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Then and Now - Changes in Public International Law over the Life of the Journal

Cover Page Footnote

International Law; Commercial Law; Law

Then and Now—Changes in Public International Law Over the Life of the *Journal*

A. Mark Weisburd¹

I. Introduction

On the fifth page of the first volume of the *North Carolina Journal of International Law and Commercial Regulation*, Governor James E. Holshouser, Jr., wrote:

The *North Carolina Journal of International Law and Commercial Regulation* was founded to provide information [about developments in international law affecting international business transactions] that is practical and easily digested. It will identify special areas of international law which will affect particular institutions and businesses.²

Since its founding, the *Journal* has remained faithful to this statement of its mission. Public international law, however, embraces many topics that at first glance may have little to do with the subjects Governor Holshouser identified. The question may fairly be raised, then, why should an article on the changes in public international law even appear in this publication?³

The answer to this question is that it has become more and more difficult in the last twenty-five years to identify areas of public international law which do *not*, in some manner, “affect particular institutions and businesses.” This is most clearly true as to those developments in public international law which directly impact day to day international practice, for example, with respect

¹ Professor of Law, the University of North Carolina at Chapel Hill; A.B., Princeton University, 1970; J.D., University of Michigan, 1976.

² James E. Holshouser, Jr., *Introduction*, 1 N.C. J. INT’L L. & COM. REG. v, v-vi (1976).

³ One reason, of course, is that I teach public international law and can write about it, while I know very little about international commercial law and certainly cannot write about *that*. Since my ignorance is my problem and not the reader’s, however, I don’t expect anyone else to agree that my limitations amount to an affirmative justification for an article addressing subjects arguably with little or no relation to the general thrust of this publication.

to international trade. But even such matters of high politics as changes in the international response to the use of force significantly affect the ease, or difficulty, of all manner of international interchanges. While Americans might think questions of the international law of human rights primarily affect persons in countries with neither a bill of rights nor a strong judiciary, change in this area also has a direct bearing on everyday business practice in North Carolina—indeed, a recent article in the *Journal* points out that American businesses might find themselves affected by international human rights law rather more directly than they find comfortable.⁴

This article, therefore, will address developments in three areas. Part II discusses briefly fundamental changes in the law of international trade which have taken place since 1975.⁵ Part III addresses developments in international regulation of the use of force.⁶ Finally, Part IV discusses the evolution of the international law of human rights.⁷ These topics are rather different from those addressed in Issue One of Volume One, but perhaps the most fundamental change in public international law in the past quarter century is the extent to which discussion of such subjects has come to satisfy Governor Holshouser's description of the *Journal's* purpose.

II. From GATT to WTO

Anyone involved in the law of international trade, or who read accounts of the riots in Seattle in the fall of 1999,⁸ can hardly be unaware of the existence of the World Trade Organization (WTO). Its predecessor, the General Agreement on Tariffs and Trade (GATT), of course existed in 1975, but drew rather less attention than has the WTO. Why the WTO is rightly seen as different from GATT in several significant aspects, and why it is not, is one of the significant changes in public international law since 1975.

⁴ Lucien J. Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1 (1998).

⁵ See *infra* notes 8-18 and accompanying text.

⁶ See *infra* notes 19-45 and accompanying text.

⁷ See *infra* notes 46-73 and accompanying text.

⁸ See Michael Elliott, *The New Radicals*, NEWSWEEK, Dec. 13, 1999, at 36-39; see also Kenneth Klee et al., *The Siege of Seattle*, *id.* at 30-35.

The WTO was formally established by an international agreement concluded in 1994.⁹ Although the agreements accompanying its formation broadened the categories of trade subject to regulation by multilateral agreement as compared to the pre-1994 regime,¹⁰ the approach to substantive regulation taken in these agreements is simply an extension of the approach taken by GATT regarding trade in goods. Nor does the mechanism for enforcing states' obligations differ. In both cases, the ultimate sanction for one state's violation of the rights of another under the relevant agreement is the imposition of retaliatory measures by the victim state after authorization by the international body.¹¹ The crucial difference between GATT and the WTO goes to the manner in which an authorization for retaliation is granted.

