What is the Status of Armed Merchant Vessels? Expanding Legal Interpretive Capacity in the International Enforcement of Human Rights

By

Seung-Jee Shin

Email: ss3484@columbia.edu

Department of Political Science
Columbia University

DRAFT: April 2010

International law, though it consists of rules that unique properties that make them resilient to forceful change (Hoffmann 1961), still depends largely for its effectiveness on state consent (Henkin 1995). State discretion in the interpretation of law is the key to upholding legal standards. The diversity of standards in international law (see Steiner et al. 2007), however, make for at best a "weak relativism" (Donnelly 1998) of common substantive commitments among states. With the exception of standard procedures such as the Vienna Convention rules for treaty interpretation[1] (Gardiner 2008), however, establishing whether more than one state has committed to a single set of standards can be a difficult task, due to the diversity of values and the political complexity of the international system.

States cannot consent to substantive commitments that are unacknowledged by them (Brierly 1963; Henkin 1995). A state cannot be held internationally accountable (see Grant and Keohane 2005) for non-compliance with standards that it does not consider to be valid—the commitment, in effect, does not exist for it. This paper argues that the determination of substantive commitments to international human rights norms depends on establishing the legitimate expectations for conduct that can derived from implied state consent. I proceed by first examining the broader relationships between substance and procedure in international law and politics. I then determine that the expansion of commitments through the incorporation of legal "exceptions" into the established body of "normalized" rules among states is a futile endeavor. My findings are then incorporated into a formal model of that summarizes the relationship between "implied consent" (Brierly 1963) and legitimate expectations. I conclude that only substantive content established as "common knowledge" satisfies the condition of

[1] Articles 31, 32, and 33 of the 1969 Vienna Convention on the Law of Treaties, as well as the relevant preparatory work.

mutual state acknowledgement stated, which implies state consent regarding expectations of permissible conduct.

Competing Systems of Power and Law

The expansion of a legal regime first requires a conceptual separation of the substantive content of its norms from their procedural safeguards[2]. Expansion initially involves the dissemination of legal norms, which provides the justification for the subsequent implementation of procedural mechanisms for their consolidation. The dissemination of norms requires that policy-makers place a high priority on their generation—at all points in the international system where receptivity to them can be found—at the outset of their conception (Keck and Sikkink 1999). NGOs and other grassroots organizations with extensive transnational networks therefore place a high priority on keeping the "idea" of, for example, human rights "alive" on the agenda of states (ibid.). The substance of norms must precede procedure if both a normative and political justification for the expansion of a legal regime is to be found.

Procedure, however, is closely linked to substance, since it can be considered the articulation of legal reasoning. For political theorists, "minimalism" is the equivalent of keeping to the barest, most essential demands that one can morally make upon others (see Walzer 1994).[3] The "minimal" framework for political dialogue, based on a "common language"[4] of basic conceptions of "truth" and "justice" (p.6)—convictions that appeal to the sensibilities of the

[2] By "procedural safeguards," I am referring to the procedural mechanisms and institutionalized rules that are designed to preserve the established (substantive) meaning of norms. For example, the 1948 Universal Declaration of Human Rights (UDHR), G.A. Res 217, U.N. GAOR, (III1948), could be considered as a substantive precursor to the more "procedural" mechanisms within the UN human rights system, such as the Universal Periodic Review. Information on the latter is available at http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx, accessed April 11, 2010.

[3] Walzer (1994) has stated that the difference between "minimalism" and "maximalism" becomes spurious when the minimal foundation, complete with standards, is established—minimal standards turn out to be pretty "thick" (p.12) after all. This observation parallels the connections between substance and procedure that I make in the final sections of the discussion.

[4] I am indebted to Ariel Colonomos for this phrase in response to a student's (mine) question.

average mind, regardless of cultural or political affiliation—once established, renders the subsequent realization of "maximal" values a natural step. It has the "critical function" (p.13) of directing the imperatives of activity in the search for maximal meaning.

For legal scholars, reliance on procedure is the equivalent of a commitment to the "lowest common denominator" of possible regulation (Henkin 1995, p.100-101).[5] The preservation of state autonomy requires that states be subjected only to the essential procedural requirements that are necessary for the clarification and protection of substantive content that has already been clarified by consensus and no more. For treaty law, therefore, procedure serves as an institutional marker of the progress that has been made by states in clarifying substantive content through negotiation and interpretation. For customary international law, procedural constraints could be regarded as precautionary measures intended to preserve the gradualism that must accompany the generation of genuine consensus regarding substantive content (see Henkin 1995 for a description of how customary international law develops). In the international system, substance can take a long time to "emerge" and often requires clarification. Procedure is therefore a means of ensuring certainty, of allowing the conflict to "play out" before one draws conclusions; in short, a measure of caution when exercising legal discretion.[6] Procedure, in any case, is the equivalent of minimal substance in the sense that a state has conceded the importance of procedural implementation without making a deep commitment to the substance of the norms it is meant to protect.

