⁵

The articulation of a responsibility to protect coincided with the preparation for the United Nations’ 60th anniversary summit in September 2005, at which Secretary-General Annan hoped to secure international support for a fundamental reform of UN institutions and policies.³⁹⁶ As a first step in this campaign, Annan created another international committee, the High-Level Panel on Threats, Challenges and

³⁸⁹ *Id.* ¶ 6.7.

³⁹⁰ *Id.* ¶ 6.23.

³⁹¹ *Id.* ¶ 6.28.

³⁹² *Id.* ¶ 6.21.

³⁹³ ICISS, *supra* note 337, ¶¶ 6.29–30. Recourse to the GA, the Commission noted, was limited in various ways, including the requirement of a two-thirds majority under the Uniting for Peace procedure, and the fact that the GA “lacks the power to direct that action be taken.” *Id.*

³⁹⁴ *Id.* ¶¶ 6.31–35. “In strict terms,” the Commission noted, “the letter of the Charter requires action by regional organizations always to be subject to prior authorization from the Security Council,” although previous instances of post-hoc authorization in Liberia and Sierra Leone could leave “certain leeway for future action.” *Id.* ¶ 6.35. The Committee also distinguished instances in which regional organizations intervened in the affairs of member states (as anticipated in the constituent instruments of the African Union and the Organization of American States), and the more difficult question of a regional organization intervening in the affairs of a neighboring nonmember state (as NATO did in Kosovo). *Id.* ¶¶ 6.33–34. In contrast to these possibilities, the Commission found little or no support for intervention by individual states or ad hoc coalitions, of the kind that the United States would later assemble for the 2003 invasion of Iraq. *See id.* ¶ 6.36.

³⁹⁵ *See id.* ¶¶ 6.28–40.

³⁹⁶ *See In Larger Freedom, supra* note 339, ¶¶ 1–5.

Change (“HLP”).³⁹⁷ The panel of fifteen experts from the North and South, chaired by former Thai Prime Minister Anand Panyarachun and former U.S. National Security Advisor Brent Scowcroft, had a wide mandate to identify the threats and challenges of the 21st century and make recommendations for UN reforms across a wide range of areas.³⁹⁸ As part of this mandate, the HLP explicitly considered the issue of humanitarian intervention and the responsibility to protect, likely influenced by the presence on the panel of Gareth Evans, who had co-chaired the ICISS.³⁹⁹ Although the R2P concept had been enunciated just three years earlier by the ICISS, and had yet to be endorsed by either the Security Council or the General Assembly, the final report of the High-Level Panel, *A More Secure World: Our Shared Responsibility*, spoke of the responsibility to protect as an “emerging norm” of international law.⁴⁰⁰ The report maintained that:

[T]here is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community—with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.⁴⁰¹

The HLP was ambitious in its depiction of R2P as an “emerging norm,” given the recent origins of this concept and the absence of any reference to the doctrine in any high-level UN document or legal proceeding. In support of the norm’s development, the HLP recommended that “the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be.”⁴⁰² The HLP then proposed five guidelines, drawn from but not identical to those in the ICISS report, including: (1) seriousness of threat, (2) proper purpose, (3) last resort, (4) proportional means, and (5) balance of consequences.⁴⁰³ These guidelines, the panel suggested, would “not produce agreed conclusions with push-button predictabil-

³⁹⁷ See *id.* ¶ 4; EVANS, *supra* note 371, at 5.

³⁹⁸ See EVANS, *supra* note 371, at 5.

³⁹⁹ See *id.* at xiii, 5.

⁴⁰⁰ HIGH-LEVEL PANEL REPORT, *supra* note 338, ¶¶ 201–203.

⁴⁰¹ *Id.* ¶ 201.

⁴⁰² *Id.* ¶ 205.

⁴⁰³ *Id.* ¶ 207.

ity,” but they would “maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force,” and would reciprocally “minimize the possibility of individual Member States bypassing the Security Council.”⁴⁰⁴ Nevertheless, the panel, with a diverse membership including Russian and Chinese representatives, “broke with ICISS by omitting any discussion of what should happen if the Security Council was unable or unwilling to act.”⁴⁰⁵ The result was a significant endorsement of R2P, but one that failed to address one of the central issues arising out of the Kosovo intervention. It was therefore less radical in its implications, and more acceptable to champions of state sovereignty such as Russia and China.

The language of the HLP report was, in turn, largely incorporated into the Secretary-General’s March 2005 report, *In Larger Freedom*, which served as an informal agenda for the forthcoming 60th anniversary summit of the UN.⁴⁰⁶ In the report, Annan repeated his forceful 1999 message about sovereignty and responsibility,⁴⁰⁷ and proceeded to endorse the R2P provisions of the HLP report:

While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. *I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.* This responsibility lies, first and foremost, with each individual

⁴⁰⁴ *Id.* ¶ 206.