Under GATT, disputes between states regarding acts alleged to violate the agreement could be referred to ad hoc panels for consideration; however, the decisions of those panels were not binding.¹² Rather, the decisions became binding upon the parties to the dispute only after adoption by the General Council of GATT, and adoption required unanimity, including the agreement of the states who were parties to the dispute in question.¹³ That is, if a state clearly violated GATT with respect to a second state, and the second state followed to the letter all the procedures established to deal with such situations, and the dispute resolution panel agreed completely with the position of the second state, the wrongdoing state could nonetheless deny binding effect to the panel's determination simply by refusing to agree to the General

⁹ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

¹⁰ See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 28, 33 I.L.M. 1168 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).

¹¹ See Andreas F. Lowenfield, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 A.J.I.L. 477, 481 (1984); see also General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

¹² See Lowenfield, *supra* note 11, at 479.

¹³ See *id.*

Council's adoption of that determination.¹⁴

Unanimity is still relevant to the adoption of the recommendations of dispute resolution under the Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁵ (Dispute Settlement Understanding) adopted in conjunction with the agreement establishing the WTO, but with a crucial difference. Under the new agreement, a panel report is adopted by the WTO as binding unless the states that are members of the organization unanimously *reject* the report.¹⁶ We have moved from allowing a wrongdoing party to block unilaterally an internationally created remedy to a regime in which the victim of the wrongdoing can unilaterally insist on a binding remedy.

What difference will this make? Certainly, it will decrease the room for negotiation for states violating their obligations under the trade agreements overseen by the WTO. Under the old system, states determined by panels to have violated their obligations under GATT were able to compel the victim states to settle the dispute for something less than the result to which they were entitled under the agreements, despite panel determinations that the victims' rights had in fact been violated.¹⁷ Under the new system, the advantage clearly shifts to the victim, since the wrongdoer cannot prevent the victim's ultimately being authorized to retaliate. One may assume that, under the new system, violations of trade agreements will be less common, since the risks from such violations have been increased.

At one level, this statement may seem mistaken. After all, under the former system as under the current system, the only real sanction for treaty violation was retaliation by the victim state. Furthermore, if the former system could not prevent violations, neither could it prevent retaliation for violations. Why then would the new system make violations more risky?

Understanding this point requires consideration of the reasons why states enter into trade agreements in the first place. At

¹⁴ See *id.* at 479-80.

¹⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1226 (1994) [hereinafter Dispute Settlement Understanding].

¹⁶ See *id.*, at art. 16.

¹⁷ See Lowenfield, *supra* note 11, at 480, n.6.

bottom, each state adhering to such an agreement assumes that it would gain more from other states' opening their markets to its products than it would lose from opening its own to theirs. That is, the advantage to each party derives from compliance by other parties, but that compliance, in turn, is premised on the expectation of reciprocal compliance. Doubts as to whether such reciprocal compliance will take place will make states reluctant to honor their own obligations, thereby jeopardizing the whole system. Any violation of the rules necessarily raises fears that this network of reciprocal exchanges is about to unravel. A state that violates the rules anyway presumably assumes that the benefit it realizes from its violation outweighs the increased risk to the system its violation poses. A state contemplating retaliation, however, is also violating the rules if it acts outside the relevant treaty framework, and thus also jeopardizes the system. Further, its gain from retaliation presumably depends at least as much on the ending of the violation that provoked the retaliation as on whatever gains it realizes from its retaliatory violation. Its motive for retaliation would, in the first instance, be the protection of the system. In other words, to retaliate in order to protect the system simultaneously endangers the system, if the retaliation is unsanctioned. This situation therefore reduced the likelihood of retaliation under the old system, and thus reduced the risk of violations.

Under the new system, however, sanctioned retaliations will be much more common. Retaliation will now be a part of the system, not a threat to it. Hence, the likelihood of such retaliation increases, and the risk in violating the rules therefore also increases.

From a lawyer's point of view, it is crucial to focus on the mechanism used to bring about this change. Governments agreed to be subjected to third-party evaluations of their compliance with a general set of rules, even without their consent in particular cases. This system replaced one in which disputes were decided, as a practical matter, on a case by case basis and in the context of the overall relationships between the parties. That is, states agreed to replace a system in which states had some scope for avoiding purportedly governing general rules with one that not only reduces the ability to avoid those rules, but reaches that result by requiring submission to what amounts to judicial determinations of compliance.