The initial receptivity—of states—to substantive content must be accompanied by the willingness to implement the necessary procedural infrastructure, to reform the existing system if

[5] The implementation of procedural safeguards in the form of quite complex and widely-supported regulatory constraints is justifiable if the substantive content they are meant to protect is accepted as being important enough. For a detailed discussion in the context of human rights, see Simmons (2009).
[6] See Note 2, above.

necessary in order to accommodate the influx of norms that will accompany genuine implementation in view of compliance. Substantive meaning, comprising the content of legal norms, is therefore transformative in the sense that it requires the implementation of institutional structures consistent with the central purpose of its definitive preservation. The most recent examples of this phenomenon can be traced to the assertion of universal jurisdiction by international tribunals to review gross violations of human rights, regardless of whether these violations took place on the territory of their home state.[7] In other words, the procedural requirement of *universal* review has been implemented as a reaction, a follow-up, to the assertion that the substance of certain legal norms constitutes *jus cogens*.

Another example would be the fairly modern receptivity of states to *individual* as opposed to *states'* rights (Aceves 2000, p. 137), which can also be viewed as a separation of substance from procedure that is conducive to norm generation. Individual rights belong solely to their carrier and are therefore not necessarily confined to the boundaries of state jurisdiction.[8] Individual mobility has been particularly enhanced within areas of jurisdiction such as the European Court of Human Rights (ECtHR), which have granted this mobility on a formal basis

[7] See the opinion of the United States Court of Appeals for the Second Circuit, 1980, in *Filártiga v. Peña-Irala*, 630 F.2d 876, in which the authority of U.S. federal courts to review cases concerning the crime of torture by non-U.S. citizens was established, through the dictum that "…torture […] during the modern and hopefully more enlightened era […] has been universally renounced" by all states.

[8] See the *LaGrand Case* (*Germany v. United* States), International Court of Justice, 2001, I.C.J. 466, in which the individual was held to be the bearer of the right, with the state just being the procedure that he goes through to obtain that right. With the exception of peremptory norms, however, the obligations of states to guarantee individual rights is yet to be consolidated as a cohesive body of law. State obligations are still largely confined to the protection of their own citizens and the decision as to whether the necessary measures are to be implemented is entirely up to their discretion. The U.S. Supreme Court has held that, "…absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of the treaty in that State" in *Breard v. Greene* (1998), 523 U.S. 371. Also see Michael W. Doyle, (2009), "Differentiating Compliance with International Law: Stanley Hoffmann's Threefold Distinction," *French Politics* 7 (September): 423-431.

(Thompson 1999; Weiler 1991).[9] The basic idea is therefore that the substantive *meaning* of what constitutes, say, individual dignity must be clarified through legal reasoning.

Recent work in political philosophy has highlighted this emphasis on the meaning of "what it means to be human" (e.g. MacManus 2009) in the hopes of isolating those essential properties of rights that demand protection. When the substantive meaning of human rights norms is not only shared by two separate legal centers—authorized bodies, such as arbitral tribunals, that have the competence for constitutional interpretation—but also mutually acknowledged as being shared, the implementation of procedural safeguards becomes a natural corollary. Procedural implementation, in fact, becomes the next logical step, as demonstrated by the realization of transnational legal networks (Aceve 2000; Jessup 1956; Koh 1987, 1991; Moravcik 1997; Slaughter-Burley 1993).

To sum up the argument thus far: State consent is necessary for the establishment of legal procedure since states cannot be subjected to international regulation (see Simmons 2009) against their will. However, submission to procedural constraints also implies the acceptance of the substantive content that they were meant to protect. The question, therefore, becomes how to 1) define the substantive content of and 2) identify within the international system those norms whose substance and procedure will generate this "compliance pull" (Franck 1990). It is tempting at the outset to conclude that moral content alone (e.g. "human life must be valued") will be a sufficient qualification. Hoffmann (1981), however, reminds us that moral content is a relative conception and that the competing logics of different moral regimes will make for endless debate that will ultimately prevent any mutually acceptable justification for their enforcement. Furthermore, if moral reasoning is contextually dependent (ibid.), different

[9] The landmark decision for the establishment of individual accessibility to adjudication vis-à-vis a state for the European Union was *Donato Casagrande v. Landeshauptastadt Munchen*, Case 9/74, ECR 773, (1974) 2 CMLR 423.

conceptions of the "human" in his various "labors" (i.e. industrialization vs. communalism) will clash with each other from the outset.

The first step, therefore, in the process of building a comprehensive model, is to declare that legal substance is capable of arising in *any* part of the international system via the generation and consolidation of norms. The second step is to identify those norms that will remain viable long enough for the implementation of procedural safeguards to take place. I now turn to the concept of "legal norms" as a subset of international norms that possess these properties.