⁴⁰⁵ Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit*, 2 J. INT’L L. & INT’L REL. 95, 96 (2005). Indeed, one author suggests, the panel’s agreement on the principle of the responsibility to protect was

crucially dependent upon the High-level Panel’s explicit statement that the use of force would have to be authorized by the Council under its Chapter VII provisions. It was this criterion that the United Kingdom had refused to accept in negotiations over criteria in the Council, believing that such a constraint would bind it and its allies in future cases where consideration was being given to using force without express Council authorization, as had happened over Kosovo.

Id. at 99.

⁴⁰⁶ See *In Larger Freedom*, *supra* note 339, ¶¶ 4, 135.

⁴⁰⁷ *Id.* ¶ 132.

We must also move towards embracing and acting on the “responsibility to protect” potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service.

Id.

State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.⁴⁰⁸

D. *Global Consensus? The 2005 World Summit Endorses R2P*

Having received the endorsement of the High-Level Panel and the Secretary-General's pre-summit report, the responsibility to protect doctrine was finally taken up by the UN member states in advance of the UN's 60th anniversary summit in September 2005. The 2005 summit in general was notable for the extraordinary ambition of its preparatory documents, which sought fundamental UN reform across a range of security, development, and human rights issues and institutions, and for the paucity of its final results, which failed to agree on core issues such as the reform of the Security Council or the Secretariat.⁴⁰⁹ In the context of that larger failure, the consensus agreement on the responsibility to protect is often depicted as one of the few tangible achievements of the summit.⁴¹⁰ Yet a closer examination reveals that the R2P issue, like the rest of the issues raised at the summit, was the subject of intense negotiation and compromise among the UN's member governments in the preceding weeks and months. Indeed, while the proposed declaration was to be a non-binding, soft-law document, negotiations on this issue involved hard bargaining in light of member states' understanding of the link between the R2P doctrine and hard law, and in particular possible future Chapter VII-authorized humanitarian interventions or, in their absence, alleged justifications of intervention under customary international law. This prospect led to considerable dissension among the member states.

In the negotiations leading up to and at the 2005 world summit, the Secretary-General and a number of liberal democratic member states, and in particular the European Union members and Canada,

⁴⁰⁸ *Id.* ¶ 135.

⁴⁰⁹ See Wheeler, *supra* note 405, at 98–102.

⁴¹⁰ See, e.g., EVANS, *supra* note 371, at 47.

pressed the other members for a specific declaration on the responsibility to protect.⁴¹¹ In doing so, however, they encountered significant resistance from several quarters. Russia and China, although lacking veto power in the General Assembly, remained opposed to any language that could substantially weaken the bedrock principle of state sovereignty and/or bypass the Security Council and the security of a P-5 veto.⁴¹² Just as significantly in the context of the General Assembly, the majority of states in the Non-Aligned Movement strongly opposed any language that would loosen existing restraints on the use of force—not least because the United States and Great Britain had recently cited humanitarian justifications for their 2003 invasion of Iraq.⁴¹³ The United States, now represented by the administration of President George W. Bush and his controversial UN Ambassador John Bolton, was widely seen as a spoiler at the world summit, proposing a last-minute series of nearly 700 amendments to the proposed summit declaration.⁴¹⁴ With respect to R2P, the Bush Administration supported the concept of a responsibility to protect, but vigorously opposed any provisions that would limit U.S. freedom of action in the use of force, including any R2P language that might legally obligate the United States to intervene against its will.⁴¹⁵

⁴¹¹ Wheeler, *supra* note 405, at 101.

⁴¹² Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFF. 615, 625 (2008).

⁴¹³ The collective statement of the NAM countries in 2000 was:

We also want to reiterate our firm condemnation of all unilateral military actions without proper authorisation [sic] from the United Nations Security Council. . . . We reject the so-called “right” of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.

Wheeler, *supra* note 363, at 563 n.50 (quoting the Foreign Ministers of the Movement of Non-Aligned Countries) (alterations in original). Members of the African Union, by contrast, had embraced in its 2002 Constitutive Act “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.” EVANS, *supra* note 371, at 274 n.21. Nevertheless, African countries generally remained skeptical of R2P at the UN level in the negotiations, and in particular of any effort to bypass Security Council authorization. Wheeler, *supra* note 363, at 563 n.50.

⁴¹⁴ EVANS, *supra* note 371, at 47.