States have thus decided, in establishing the WTO's dispute resolution system, that the concrete gains they hope to experience from a free trade regime can be realized only if they accept the limitations on sovereignty inherent in the submission to judicial determinations of legality. Law, in this case, is not simply a limitation on states' freedom; it is the means whereby states enable themselves to reap benefits not otherwise available.

In this particular area of international intercourse, then, one development over the past twenty-five years is states' realization that submission to law can facilitate, rather than obstruct, achievement of state objectives. Further, this development has taken place regarding a subject whose link to international business could hardly be more obvious.¹⁸

III. The Use of Force

The publication of Volume One of the *Journal* coincided with an exceptionally violent period in international relations. In December 1975, just prior to the date the *Journal* first appeared, Indonesia invaded and began its conquest of East Timor.¹⁹ In July 1977, Somalia's army invaded Ethiopia in support of ethnic Somali separatists.²⁰ In October 1978, Uganda invaded Tanzania; Ugandan troops withdrew in November, but Tanzania invaded Uganda in January 1979.²¹ Vietnam invaded Cambodia (then called Kampuchea) in December 1978.²² China responded to this invasion by attacking Vietnam in February 1979.²³ The Soviet Union invaded Afghanistan in December of that year.²⁴ September 1980 saw Iraq invade Iran.²⁵

The United Nations was established primarily to prevent inter-

¹⁸ For a discussion of different disputes that have come before the WTO, see Sue Ann Mota, *The World Trade Organization: An Analysis of Disputes*, 24 N.C. J. INT'L L. & COM. REG. 75 (1999).

¹⁹ See A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 248 (1997).

²⁰ See *id.* at 38.

²¹ See *id.* at 40-41.

²² See *id.* at 42.

²³ See *id.* at 282.

²⁴ See *id.* at 45.

²⁵ See *id.* at 47.

state uses of force in circumstances forbidden by the U.N. Charter,²⁶ and each of the incidents just listed at least arguably involved Charter violations.²⁷ At this period, however, the U.N. was essentially ineffective in preventing such uses of force. Its response to the invasion of East Timor was limited to verbal criticisms of Indonesia by both the General Assembly and the Security Council.²⁸ The Soviet Union's invasion of Afghanistan evoked a similar response, albeit one limited to the General Assembly.²⁹ No U.N. organ even addressed either the fighting between Somalia and Ethiopia or that between Uganda and Tanzania, and none took action regarding the Chinese attack on Vietnam.³⁰ Stronger action was taken in the case of Vietnam's invasion of Cambodia, in that the General Assembly refused to seat representatives of the government Vietnam established in Cambodia.³¹ Likewise, the Security Council actively addressed the Iran-Iraq war, though it did not invoke its mandatory authority in an effort to compel—rather than request—an end to the fighting until July 1987, nearly seven years after the war began.³² Of course, individual states reacted to each of these events in varying ways, in many cases actively seeking to coerce the state perceived as the wrongdoer into abandoning its behavior.³³ But the international community had sought to establish machinery to compel obedience to the standards of the Charter, and at the time of the *Journal's* birth, that machinery clearly was failing to

²⁶ See LOUIS HENKIN ET. AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 38-39 (2d ed. 1991).

²⁷ See U.N. CHARTER art. 2, para. 4 (obliging states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."). The attacks by Indonesia on East Timor, Somalia on Ethiopia, and Iraq on Iran were attempts to conquer territory, while the invasions of Uganda, Cambodia, and Afghanistan were all efforts to replace the incumbent governments in the target states with groups more agreeable to the invaders. See WEISBURD, *supra* note 19, at 37-38, 40-45, 47, 248. China's objective in attacking Vietnam was likewise to pressure the Vietnamese government into making particular political decisions. See *id.* at 280-83.

²⁸ See WEISBURD, *supra* note 19, at 249.

²⁹ See *id.* at 46.

³⁰ See *id.* at 38, 42, 283.

³¹ See *id.* at 43.

³² See *id.* at 49-50.

³³ See *id.* at 38-39, 43-46, 282-83.

function as intended.