Legal Norms

I define legal norms as partially legalized norms governing international behavior that have yet to be embedded within a comprehensive procedural regime for the interpretation, or safe-guarding, of their substantive content.[10] In other words, the substance and procedure of legal norms do not share a tight relationship and therefore can be 'separated' in course of legal interpretation. Another way of categorizing legal norms would be as substantive categories of norms that states have determined are important enough such that procedural requirements for their realization are necessary, but whose substantive content is still under deliberation (see Beitz 2009, p.9). The legality of their content, however, once deliberation is complete, is ensured.

Legal norms (see Finnemore 1999) overlap with social norms to the extent that both depend on their regeneration through practice. All norms depend for their "survival" on their practical applicability in conditioning behavior. Even if a norm has intrinsic value, its survivability is questionable and not ensured if the prevalent practice is inimical to its content.[11]

[10] It is difficult to reconcile the terminology between the two fields of international law and international politics, even though their subject matter overlaps to such a great extent. Part of the problem stems, I think, from the fact that political scientists are mainly concerned with what is effective in terms of policy, while legal scholars are so with keeping the standards of law intact. Terms such as "effectiveness" and "necessity" are applied by academics in both fields without accounting for the differences in the other.

[11] One might, of course, object at this point that norms containing moral content will "survive" even if the prevalent practice contradicts what it prescribes. I address this problem below by examining the relationship

Legal norms, however, have a better chance of "surviving" than social norms through a societal commitment to the rule of law, once their procedural link to the legal regime has been established. This is because the societal commitment to the rule of law exists on an independent basis from any commitments to the contents of any particular issue area.

Legal *norms*, though, are only partially law in the sense that subsequent interpretation is needed in order to give them full status as law. Examples of legal norms would be attempts at clarifying categorical distinctions that a tribunal has established but not yet clarified in terms of *how* one would determine that certain classes of individuals or actions belonged in a particular category.[12] The first nascent practices that serve to generate customary international law, before they come to be established as international custom *per se*, could also be regarded as such. Until a comprehensive legal regime is established by filling in the gaps of minimal substance, or entirely procedural commitments, with substantive content, tribunals and other official bodies must rely on legal norms.

A case in point would be the rules governing humanitarian interventions in the international system (see Chesterman 2001).[13] It is possible to consider the legal norms of humanitarian intervention as consisting of the following components: 1) Substance, based on the international law of human rights and 2) Procedure, based either on principles of the UN Charter System or customary international law (ibid.). Notice that I am also referring to "procedure" in

---

of moral content to formal structure and why the two are interdependent but separate. My present concern is with norm applicability, or utility to policy, rather than norm persistence.

[12] An example might be the norms, customs, etc. signified by the practice of not targeting civilians during times of war that prevailed before the legal distinction of non-combatant was codified and formalized in "Common Article 3" of the Geneva Conventions. Current developments again stress the need to redefine the status of "enemy combatant" (see Waxman 2008).

[13] The recent formulation of the "Responsibility to Protect" (see paragraphs 138-139 of the 2005 World Summit Outcome Document following the High-Level Plenary Meeting of the General Assembly, available at http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=398, accessed April 17, 2010) might thus be considered an institutional marker of the extent to which the regime on humanitarian intervention has been developed—not yet formal law but also a step forward from the strict prohibition against the violation of Article 2(4) of the UN Charter.

the broadest sense as implied in the Lockean tradition of the theory of contracts, as relates to the legal obligation of fulfilling one's contracted duties once an agreement is established, regardless of the moral content upon which it was based in the first place.[14] The Lockean conception of binding legal obligations derived from consent-based agreements can then be extended to explain the nature of self-sustaining legal infrastructures, such as that which integrates the members of a Liberal community (Doyle 1997).

Procedure in this context thus refers not only to the more conventional rules of administrative procedure but also to the independent legal structures that channel the flow of substantive commitments. In the broadest sense, procedure is the articulation of policy among states that are interacting upon a legalized basis. For example, the nearly universal more of the international community that UN Security Council authorization be a pre-requisite for a humanitarian intervention is a *procedural* criterion for legal validation (Chesterman 2001; also Alvarez 2005; Doyle 2008). This procedural requirement persists, despite the absence of agreement in international law on what constitute those rights that must be protected through the use of force (Chesterman 2001), or the substance of fundamental human rights.[15]

Norm Survival

The survivability of legal norms has a "temporal" dimension. Legitimate and legal interventions such as UN authorized peacekeeping missions, for example, may last for long

[14] Locke, *Second Treatise of Government.*

[15] Conditioning the privilege of engaging in political transactions on the fulfillment of procedural requirements is not a practice endogenous just to the community of Liberal states, however; the diplomatic practice of Italian city-states dating back to the 13th century shows that an infrastructure of obligations persisted on the general acceptance of having diplomatic agents register their credentials in foreign capitals (Mattingly 1955). A more modern application of the idea of a 'minimal' legal framework that allows for basic diplomatic interaction between states can be found in the U.S. Supreme Court's opinion in *Blackmer v. United States* (1932), 284 U.S. 421, in which the Court stated that "while consular privileges in foreign countries are the appropriate subjects of treaties, it does not follow that every act of a consul […] must be predicated upon a specific provision of a treaty. The intercourse of friendly nations […] *presupposes and facilitates* such communications." [Emphasis added].

periods of "actual time," as in the case of the United Nations Truce Supervision Operation (UNTSO), which was established in 1948 and is still active,[16] but are by their very nature limited in terms of their "institutional time."[17] Indeed, because the institutional mandate allowed to them is by definition temporary, the legal norms of intervention could be considered as having a shorter life-span than those related to the regulatory uses of force in the national setting.