⁴¹⁵ See, e.g., Wheeler, *supra* note 405, at 101 (citing Ambassador Bolton & Permanent Rep. of the U.S. to the U.N., Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the UN, to the United Nations (Aug. 30, 2005)). In his August 30, 2005 letter to the United Nations, U.S. Ambassador John Bolton acknowledged:

Given this array of state preferences, and the formidable opposition to humanitarian intervention among both great powers and non-aligned states, it is remarkable that the 2005 world summit, having deadlocked on nearly all other matters of importance, was able to adopt a provision explicitly endorsing the “responsibility to protect” doctrine:

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its

[T]he international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host. . . . We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.

Id; see also EVANS, *supra* note 371, at 47.

implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁴¹⁶

The General Assembly's explicit embrace of a responsibility to protect is indeed a significant step that reflects the advocacy of governments such as those of Great Britain and Canada, the embrace of "limited-sovereignty principles" by a growing number of countries in sub-Saharan Africa and Latin America, and the leadership of Secretary-General Kofi Annan and other advocates from international and nongovernmental organizations.⁴¹⁷ Nevertheless, the specific language of the world summit declaration differs in important ways from the ICISS and other previous articulations of R2P, and reflects the interests of the various member states and the compromises necessary to reach consensus.⁴¹⁸

Four observations are in order.

First, and most obviously, the ICISS, HLP, and the Secretary-General's articulations of the responsibility to protect all featured explicit criteria or guidelines for the Security Council in authorizing the use of force. Nevertheless, explicit criteria were opposed by a diverse group of countries, including Russia, China, India, Pakistan, Egypt, and the United States, and no such criteria were adopted in the final document.⁴¹⁹ The final document does anticipate the possibility of Chapter VII action where "peaceful means [are] inadequate," but only "on a case-by-case basis" where "national authorities are manifestly failing to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."⁴²⁰ Hence, Annan's call for a clear set of

⁴¹⁶ 2005 World Summit Outcome, *supra* note 326, ¶¶ 138–139.

⁴¹⁷ EVANS, *supra* note 371, at 50. The linkages between R2P and other issues have also been emphasized, for example in attributing China's willingness to sign on to a watering down of provisions on the proposed Human Rights Council, which China opposed. See Wheeler, *supra* note 405, at 101–02.

⁴¹⁸ For critical analyses of these documents, emphasizing the changes and omissions of the world summit outcome document, see Wheeler, *supra* note 405, at 96–105; and Stahn, *supra* note 332, at 102–10. See also EVANS, *supra* note 371, at 47–50, which provides a somewhat more optimistic interpretation of the summit language.

⁴¹⁹ See Wheeler, *supra* note 405, at 101–02.

⁴²⁰ 2005 World Summit Outcome, *supra* note 326, ¶ 139. For a good discussion, see Bellamy, *supra* note 412, at 625–30; and Wheeler, *supra* note 405, at 102. See also EVANS, *supra* note 371, at 48, for a concession by an author who generally defends the world summit language against critics that the absence of explicit criteria is a "disappointing omission."

guidelines, to lend both urgency and consistency to the Security Council's decisions on the use of force, remained to be answered after the world summit.⁴²¹

Second, both the ICISS and earlier British efforts within the Security Council following the Kosovo intervention had sought to leave open the possibility of action by the GA, or regional organizations or individual states, in the event of deadlock in the Security Council. This option had been a casualty of negotiations in the High-Level Panel, however, and enjoyed scant support among the bulk of the UN membership, particularly after the unauthorized US-led invasion of Iraq in 2003.⁴²² The world summit document is thus silent on this point, leading UN scholar Thomas Weiss to refer to the summit declaration as an "R2P lite."⁴²³ Whether and how states or regional organizations may proceed in the event of Security Council paralysis remains as questionable today as it was during the Kosovo intervention a decade ago.

Third, as Nicholas Wheeler points out, "governments which are reluctant about humanitarian intervention are increasingly persuaded that the language of the responsibility to protect can be used to constrain rather than enable interventions."⁴²⁴ In Wheeler's view, states concerned with bolstering national sovereignty sought to influence the specific formulation of R2P, emphasizing the primary responsibility of national governments and stripping away detail and clarity from the text on the "residual" responsibility of the international community. By contrast with previous versions of R2P, the world summit outcome document places particular stress on the responsibilities of states to protect their own populations, and declares that the member states "accept that responsibility and will act in accordance with it."⁴²⁵ In addition, however, the world summit document adds new language (not present in earlier manifestations) that "collective action" should only be taken where national governments are "manifestly failing" to protect their own populations from a list of four international crimes. The meaning

⁴²¹ See *In Larger Freedom*, *supra* note 339, ¶ 135.