The situation has changed considerably over the last twenty-five years, beginning in the late 1980s. On July 20, 1987 the Security Council adopted a mandatory resolution, based on its authority under Chapter VII of the U.N. Charter, demanding that the combatants in the Iran-Iraq war agree to a cease-fire; after some delay, they did so.³⁴ The most obvious demonstration of a new international attitude toward such situations took place in 1990. In that year, the Security Council responded to Iraq's attempt to subjugate Kuwait by authorizing members of the United Nations to take whatever actions were necessary, including the use of force, to protect Kuwait's sovereignty.³⁵

Since the end of the Gulf War, the Security Council has continued its efforts to address threats to international peace; producing mixed results. United Nations efforts to assist in ending civil wars with international implications have seen both striking successes, as in the assistance provided to Mozambique and El Salvador to end their civil wars³⁶—and equally striking failures, as in the continuing disappointment in Angola, despite repeated agreements between the combatants.³⁷ It is also noteworthy that in some cases, efforts by the United Nations have seemed not just ineffective, but ineffectual, as shown by the continuing difficulties encountered in attempting merely to organize elections to end the civil war in the Western Sahara.³⁸ Further, the United Nations has played little role in addressing certain international situations in which the risks to peace are obvious. For example, it has not sought actively to address the dangers posed by the acquisition of nuclear weapons by India and Pakistan. The U.N.'s approach to the continuing warfare in central Africa has been very cautious, stressing the prime responsibility of African leaders to end the fighting.³⁹

³⁴ See *id.* at 48-50.

³⁵ See *id.* at 55-58.

³⁶ See DAVID MALONE, *DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI, 1990-1997* 20, 26 (1998).

³⁷ See Suzanne Daley, *Hunger Ravages Angolans in Renewed Civil War*, N.Y. TIMES, July 26, 1999, at A1.

³⁸ See Terence Neilan, *World Briefing*, N.Y. TIMES, Sept. 15, 1999, at A16.

³⁹ See Barbara Crossette, *U.N. Urges End to Congo Cease-Fire Impasse*, N.Y. TIMES, Jan. 27, 2000, at A8.

What then can one say at this point about the state of the international machinery established to deal with international breaches of the peace? One striking fact seems frequently to be taken for granted: the Security Council retained its authority during the period of about forty-five years in which its use of that authority was effectively hamstrung by the Cold War. At one level, this may not seem surprising. After all, the United Nations Charter is quite explicit as to the scope of the Council's power; any claim that the Council has somehow lost the capacity conferred upon it by the Charter would have to overcome the effect of the language of that instrument. Nonetheless, history is replete with examples of institutions whose formal power has atrophied as that power has not been used, such that any attempt by the institution to reclaim the authority formally permitted to it would be seen as an abuse. How, for example, would Americans react if the members of the Electoral College took it upon themselves to deliberate over the choice of the President and Vice-President, as permitted by the Constitution?⁴⁰

Yet the Council's authority has not withered despite its non-use. For example, no state challenged the legal capacity of the Council to authorize a forceful response to Iraq's invasion of Kuwait, even though the Council had taken no comparable action since the Korean War. To be sure, with China, the Soviet Union (as it then existed), and the United States all having considerable incentive to insist upon the continuing validity of the Council's claim to authority, it would have taken a bold government indeed to insist that such a claim had been destroyed by atrophy. Yet quite apart from whatever effect was created by the influence of the permanent members of the Council, it may be that the states of the world have come to take for granted that there is much to be gained for all states in the existence, somewhere in the international system, of a body capable of addressing the most serious outbreaks of violence without regard to the consent of the combatants. In any case, one aspect of the future of the United Nations with respect to violence prevention is precisely that it retains the capacity to act through the Security Council even in the face of opposition by states that might be affected by its action.

Capacity to act is one thing; the ability to act effectively,

⁴⁰ See U.S. CONST. art. II, § 1, cl. 2, 3.

however, is another. If the legal capacity of the United Nations was not affected by the two-generation hiatus in the effective functioning of the Security Council, the same cannot be said concerning its operational capability. The character of this operational capability is the second aspect of the history of the United Nations that will affect its future workings.