Consider now the body of rules that are termed "humanitarian law," applicable in times of war as opposed to those of peace. The laws of armed conflict are internally consistent and therefore self-sustaining with regard to the treatments of POWs, the distinction between combatants and non-combatants, etc. (see Jochnick and Normand 1994). More to the point, its central prescription for the respect of basic rights in terms of both *jus ad bellum* and *jus in bello* is a coherent proposition. The survivability of the legal norms of humanitarian intervention, however, is questionable.[18] The legal norms of humanitarian intervention have not yet acquired the general acceptance necessary to elevate regularized interference in the domestic affairs of sovereign states to the level of a formal rule (Abresch 2005, p. 742; also Schachter 1986). Theoretically, the loose link between their substance and procedure should enable the separation of moral values into those that relate to the immutable rights of peacetime, and those arising with the contingencies of exceptional situations during "emergencies" (see Hart 1955). The substantive content of each could then be generated in any part of the international system where support could be found. The reason that this proves difficult, I explain below, is due to the *exceptional* nature of such interventions—exceptionality translating to a short life-span of the legal norm.

[16] Mandate available at http://www.un.org/en/peacekeeping/missions/untso/mandate.shtml. Accessed April 12, 2010.
[17] See Shin and Diehl (2008) for a similar application in terms of "conflict time."
18 I should note that by "applicability," I am referring to both utility in policy and as a basis for legal justification.

Normalization and Mutual Consent

Substantive content that has gained mutual acceptance, meaning mutual consent regarding expectations for permissible conduct, can be utilized as a justification for the expansion of a legal regime. Only those legal norms whose substantive content satisfies this condition can be utilized for this task. I explain in the following paragraphs that normalization is the only goal that both satisfies this condition and provides a justification for regime expansion.

On a purely theoretical plane, we could consider the restoration of *normal relations,* or their normalization, among individuals, states, and societies, an act of restoring an ideal of equilibrium among "peoples," or as returning to the ideal rate of integrating "decent hierarchical peoples" according to the progress that has been made on the dialogue between them and "liberal peoples."[19] Normal relations would constitute the state of affairs that the average citizen, who should not have to care about the minutiae of governance, would accept as the status quo. Normal relations are not necessarily the equivalent of stability that arises from coercion.[20]

Extrapolating from the theoretical to the international dimension allows me to assert that *the normalization of substantive content equals the convergence of legitimate expectations on what is mutually regarded as permissible conduct.* I formalize this proposition below. For now, it suffices to say that because normalized content possesses the validity of mutual consent, it is capable of constituting the (minimal) justification for the generation of legitimate expectations. In other words, once the fact that supporting the norm's substantive content is in the mutual interests of the parties concerned is established, doctrinal extrapolation—regarding the expectations for conduct—becomes possible. Mutuality is therefore the legal articulation of the understanding that both states wish to return to normal relations. This could also be

19 Rawls, The Law of Peoples. Also see Rawls, A Theory of Justice.
20 Stability, for example, may be ensured by a cease-fire but neither party would find this an acceptable status quo.

characterized as conduct that is mutually tolerated on a normative basis (Beitz 2009). The substantive content of norms must be completely understood by all states for which the normalization is taking place as being understood by them all and this mutuality must then gain status as a legal condition that has been satisfied. Satisfying the legal condition of mutuality therefore constitutes a centralization of decision-making power, or the (re)placement of interpretive discretion into the hands of a single authority recognized by all concerned states. In short, normalization entails a process of establishing formal control.

All legitimate institutional rules will, by default, exhibit this tendency. For Liberal states, for example, the convergence of legitimate expectations would be the equivalent of the mutual acknowledgment of both the necessity and moral value of pursuing the ideal standard of outlawing aggression amongst themselves (Doyle 1986, 1997). Notice, however, that the convergence of expectations involves not only the articulation of the ideal standard—necessary for international recognition—[21]but also the legal permissibility of the establishment of the ideal as a reasonable standard to be pursued. Ideal standards are therefore no longer a nebulous paradigm, constituting no more than political rhetoric, but targets that are capable of being met.[22] The pursuit and enforcement of the ideal standard thus becomes an ongoing process that legitimates consistent attempts, including through trial and error, to reach the desired state. Its *continuous* pursuit, however, cannot be justified unless it is a goal to which all Liberal states would mutually consent.