⁴²² Bellamy, *supra* note 412, at 625–26; *id.* at 616 n.11 (noting that the first Security Council discussion of the responsibility to protect, in 2002, elicited strong views from China and Russia regarding the importance of a Security Council mandate for any proposed intervention).

⁴²³ THOMAS G. WEISS, HUMANITARIAN INTERVENTION 117 (2007). *But see* Bellamy, *supra* note 412, at 618, 625–30 (arguing that the ICISS criteria, while innovative, were and are unlikely to be adopted by the Security Council, and would not in any event have provided the legal or political clarity claimed by their proponents).

⁴²⁴ Wheeler, *supra* note 405, at 102; *see also* Bellamy, *supra* note 412, at 625.

⁴²⁵ 2005 World Summit Outcome, *supra* note 326, ¶ 138.

of manifest failure is left unspecified in the text, but, as Alex Bellamy has demonstrated, defenders of national sovereignty and opponents of intervention have already pointed to the primary responsibility of home governments and the “manifest failure” provision to argue against international intervention.⁴²⁶ Indeed, the UN Secretary-General’s 2009 Report on Implementing the Responsibility to Protect maintains that the doctrine “does not alter; indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.”⁴²⁷

Fourth and finally, in terms of our analysis of hard and soft law, the world summit outcome document, like the aforementioned reports that developed R2P, is a soft-law declaration. It is not directly binding on UN member states and clearly is not enjoying the status of either treaty or customary international law.⁴²⁸ States engaged in hard bargaining on the language of R2P because of its implication for future legally binding Security Council decisions to intervene in particular countries. They endorsed the concept in the abstract but stripped away the criteria that might have guided its application in practice. The UN member states did not use soft law to elaborate existing hard-law provisions, but rather opted to paper over their differences with a vague and underspecified definition of the responsibility to protect, omitting the explicit criteria that had been a feature of the previous three documents.⁴²⁹ As a result, the world summit language provides little or no guidance as to when and how the Security Council may and should intervene for humanitarian purposes, or what may and should be done in the event of paralysis in the Security Council.

⁴²⁶ Bellamy, *supra* note 412, at 623–25.

⁴²⁷ U.N. Secretary-General, Implementing the Responsibility to Protect: Report of the Secretary-General, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009).

⁴²⁸ Stahn, *supra* note 332, at 101 (“None of the four main documents in which responsibility to protect has been treated in depth can be regarded as generating binding international law under the classic sources of international law set forth in Article 38 of the Statute of the International Court of Justice . . .”).

⁴²⁹ See, e.g., Wheeler, *supra* note 405, at 96.

The High-level Panel shared the Canadian sponsored Commission’s enthusiasm for reaching an agreement on the criteria that should govern the use of force, and this idea was taken up by Annan in his major report *In Larger Freedom*, which sets out a detailed blueprint for UN reform. However, this part of the reform package was a casualty of the negotiations in New York which took place in the run-up to the world summit.

Id.

E. *Implementing R2P Since 2005: Backpedaling?*

The record of normative development and implementation of the R2P doctrine has been at best mixed since the 2005 world summit. The “good news,” Gareth Evans writes, includes an embrace of the concept by the new Secretary-General Ban Ki-moon, who fully endorsed R2P and proposed a special advisor to guide him on the implementation of the concept.⁴³⁰ In addition, the norm of the responsibility to protect has become part of the “working language” of international organizations, NGOs, and governments in response to crises such as the ongoing massacres in Darfur and the election-related violence in Kenya in 2007 and 2008.⁴³¹ Perhaps most significantly, Evans notes, R2P has secured at least a “toehold” within the Security Council.⁴³² For example, in Security Council Resolution 1674, a thematic resolution on the protection of civilians in armed conflict, the Security Council reaffirmed the summit language on R2P.⁴³³ The inclusion of the R2P concept in a hard-law Security Council Resolution is potentially significant. The reference to R2P in Resolution 1674, however, is brief, does not elaborate on the concept or its application, and it is *not* invoked in the context of any specific authorization for a UN-sanctioned humanitarian intervention.⁴³⁴ Perhaps more importantly, the Security Council did *not* choose to invoke the responsibility to protect doctrine in other resolutions relating to the ongoing humanitarian disaster in Darfur, or to the humanitarian effects of Cyclone Nargis in Myanmar in May 2006.⁴³⁵

⁴³⁰ EVANS, *supra* note 371, at 50–51.

⁴³¹ Bellamy, *supra* note 412, at 615.