One feature of this issue is a reflection of what might be called a deformation of the operations of the United Nations during the Cold War. Although the Charter purports to forbid uses of force in a variety of circumstances, the paralysis of the Security Council—the only organ of the United Nations empowered to take action without regard to the consent of the parties to a dispute—eliminated even the formal capacity of the United Nations to act except when such consent had been obtained. This requirement of consent from all sides as a prerequisite to action established within the bureaucracy of the United Nations habits of mind more consistent with a focus on mediation and persuading parties to refrain from violence than with an orientation toward identifying particular behavior as a breach of the Charter and therefore requiring a commensurate response.⁴¹

This attitudinal problem, however, was not the only difficulty arising from the long period during which the United Nations could assist states which had determined to make peace, but could not otherwise compel states to stop fighting. At the more prosaic level, the organization had developed little experience in the mechanics of employing the power of an international organization to compel a halt to illegal uses of force. This has led to a number of difficulties as the United Nations has sought to take on a more active role in the world.

Some of these difficulties are managerial. In other words, United Nations efforts have encountered difficulties because of the Security Council's unwillingness to consider carefully the nuts and bolts requirements of the tasks it sets out to achieve. For example, the Security Council has prescribed missions without reference to the resources available to carry them out and without careful attention to factors essential to success, such as well-functioning

⁴¹ See *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, at 102-08, U.N. Doc. A/54/549 (1999) [hereinafter *Srebrenica Report*] for a narrative giving an example of the application of this approach in a particular situation, with horrible results.

command and control systems.⁴²

Apart from difficulties of this sort, the mechanics of employing the power of an international organization assumes a willingness on the part of the states making up the organization to pay the costs of using power. Nonetheless, neither Security Council members nor states furnishing troops to carry out their mandates have, since the Gulf War, shown much willingness to undertake missions posing a significant risk of cost in lives and resources.⁴³ This risk aversion had its most unfortunate consequences in the events in Bosnia-Herzegovina, where the United Nations was unable to keep its promises to protect the inhabitants of certain "safe areas" established under its auspices.⁴⁴

Likewise, an organization cannot act if it is paralyzed by disagreements among its members. This point is relevant since differences between members of the Security Council regarding the necessity and propriety of particular actions have not disappeared with the end of the Cold War. On the contrary, Council members continue seeking to further their perceived national interests in the Council, rather than seeking to implement some idea of disinterested collective action.⁴⁵

In short, the Security Council has, over the past twenty-five years, moved from a situation in which its ineffectuality was taken for granted to one which is much more complex. On the one hand, states now take for granted that the Council is capable of various types of action. Nonetheless, no one can predict whether the Security Council will act in a given situation, what type of action it will take, and how effectively it will perform whatever tasks it chooses to undertake. At bottom, the question comes down to states' willingness to establish the organizational structure necessary to support any significant undertaking in support of peace and to bear the human and material costs of using whatever structure they bring into being. To date, states have not, since the Gulf War, been willing to do either.

⁴² See MALONE, *supra* note 36, at 22-23.

⁴³ See *id.*

⁴⁴ See *Srebrenica Report*, *supra* note 41, at 102-08.

⁴⁵ See MALONE, *supra* note 36, at 160-69, 180-91.

IV. Human Rights

In 1976, two multilateral international treaties dealing with human rights were in force: the Convention on the Prevention and Punishment of the Crime of Genocide⁴⁶ (Genocide Convention) and the International Convention on the Elimination of All Forms of Racial Discrimination.⁴⁷ In addition, a number of European States had entered into a regional human rights treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁴⁸

Since that date, a number of other international human rights treaties have gone into force, among them the International Covenant on Civil and Political Rights⁴⁹ (CCPR), with its Optional Protocol;⁵⁰ the International Covenant on Economic, Social and Cultural Rights;⁵¹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁵² the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵³ (CAT); and the Convention on the Rights of the Child.⁵⁴ In addition, regional human rights treaties have been established both in the Americas⁵⁵ and in Africa.⁵⁶

⁴⁶ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁴⁷ See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 [hereinafter CRD].

⁴⁸ See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. No. 5 [hereinafter European Convention].

⁴⁹ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter CCPR].

⁵⁰ See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

⁵¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESC].

⁵² Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW].

⁵³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified 24 I.L.M. 535 (1985) [hereinafter CAT].

⁵⁴ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter CRC].

⁵⁵ See American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S. T.S. 1, 1144 U.N.T.S. 123.