Another way of looking at this might be that interventions are effective at the norm generation stage, in establishing the initiative for the support of a legal norm, but are, by

[21] Articulation for the purposes of international recognition of their substantive content could be stated to have been the purpose of drafting the "basic documents" on human rights, available at http://www2.ohchr.org/english/law/index.htm#core. Accessed April 12, 2010. Also cited in Beitz (2009), p.19, footnote 18.

[22] This becomes important for subsequent implementation and if necessary, enforcement, as I explain below.

themselves, not enough to guarantee its survival without their being anchored in a more comprehensive framework. The more "normalized" the substantive content of a legal norm happens to be, the more durable it will be and likely to fill in the gaps of a comprehensive legal regime based on formal rules (see Goldstein et al. 2000; Abbott et al. 2000 for an explanation of what it means to have a comprehensive legal regime of formal rules). The bottom line is this: In the course of expanding a legal regime, only those legal norms that have satisfied this "mutuality" condition will "survive" the initial separation of their substance and procedure. This is because the justification for this separation must always be based on the restoration of normal relations among states. Otherwise, there is simply no point in breaking apart the cohesion of a norm unless there is a good reason to do so.

This is probably why the recent developments that have been taking place in international law with regards to peremptory norms place more of an emphasis on the immutability of "human rights" as opposed to "humanitarian rights" (see Franck 2002 for the necessity of keeping the existing international regime intact). The legal norms of the latter have not "survived" for long because the justification for their dissemination has not been the normalization of relations. If, as at present, the use of force for humanitarian intervention constitutes an exception, an emergency measure implemented only in very special circumstances, then by definition its incorporation into the body of established law, or its "normalization," is prohibited. The legal norms of humanitarian intervention have therefore "died" soon after they were generated, and were applicable only on an ad hoc, contextual basis. If a legal regime of humanitarian intervention were to achieve formal status on a universal basis, exceptions would still be treated as such, but by implication would be everywhere and would no longer be exceptions.[23] In other

[23] It was pointed out to me by a law professor that a simpler conception might be just to take a changed international environment in which threats are prevalent as a given. This would make the task of

words, the convergence of expectations is not possible for the norms of humanitarian intervention because, by definition, ex ante expectations are not possible for exceptions. I illustrate this point through two examples below. The first is the example of the development of doctrine relating to the use of force by the ECtHR as relates to Article 2(2) of the 1950 European Convention on Human Rights. The second is the law of naval warfare as relates to the treatment of merchant vessels for the illustration of my point that a gradual incorporation of substantive content is the only way to "normalize an exception."

Recent Developments

By placing all uses of force, whether in times of national emergencies or for routine law enforcement operations, on a single regulatory level (Abresch 2005), the ECtHR has effectively through the *Chechnya* decisions[24] created categorical distinctions for the use of force based purely on the contingency of a situation.[25] The use of force even for law enforcement now concerns considerations of proportionality, etc. (ibid.). More importantly, it has generated a potential distinction between the realm of contingencies, where rights may be curtailed for the ends of social justice, and that of normal relations, wherein the law of peacetime prevails as the interpretive norm. The doctrinal shortcoming with this development is that because emergencies have been placed in the same category with routine law-enforcement operations, the clear dichotomy between the normal and the exceptional has disappeared. Rather, the use of force is to operate solely on a contingent basis, as the situation dictates (see Damrosch 1991, p.100; Scheffer 1991; Macfarlane et al. 2004).

---

interpretation simpler, but would run into problems in terms of democratic constituencies not being willing to accept a permanent threat environment. Legal standards should also include allowances for potential future remedies to threats that would effectively and permanently resolve them.

[24] *Isayeva Yusupova and Bazayeva v. Russia,* App No. 57947-49100, and *Isayeva v. Russia,* ECtHR, App No. 57950100.

[25] Also see *Kadi v. Council and Commission*, European Court of Justice (Sept. 3, 2008) for the establishment of the reviewability of Security Council decisions that affect the fundamental rights of applicants under EC law.

Let us take as a given, then, that the basic legal framework, the procedural infrastructure, for the use of force on a contingent basis has been established for the European legal system. Could this legal regime, based solely on the procedural framework of European human rights law as it now stands, incorporate and be incorporated into the diverse legal systems outside of this region? My answer would be, no; the substantive content to fill the gaps are now to be found in neither the law of human rights nor humanitarian interventions. The convergence of legitimate expectations outside the European community is now impossible because the entire point of having an exception as the legal standard—justifying its continuous pursuit as well as enforcement for the sake of progress—negates the generation of a coherent expectation regarding conduct. Rather, the generation of mutual expectations between those members of the EC that have already accepted the Court's jurisdiction and those that have not is now obsolete because, by direct implication, *any* substantive content can now be expected from those interpreting the standards; exceptions substantively belong in the categorical domain of non-mutuality. An exception is by definition non-prevalent, and therefore beyond the realm of justifiable *ex ante* expectations. Any justification for a progressive agenda towards the realization of rights[26] within regions where the legal norms are less developed must involve legitimate expectations beyond this pre-established framework, which will never be mutual in understanding among all concerned parties. Since mutuality is an essential condition for the justification of a legitimate expectation, the targets that are generated for realization will therefore be viewed outside the region as dictums, rather than expectations. What, therefore, is the structure of expectations, in relation to the pre-established procedural framework, that permits the expansion of the legal regime? I first describe the structure of expectations in more detail.