⁴³² EVANS, *supra* note 371, at 50 (“A General Assembly resolution may be helpful, as the World Summit’s unquestionably was, in identifying relevant principles, but the Security Council is the institution that matters when it comes to executive action. And at least some toeholds there have now been carved.”).

⁴³³ See S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006). Paragraph 4 reads, in its entirety: “Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” *Id.*

⁴³⁴ See S.C. Res. 1706, ¶ 9, U.N. Doc. S/RES/1706 (Aug. 31, 2006). Later, in August 2006, the Security Council, in a prefatory paragraph of Resolution 1706 extending the mandate of the UN Mission in Sudan to the Darfur region of the country, recalled, *inter alia*, Resolution “1674 (2006) on the protection of civilians in armed conflict, which reaffirms *inter alia* the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document” *Id.* The resolution, which was adopted by a vote of twelve in favor with three abstentions (China, Qatar, and the Russian Federation), “invited” but did not order the consent of the Sudanese government for such a deployment. See U.N. SCOR, 61st Sess., 5519th mtg. at 2, U.N. Doc. S/PV.5519 (Aug. 31, 2006).

⁴³⁵ Bellamy, *supra* note 412, at 632–34.

Nor is the weakness in implementation limited to the Security Council. Although the states agreed unanimously to endorse R2P at the 2005 world summit, a growing number of states have evidenced apparent “buyer’s remorse” in subsequent debates.⁴³⁶ In early 2008, for example, the General Assembly met to consider Secretary-General Ban Ki-moon’s appointment of Edward Luck as “Special Advisor on the Responsibility to Protect”:

The prevailing mood in at least some quarters was captured . . . by the way in which, with evidently perfectly straight faces, Latin American, Arab, and African delegates to the UN’s budget committee took to the floor to say, variously, that “the World Summit rejected R2P in 2005,” “the concept of the responsibility to protect has not been adopted by the General Assembly,” and “the responsibility to protect itself . . . was not accepted or approved as a principle by the General Assembly” . . . For whatever reason . . . there is a recurring willingness by a number of states to deflate or undermine the new norm before it is fully consolidated and operational. There has been a falling away of overt commitment to the norm in sub-Saharan Africa . . . and some increased skepticism in the Arab-Islamic and Latin American worlds. And in Asia there has never been much enthusiasm . . .⁴³⁷

Reflecting this normative backpedaling by some states, as well as the absence of forceful action by the Security Council in Darfur, a growing number of activists and practitioners have begun to question the significance and the implementation of the R2P doctrine.⁴³⁸ As U.S. Secretary of State Condoleezza Rice noted in an interview with the *New York Times*:

I think we thought the Responsibility to Protect meant something. I remember when the responsibility-to-protect language came up at the 2006 [sic] United Nations General Assembly, and I remember thinking at the time: If this turns out to be nothing but words, the Security Council is going to have a real

⁴³⁶ See, e.g., Warren Hoge, *Intervention, Hailed as a Concept, Is Shunned in Practice*, N.Y. TIMES, Jan. 20, 2008, at A12 (“There has been a tremendous amount of buyer’s remorse . . .”) (quoting Donald Steinberg, the New York Director of the International Crisis Group).

⁴³⁷ EVANS, *supra* note 371, at 52–53.

⁴³⁸ See Helene Cooper & Scott L. Malcolmson, *Welcome to My World, Barack*, N.Y. TIMES MAGAZINE, Nov. 13, 2008, at 44, 49.

black eye, and in the Darfur case it has turned out to be nothing but words. I think it has been an enormous embarrassment for the Security Council and for multilateral diplomacy.⁴³⁹

In Rice and other critics' views, the official world summit declaration remains a soft-law provision, vague and open to multiple interpretations, and offers little concrete guidance regarding the legal justification or the specific criteria for humanitarian intervention.⁴⁴⁰ The language of R2P has also failed to overcome the principled objections to such intervention among states such as Russia and China, which continue to block more forceful action in crises such as the one in Darfur.

None of this analysis suggests that the responsibility to protect is dead, or that it will not, in time, be more fully elaborated and serve as a guide to action in the Security Council and elsewhere. Indeed, much of the literature on R2P over the past several years has been designed to "move the agenda forward" by clarifying, institutionalizing, and providing political will to implement the concept in practice for purposes of its progressive development.⁴⁴¹ Perhaps the clearest manifestation of this has been in UN Security Council Resolution 1973, which authorized the use of all necessary means—including a NATO-enforced no-fly zone—to protect civilians from the military forces of Libyan leader Muammar Gaddafi.⁴⁴² This intervention, and other recent actions in

⁴³⁹ *Id.* at 44, 49.