In addition to this proliferation of human rights treaties, there has been a significant change in the manner in which states collectively deal with human rights. The United Nations Human Rights Commission has, since 1976, evolved into a body in which a wide variety of human rights abuses are discussed openly by representatives of governments, in fact openly rebuking known human rights abuses. Furthermore, the members of the United Nations have established the post of High Commissioner for Human Rights to provide stronger direction to international efforts to protect individuals from their governments.⁵⁷ Additionally, in 1998 a number of states agreed to establish an international criminal court with authority to try individuals for certain extreme violations of human rights.⁵⁸

Countries acting individually have, since 1976, also changed their approaches to human rights violations in other states. Increasingly, they claim the right to respond to such violations. Thus, the United States—which also became a party to the Genocide Convention, the CCPR, and the CAT after 1976⁵⁹—enacted statutes creating private rights of action for persons tortured in foreign states and criminalizing torture and genocide even when perpetrated by foreigners outside the United States against other foreigners.⁶⁰ Some federal courts have even recognized civil actions under federal common law for human rights violations,⁶¹ although the reasoning of these decisions is doubtful.⁶²

⁵⁶ See African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59.

⁵⁷ See G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/RES/48/141 (1993).

⁵⁸ See Rome Statute of the International Criminal Court, Nov. 10, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999.

⁵⁹ Genocide Convention: Feb. 23, 1989, DEP'T ST. BULL., FEB., 1989, at 73. CCPR: Sept. 8, 1992, 3 DEP'T ST. DISPATCH at 817 (1992). CAT: Nov. 20, 1994, 6 DEP'T ST. DISPATCH at 106 (1995).

⁶⁰ Private action for torture: Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (codified as 28 U.S.C. § 1350 note (1994)). Criminalization of genocide: Genocide Convention Implementation Act, Pub. L. No. 100-606, § 2(a), 102 Stat. 3045 (codified as amended at 18 U.S.C. §§ 1091-1093 (1994)). Criminalization of foreign torture: Pub. L. No. 103-236, § 506(a), 108 Stat. 463 (codified as amended at 18 U.S.C. §§ 2340-2340B (1994)).

⁶¹ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁶² See A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20

Not only has progress been made regarding the establishment of standards of liability and oversight institutions regarding human rights, but there has also been progress in actually enforcing those rights. The European regional system has for decades been quite effective; the decisions of the European Court of Human Rights are obeyed as a matter of course by the countries that make up that treaty system.⁶³ The United Nations Security Council has established tribunals to try individuals for violations of human rights in connection with the fighting in various parts of the former state of Yugoslavia and with the genocide that took place in Rwanda in 1994.⁶⁴ Perhaps more fundamentally, both Secretary-General Kofi Annan, in his report on the capture of Srebrenica by Bosnian Serb forces in 1995, and the group of experts he appointed to examine the reaction of the United Nations to the genocide in Rwanda in 1994, have taken the position that the United Nations must act against massive violations of human rights, even if such actions require the U.N. to abandon its tradition of neutrality between contenders.⁶⁵

Nor has this opposition to human rights violations been limited to establishing international tribunals to address such violations, or to calls for action against violations that have not yet taken place. NATO attacked Serbia in 1998 at least in part because the use of force was seen as the only way to compel Serbia to cease its violations of the rights of the ethnic Albanian province of Kosovo.⁶⁶ Governments strongly pressured Indonesia to permit foreign intervention in East Timor when groups opposed to that entity's achieving independence from Indonesia began a brutal campaign of revenge after the Timorese population, in a

YALE J. INT'L L. 1, 28-48 (1995).

⁶³ See FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* 478, 487 (2d ed., 1996); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 959 (2d ed., 1995).

⁶⁴ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25626 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing the International Criminal Tribunal for Rwanda).

⁶⁵ See *Srebrenica Report*, *supra* note 41, at 106-08; Ingvar Carlsson et al., *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* at 26, U.N. Doc. S/1999/1257 (1999).