The Structure of Expectations

[26] Beitz (2009) characterizes this as a *pro tanto* formulation of understandings about goals.

It is only through the links of voluntary associations that effective burden-sharing, based on mutually acknowledged expectations, is possible. Consider the following model of exclusion zones in naval warfare. The declaration of an exclusion zone, in which any armed ship may be attacked and sunk by the belligerents—with due regard for the safety of passengers—is the "war zone," or the legal exception. Exclusion zones must be fully enforceable, adapted to military objectives, and cannot be declared in neutral waters (see Fenrick 1986; Leckow 1988; Ronzitti 1988). If we consider the international legal system in the holistic sense of the laws of peacetime prevailing in any areas where the zone of war is *not* located, then the use of exclusion zones could be considered to be institutional limitations aimed at containing the effects of the conflict to the territory of the belligerents.

The dilemma of intervention could therefore be re-conceptualized as the problem of entering and leaving the exclusion zone without losing one's status as a neutral party. One wishes to relate the two zones, or the normal and the exceptional realms, in a meaningful way so as to retain the prerogative of a state in the former to make demands—namely, to limit their hostilities to the war zone—on those in the latter. An intervening party wishes to have a reason for entering the war zone—the best way would be to declare an intrusion into the exclusion zone as an "exceptional matter" that would not happen again. Such incursions could therefore not be conducted on a regular basis without losing one's status as a neutral party. Neutrality, it turns out, however, is a relative conception. Neutral merchant vessels, for example, have traditionally been guaranteed the right of safe passage in naval warfare (Fenrick 1986; Leckow 1988). However, the historical record demonstrates that merchant ships can easily be "converted" by—gradual degrees—from port to port if partaking in any of the following activities: 1) acting as the commercial arm of a long supply chain of provisions and weaponry, accompanied by armed

auxiliary vessels, as was the case for the British in the Falklands conflict (Leckow 1988) 2) conveying vital supplies by the use of third party shipping to one or either of the belligerents (ibid.). The use of armed merchant vessels as participants in the hostilities of WWII was widespread on both sides of the conflict, and the Tribunal at Nuremberg for the trial of Karl Dönitz[27] left open the question of the full range of military activities that a neutral vessel may undertake without assuming belligerent status (Fenrick 1986). This is unsurprising, given the fact that both the 1907 Hague Convention VII (see Ronzitti 1988) on merchant vessels, as well as subsequent conventions on the rights of neutral ships in naval warfare, has only indirectly addressed this question.[28]

The connection that I am attempting to make through this example relates to the structural dimensions of the problem of normalization. What are the limits to which states can link the realms of "contingent laws" prevailing in times of "emergencies" and "normalized" laws that prevail in times of peace by relying on their interpretations of substantive content that has yet to be fully clarified? If regulation is a desired aspect of interstate relations, how far can the justification for regulation, based on a common understanding of substantive meaning, are extended beyond the borders of already institutionalized procedures within integrated legal communities? How far is substance capable of "traveling" outside an established procedural framework, such as the chains of ports that are shared among allies in a naval war or the constitutional foundations of the European Community? The substance of norms is easily "exchanged" through understanding among member states integrated into an institutional framework. The corollary to this proposition is two-fold. I have already established that

[27] Judgment of the International Military Tribunal (at Nuremberg). Available at http://avalon.law.yale.edu/subject_menus/judcont.asp. Accessed April 3, 2010.

[28] See Article 46 of the 1909 Declaration, available at http://www1.umn.edu/humanrts//instree/1909b.htm. (accessed April 3, 2010), as well as Articles 12 and 13 of the 1930 Convention on Maritime Neutrality, available at http://www1.umn.edu/humanrts/instree/1928b.htm (accessed April 3, 2010).

substance can arise in isolation from a procedural framework. It is obvious that substance will be incapable of being disseminated further within a system without a procedural foundation with which to support its continued viability. The 1999 NATO intervention in Kosovo, which was undertaken with the political justification that overwhelming humanitarian concerns overrode the norm against the violation of territorial integrity, has been characterized as "illegal but legitimate" (Report of the Independent International Commission; also Franck 2002). It is possible to regard this as an example of humanitarian intervention based mainly on substantive considerations—sensibility to gross violations of human rights—without the procedural foundation (i.e. preliminary UN Security Council authorization) to support its continued viability as legal precedent. Consequently, the status of the Kosovo intervention remains an anomaly as relates to the regime of legally sanctioned uses of force.