⁴⁴⁰ See generally, for example, the critiques in Bellamy, *supra* note 412; EVANS, *supra* note 371; Stahn, *supra* note 332; and Wheeler, *supra* note 405. By contrast, for questions as to the practicality and utility of R2P as a legal concept, see Jose E. Alvarez, Hamilton Fish Professor of International Law & Diplomacy, Columbia Law School & President, American Society of International Law, Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: The Schizophrenias of R2P (June 30, 2007), available at <http://www.asil.org/pdfs/r2pPanel.pdf>.

⁴⁴¹ See, e.g., the detailed analyses and proposals put forward in EVANS, *supra* note 371; MARIA BANDA, U.N. ASS'N IN CAN., THE RESPONSIBILITY TO PROTECT: MOVING THE AGENDA FORWARD 7 (2007), http://www.unac.org/en/library/unacresearch/2007R2P_Banda_e.pdf; and Human RIGHTS CENTER AT U.C. BERKELEY, THE RESPONSIBILITY TO PROTECT (R2P): MOVING THE CAMPAIGN FORWARD I, 47, 58 (2007), <http://www.law.berkeley.edu/HRCweb/pdfs/R2P-Final-Report.pdf>. One author, for example, argues that "[i]f the unanimous adoption of the R2P principles by the 2005 World Summit and the UN Security Council is not to be the high-water mark from which the tide recedes, then serious, ongoing diplomatic and other advocacy efforts have to be made," and provides recommendations for the conceptual clarification, institutionalization, and political implementation of R2P principles. EVANS, *supra* note 371, at 53–54.

⁴⁴² See generally S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter S.C. Res. 1973]. See also Resolution 1970 (2011), in which the Security Council, acting unanimously under Chapter VII, invoked Libya's responsibility to protect its citizens, condemned the Libyan government's actions, called for an investigation by the International

Cote d'Ivoire and elsewhere, have been hailed as signs of a "new politics of protection," in which civilian protection has become a reflexive priority of the international community, whose members have demonstrated a clear willingness to invoke R2P and authorize the use of force through the Security Council, and against the will of the target state.⁴⁴³ The international community's response to events in Libya has indeed been remarkable, although a careful reading suggests that Libyan case has been unusual in terms of the clarity and ferocity of the slaughter by Gaddafi's forces as well as the highly unusual calls for intervention by regional organizations such as the (normally sovereignty-conscious) Arab League.⁴⁴⁴ It is also striking that Resolution 1973 was adopted with five abstentions, all from large countries (China, Russia, Brazil, Germany, and India), and that the invocation to R2P was limited to a preambular reference to *Libya's* primary responsibility to protect its own people.⁴⁴⁵ Finally, NATO's implementation of the Security Council mandate has proven controversial, with Russia, China, and South Africa, among others, accusing the alliance of overstepping the bounds of its mandate in the months-long campaign of aerial bombardment of the Libyan government and military.⁴⁴⁶ In any event, the precedent of the Libyan case has not been followed, at this writing, by any similar intervention, or even any clear Security Council denunciation of Syria for similar actions with respect to its own civilians, despite clear and repeated criticism from the UN Secretariat, the EU, and others.⁴⁴⁷ All of

Criminal Court, and imposed a series of diplomatic and economic sanctions on the country's leadership. See generally S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

⁴⁴³ Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Cote d'Ivoire, Libya, and the Responsibility to Protect*, 87 INT'L AFF. 825, 825-50 (2011).

⁴⁴⁴ *Id.* at 838-46.

⁴⁴⁵ S.C. Res. 1973, *supra* note 442; U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011); see also Simon Chesterman, *Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya* 3-4 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-35, 2011).

⁴⁴⁶ Bellamy & Williams, *supra* note 443, at 845.

⁴⁴⁷ See, e.g., Press Release, Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, On the situation in Syria, U.N. Press Release (June 2, 2011), available at <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20statement%20Syria%202%20June%202011%20FINAL%20ENGLISH.pdf> (expressing "grave[] concern at the increasing loss of life in Syria as a result of the continued violent suppression of anti-government protests" and reminding the Syrian government "of its ongoing responsibility to protect its population"); Press Release, Council of the European Union, EU Extends Sanctions Against Syria, (June 23, 2011), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/123015.pdf (imposing targeted sanctions on individuals held responsible for repression as well as "an embargo on arms and equipment which might be used for internal repression"). Despite these and other repeated criticisms (including from the United States),

these considerations suggest caution in our interpretation of the robustness of the R2P norm, whose political fate is likely to be influenced by the ultimate outcome of the intervention in Libya.