⁶⁶ See Roger Cohen, *The World: Europe's New Policeman; NATO Shatters Old Limits in the Name of Preventing Evil*, N.Y. TIMES, Oct. 18, 1998, § 4, at 3; Blaine Harden, *Crisis in the Balkans: Doing the Deal*, N.Y. TIMES, June 6, 1999, § 1, at 1.

referendum, had massively rejected continued union with Indonesia.⁶⁷ It is also noteworthy that Russia has drawn great criticism for the harm civilians have suffered in its war against secessionists in Chechnya.⁶⁸

Individual states have also acted against human rights violators. Great Britain asserted the authority to try the former President of Chile, Augusto Pinochet, for acts of torture carried out under the authority of his government.⁶⁹ Similarly, Senegal has opened a criminal inquiry against Hissene Habre, the former president of Chad who has resided in Senegal since 1990 based on a criminal complaint alleging Habre's responsibility for the widespread torture perpetrated under his regime.⁷⁰

It is thus clear that the attitude of the states of the world toward human rights violations has changed considerably over the life of the *Journal*. It is nonetheless important not to overstate the extent of the changes. Although almost all states have entered into international human rights treaties, the proportion of treaty parties who violate their obligations under those treaties is quite high.⁷¹ Even states who have elected to permit individuals to complain to international monitoring bodies regarding violations of human rights treaties have a poor record of complying with the determinations of those bodies.⁷² The effectiveness of the international courts established to try persons alleged to have violated human rights in Rwanda and in the former Yugoslavia depends in great part on the willingness of states to arrest persons the court has indicted. States have shown limited willingness to incur the costs inherent in any effort to systematically arrest prominent indictees, however. It is, of course, striking that both the United Kingdom and Senegal have chosen to honor their

⁶⁷ See Barbara Crossette, *U.N. Chief Wants Faster Action To Avoid Slaughter in Civil Wars*, N.Y. TIMES, Sept. 21, 1999, at A1.

⁶⁸ See Steven Erlanger, *Rich Nations Fault Russia on Chechnya; Call for Truce*, N.Y. TIMES, Dec. 18, 1999, at A10.

⁶⁹ See *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, reprinted in 38 I.L.M. 581 (1999).

⁷⁰ See Joseph R. Gregory, *World Briefing*, N.Y. TIMES, Jan. 29, 2000, at A4; Karl Vick, *Former Chad Dictator Faces Pinochet Test*, WASH. POST, Jan. 27, 2000, at A22.

⁷¹ See A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 53-57 (1999).

⁷² See *id.* at 57-58.

obligations under the Torture Convention and apply their law to quite prominent persons implicated in massive violations of that treaty. The very fact that such actions are unusual, however, shows that it is by no means routine for a state to enforce international rules against foreigners for acts done outside the state, regardless of the legal obligations the state has purportedly assumed. And a comparison of the events in Kosovo, East Timor, and Chechnya hardly permits the conclusion that states have decided that they will in all cases act to prevent massive, serious violations of human rights. States were willing to use force against Serbia—at least in circumstances in which casualties to their military personnel could be avoided—but the Security Council was unwilling to authorize the use of force in East Timor without Indonesia's consent. Perhaps not surprisingly, the reaction to Russian behavior in Chechnya has been purely verbal.

It would thus go too far to assert that respect for human rights has become as well-established in international law as, for example, respect for diplomatic immunity. But if uncertainties remain as to states' willingness both to limit their own violations of international human rights norms and to respond strongly to such violations when committed by other states, it is at least clear that the international law of human rights has ceased to be simply a collection of platitudinous aspirations and has come to exert an admittedly uncertain impact on the behavior of states.

V. Conclusion

How, then, can this discussion be pulled together? Certain statements, general though they are, seem accurate. First, international law addresses more subjects in depth than was true twenty-five years ago. Certainly, there was law regarding international trade, the use of force, and human rights at that time, but the bodies of law governing each of those subjects has grown greatly in richness of doctrine, in institutionalization, and in effectiveness. At the same time, there has been no sea-change in the structure of international law. It remains state-centered. For example, although there are more international tribunals than formerly, they remain dependent on states for the enforcement of their rulings. Furthermore, the state-centered character of international law means that, at this point at least, the fundamental uncertainties of that discipline remain. More specifically, since no rule of international law will be enforced unless some state or

states is/are willing to bear the costs of enforcement, the application of any such rule remains dependent primarily on states' conclusions as to their own interests, rather than on purely legal factors. The questions facing the international legal community, and those who write for the *Journal* in the future, will be whether states will come to assess their interests as requiring enforcement of and obedience to legal rules more frequently than has been true in the past, and whether such enforcement will continue to depend on such assessments to the same extent as is now true. Providing a forum for those seeking the answers to these questions will surely keep the *Journal* as busy and as vital in the future as it has been since its founding.