The Model: Implied Consent

The second part of the corollary is that legitimate expectations concerning permissible conduct are capable of being generated only to the extent that the substantive content mutually agreed upon by states comes to be 'stretched' to its barest minimum, to the point that it starts to translate into procedure. Figure 1 presents this 'stretching' visually:

Figure 1 about here

The single "point" at the top represents the status of international consensus concerning state commitments to safeguarding the substantive content of a particular legal norm. It is highly certain in this case that the international consensus about the meaning of the norm and the relevant procedural safeguards is present; this is why the mutual understanding of states is represented as a definitive point whose location is exact.[29] In most cases regarding state

[29] An example might be international consensus over the peremptory norms regarding genocide and the acceptance of the instruments that are necessary in order to prevent it. Although there has been

commitment, however, the international consensus surrounding their substance and procedure is more likely to be closer to the illustration in the middle. The circle in the middle is the locus of all points equidistant from the center, where the actual idea of the substantive commitment, somewhat fuzzy but still possible to locate, is found. The surrounding points represent the status of international consensus concerning its procedural safeguards—the farther they are from the center, the fuzzier the "circle" becomes, until the gaps between the points become quite large. International consensus regarding the status of torture would be an example—there is widespread agreement on the necessity of protecting people from "degrading treatment," but the measures for implementation in compliance with the 1987 Torture Convention have not been congruent among states. Moving away from the center therefore represents less reliance on the significance of the substantive content and more on procedure as a matter of formality. The circle at the bottom depicts the extreme case, therefore, when states cannot agree on the substantive content of norms at all and therefore must rely solely on procedure. It is fairly obvious in this case that state consent for international enforcement within their borders has not been obtained. The justification for action—whether it is enforcement, punishment, or demand for compliance—based on mutual consent therefore requires reliance on substantive meaning, rather than procedural formalities.

Now imagine that the object of consensus is not a single norm, but concerns a comprehensive regime of legal norms regarding a vast area of subject matter such as human rights. Figure 2 depicts the extent of state consent that can be derived by implication:

Figure 2 about here

---

disagreement on the definition of genocide, the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in January 1951, currently has 41 Signatories and 141 Parties, which can easily be regarded as widespread acceptance. The status of the treaty can be found at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, accessed April 17, 2010.

As shown in figure 2, the *extent* to which state consent can be inferred and expectations about compliance formed is the point at which a state can justify its acceptance of *only* the procedural formalities without agreeing upon the substantive content of norms. The "cone" represents the status of state consent regarding the protection of human rights. This is the reason that the left-hand side of the "cone" is narrower and shaded more darkly than the right-hand side—as it grows wider, the substantive meaning of legal norms becomes less clear, while there is more reliance on procedure. All that can be expected in lieu of compliance, therefore, is the state's concession that procedural safeguards are a necessary measure.

Legal justifications for establishing legitimate expectations, based on having satisfied the "mutuality criterion above," are therefore only possible to the extent that a state is willing to more on substance than procedure in justifying its conduct. In other words, a state can consent to the demands of other international actors based on its commitment to the substantive content of a norm alone, on the assumption that its significance far outweighs the incentives to bargain over the niceties of procedure. The converse proposition is that any state that does engage in the latter exhibits a lack of commitment to the norm's substantive content. Authority in legal interpretation that is acknowledged by states therefore has its 'roots' in obvious consent, or where substance is closely followed by procedure but clearly precedes procedure. In the final section, I examine the process of establishing consent based on the mutual acknowledgement of substantive content among states through a formal model.

Consent as Common Knowledge

The problem of "weak relativism" (Donnelly 2003) is equivalent to the problem of subjectivity in legal interpretation. In other words, it is the subjective aspects of interpretation, or different characterizations of substantive content, that states emphasize when they refuse to

comply with—give consent to—the terms of a treaty or to participate in a legal regime.[30] The objective of legal interpretation therefore could be considered to be the task of bounding subjectivity—creating legally sanctioned limits on conduct that can be expected—through implication.[31]

Substance can be an organizing concept (Steiner et al. 2007). My task at the moment is to focus on the substantive content of the "modern" conception of human rights (Donelly 2003; also see Falk 2000 for a timeline of the concept's evolution). Although the lack of international consensus about the substantive content of human rights could be taken to imply that this is an "empty set," creating a political ontology of human rights requires some effort at organization and conceptualization (Langlois 2005). If the effective assertion of rights is to be taken as an act of social justice, then the protection of human rights requires familiarity with the ontological divisions and organizational "flow" of their substantive content. Both the enforcement of substantive commitments and the punishment of violations—both representing efforts at normalization, or the continuous pursuit of normal relations—require an understanding of what is, in effect, being enforced.