Regardless of how we interpret the Libyan case, the foregoing account of the legal documents and developments dispels any image of a harmonious, complementary relationship between the hard-law provisions of the UN Charter and the new soft-law provisions on the responsibility to protect found in international commission and UN reports and in the 2005 world summit outcome document. The relationship among these provisions, rather, is antagonistic, in the dual sense referenced above: from a legal perspective, in the antagonism or tension between the limited-sovereignty language of the responsibility to protect and the more absolute-sovereignty language of the Charter; and, from a political perspective, in the antagonism among states, some of which have sought to undermine absolute sovereignty through R2P while others have sought—with some apparent success—to mold the doctrine to bolster (or at least not undermine) state sovereignty.

F. Hard and Soft Law Interaction in the R2P Case

Our reading of the R2P case once again supports our hypotheses about the interactions of hard and soft law in international law's development. In this case, and consistent with Hypothesis 1, the great powers of the UN Security Council were broadly in agreement regarding the legal protection of state sovereignty from the end of World War II through the end of the Cold War; during this period we do not see an antagonistic relationship between hard- and soft-law provisions on the questions of sovereignty and humanitarian intervention.⁴⁴⁸ With the end of the Cold War, however, and in particular following NATO's precedent-setting Kosovo intervention in 1999, the permanent members of the UN Security Council were divided. Britain, France, and (with some reservations) the United States, supported by a coalition of liberal democratic states, sought a new legal norm of humanitarian intervention, while Russia and China, supported by most of the members of the Non-Aligned Movement, sought to protect the existing hard-law

the Security Council was, as of mid-July 2011, unable to summon the necessary majority for a resolution condemning the Syrian government and/or authorizing the use of force, with Russia reportedly threatening a veto of any such resolution. See *UN Security Council Weighs Syria Resolution*, AL JAZEERA (last modified June 9, 2011, 4:29), <http://english.aljazeera.net/news/middleeast/2011/06/20116815955110282.html>.

⁴⁴⁸ See *supra* notes 341–343 and accompanying text.

principles of state sovereignty and non-intervention.⁴⁴⁹ These states' positions reflected the distributive implications at stake with a change in international law. Unable to secure the necessary consensus for new hard-law provisions, and consistent with Hypothesis 4, the advocates of humanitarian intervention turned to a series of soft-law fora, namely the series of international commissions that developed the R2P concept, as well as the 2005 world summit outcome document.⁴⁵⁰

Proponents of the responsibility to protect have often denied that this new soft-law norm challenges the hard-law provisions of the UN Charter, arguing that soft law complements hard law by clarifying and progressively developing the content and the limits of sovereignty in the Charter.⁴⁵¹ We find such arguments unpersuasive. Based on the historical evidence surveyed, it is clear that the advocates of humanitarian intervention were indeed proposing a *new* legal norm, which at a minimum requires a dramatic reinterpretation of the long-standing, hard-law principles of state sovereignty and non-intervention. States and non-state actors deployed existing hard and new soft law as antagonists, with the results predicted in Hypothesis 2. More concretely, we have seen a coalition of powerful and weaker states strategically using various soft-law fora, including international commissions and the UN General Assembly, to challenge existing hard law and its interpretation. This antagonistic interaction of hard and soft law has led to some softening of existing hard-law provisions on state sovereignty. The precise meaning of the legal principle and the accompanying obligation of states not to interfere in the internal affairs of other states are now less certain. At the same time, the processes within those soft-law fora increasingly involved hard bargaining when they reached the General Assembly, with sovereignty-conscious states fighting to water down the R2P doctrine at each stage in its development, and subsequently backpedaling on its substantive content as well as on the application of the doctrine in practice. The result—to the disappointment of R2P champions like Evans⁴⁵²—is the co-existence of a soft-law responsibility to protect norm and hard-law state sovereignty and nonintervention norms, with little clarity about how these norms might be reconciled or implemented in practice. In sum, hard and soft law did not work in this case as complements to progressively develop and clarify international law. Actors, rather, strategically used them as antagonists, in reflection of the vary-

⁴⁴⁹ See *supra* notes 343–358 and accompanying text.

⁴⁵⁰ See *supra* notes 359–429 and accompanying text.

⁴⁵¹ See discussion *supra* note 441.

⁴⁵² See EVANS, *supra* note 371, at 48.

ing distributive implications for states, resulting in confusion rather than clarification of the law of state sovereignty and humanitarian intervention at the start of the 21st century.

CONCLUSION

The two security cases examined here—the nuclear weapons case and the humanitarian intervention case—are different in many ways from the economic, “trade-and” cases that we have examined previously.⁴⁵³ The subject matter, the key coalitions of states, the legal instruments, and the political fora for these debates all differ starkly from the transatlantic disputes over genetically modified foods and cultural diversity. And yet, the fundamental dynamics of hard- and soft-law interaction—the strategic use of these instruments as antagonists, the ubiquity of forum-shopping, the hardening of soft-law deliberations, and the muddying and softening of hard-law rules—are all present in the security cases as well as in the economic cases. The strategic use of hard and soft law, therefore, as well as the predictable results from such use, are not issue-specific, but are general features of international law and politics.

In both of these cases, consistent with our hypotheses, the great powers of the post-war era sought to entrench strong, and even constitutive, norms in binding, hard law, and in some cases in the quasi-constitutional framework of the UN Charter. In both cases, in the course of subsequent decades, revisionist states attempted to counter existing hard-law rules with new hard-law provisions in treaties, or through the creation of new customary international law. In the first instance, mostly less developed, nonnuclear countries led the charge. In the second case, a coalition of large and politically liberal states took the initiative. In a setting of fundamental normative conflict, however, the revisionists’ efforts at hard law creation have generally been unsuccessful. Revisionist states therefore settled for the establishment of new soft-law norms, at odds with existing hard-law provisions, with the aim of undermining or reorienting them.

The resulting antagonistic interaction of hard- and soft-law instruments has had impacts on the purported advantages of hard- and soft-law fora and regimes in these cases, again consistent with our hypotheses. Intergovernmental soft-law fora have become characterized by hard bargaining in light of the potential implications of new soft law

⁴⁵³ See generally Shaffer & Pollack, *supra* note 2.

for existing hard law. The existing hard law, in parallel, has become less clear and determinate, and thus softer in its implications. In both cases the final result has not been a progressive development of more elaborate international law, but rather a stalemate, in which various states and non-state actors engage in an ongoing struggle to shape the content and interpretation of international law in light of the distributive implications at stake.

Indeed, only one striking difference emerges from our security cases as compared with the economic or “trade-and” cases analyzed in our previous works and in other studies of forum-shopping and regime-shifting. In those economic cases, distributive conflicts over the making and interpretation of international law take place among multiple distinct and overlapping international regimes, such as the World Trade Organization, the World Health Organization, and the Convention on Biodiversity. By contrast, much (though not all) of the struggle to define and interpret international law in the R2P case took place within the single regime of the UN system. In this case, the multiple decision-making bodies within the UN system—including most notably the General Assembly, the Security Council, the ICJ, the Secretariat, and soft-law commissions—are characterized by different memberships and different decision rules which differentially empower the various parties to the dispute, and which therefore provide ample incentive and opportunity to engage in strategic forum-shopping *even within a single regime* like the UN system.

Thus far in this Article, we have sought to analyze the antagonistic interaction of hard and soft law in both theory and practice, but we have refrained from offering a normative assessment of that interaction. Such an assessment would (and should) depend both on one’s substantive position on the particular issue in question, as well as one’s degree of systemic concern about the optimal level of uniformity or fragmentation of international law in a pluralist world. In the nuclear weapons case, for example, one’s attitude toward the soft-law campaign to declare the threat or use of nuclear weapons illegal depends in large part on one’s substantive views about that issue. Similarly, the R2P campaign is likely to be assessed quite differently by proponents of humanitarian intervention on the one hand and of state sovereignty on the other. In substantive terms, therefore, a single observer—say, one with views sympathetic to those of the U.S. government—might at one and the same time condemn the soft-law campaign against nuclear weapons as destabilizing the international security system, while defending the use of soft-law R2P language as “progressively developing” the law of the UN Charter in light of evolving human rights norms.

Beyond one's substantive preferences with respect to a given issue, however, lies a larger systemic question about the uniformity or fragmentation of international law. It has, as we have seen, become commonplace for legal scholars to lament the fragmentation of the international legal order, and such scholars might well see the antagonistic use of hard and soft law as contributing to such fragmentation and confusion. Indeed, we have suggested in this Article that the net effect of hard- and soft-law interaction in our two security cases, as in the economic cases we have previously examined, has indeed been to muddy the waters and render international law less rather than more clear. By the same token, however, defenders of legal pluralism might well respond that the proliferation of voices in the international legal debate has been normatively desirable in both the nuclear weapons and humanitarian intervention debates, and may in the future—possibly after a prolonged period of stalemate—finally lead to the progressive development of international law called for in the UN Charter.

Regardless of one's position on the substantive issues at stake, or on the normative desirability of international legal pluralism, the antagonistic interaction of hard and soft law is now a fact of life in both the economic and security spheres, and is likely to shape these and other legal and policy debates for many years to come.