The (political) ontology of human rights can most easily be conceived of as existing within sets and subsets of "core" rights (see Beitz and Goodin 2009; also Donelly 1981, 1989, 1998). The branch of games in formal theory that derives from Analytic Philosophy and deals with "common knowledge" relies on the idea of "partitionals" in order to reinforce the idea of categories of information distinguishable to a particular player (Aumann 1976). Figure 3

[30] Subjectivity is usually an accusation directed at the other side, however. A state would always accuse the other party to a treaty, for instance, of subjective formulations, whereas its own interpretations would be asserted as being definitive.

[31] The doctrine of implied consent is a part of the "doctrine of positivism," which assumes that states as sovereign and equal entities can only be bound by the rules to which they have consented to be bound (Brierly 1963, p.51). Implied consent is, however, not a satisfactory explanation for the existence of state obligations under customary international law, which is considered as evolving on its own until states come to be bound, unless, of course, they are "persistent objectors" (ibid., p. 52; also see Henkin 1963).

presents the information sets for two states, *i* and *j* that differ enough in the structure of their domestic politics such that the partitions are not exactly the same.

Figure 3 about here

Each information set, complete with information partitions, shows everything that each state "knows" about the international law of human rights. Consider the individual letters—or "states," in the sense of situations, of the world—to constitute categorical distinctions for rights that have been discussed among states but not yet received universal acceptance in terms of their substantive meaning. For example, a might represent individual rights, b the rights of women, etc. Because there is a partition between the first two rights in its information set, state *i* cannot distinguish the right a from b, whereas this is possible for state *j*. State *i* could therefore be considered as 'lumping together' two categories of rights considered by state *j* as being distinct. For instance, *i* could consider women's rights to be indistinguishable from individual rights.

'Lumping' two substantively distinct sets of rights together into a single category affords great control over policy to a state. For example, a developing country may 'lump' the right to develop, as embodied by economic and social rights, together with civil and political rights by suggesting the principle of "development first." A developed country, on the other hand, will have an information partition between the two categories of rights, asserting that the violation of fundamental human freedoms such as freedom of speech will hinder long-term development. A pre-dominantly Muslim state, for example, might have a partition between individual and women's rights,[32] while a non-Muslim state would not be able to "tell" the two categories apart.

[32] A state's reservation to the Convention on the Elimination of Discrimination Against Women (CEDAW) Dec. 18, 1979, 1249 U.N.T.S. 13 could be considered a "formal expression" of an information partition between individual and women's rights. For example, the Arab Republic of Egypt has stated that it "…is willing to comply with the content of this article [Article 2 of CEDAW], provided that such compliance does not run counter to the Islamic *Sharia*." United Nations Treaty Collection, Status of Treaties, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. Accessed April 10, 2010.

The "meet" or "finest common coarsening," of an n + 1 number of information sets—meaning that there are at least 2 players, or in this case, states—is defined formally as the following: An event *E* is common knowledge at a state ω if every state that is reachable at ω is in *E*. By definition, the "meet" is also the equivalent of the "common knowledge" of all the players in the game. Another way of expressing the same principle would be that an event *E* is "common knowledge" to all players if and only if every player knows *E*, every player knows that every other player knows *E*, and every player knows that every player knows *E*, *ad infinitum*. Lack of space does not permit me to explain the details of formal modeling based on Analytic Philosophy at the moment. The "meet," however, is found by reading from left to right of the different information sets until a "partition"—an indicator of a player's ability to tell apart the events in one subset from those of another—that is common to all players is found. This partition is then included as a partition in the set of all events that are "common knowledge" to the players. For readers unfamiliar with Analytic Philosophy, these remarks will become clearer below. Suffice it to say for now that in light of the present discussion, it makes sense that those events (i.e. the sets of substantive content) that states cannot mutually agree on as constituting fundamental rights will be "discarded" from the negotiation table when a procedural framework for their protection.

In the context of international law, a minimal agreement between states, or an agreement to uphold only the procedural obligations of a legal regime is equivalent to each state recognizing that each state recognizes, etc. *ad infinitum*, the substantive content of a norm as being necessary to the maintenance of their relations. The universality of [33] obligations considered to be *erga omnes* would qualify as such.

[33] State respect for the principles contained, for example, in the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, would arguably qualify. The draft articles of the

States consent is the equivalent of their "common knowledge" of shared meanings. As relates to the discussion above, substantive content that has gained mutual acceptance, meaning mutual consent regarding expectations for permissible conduct, can be utilized as a justification for the expansion of a legal regime. Recall from the discussion above that the procedural framework for the realization of human rights commitments constitutes the legal 'infrastructure' that safeguards the substance of the latter. In terms of legal institutions, therefore, a commitment to procedure alone is the equivalent of legal *minimalism* (see Sunstein 2006 for an application)—in other words, an "agreement to disagree" (Aumann 1976). In the extreme case that two states cannot agree on *any* of the substantive content of an issue area, they will (peaceably) "agree to disagree" on substance through procedural argumentation. For example, suppose that two states are negotiating a human rights treaty, but cannot agree on their substance (i.e. whether to focus on "individual" versus "collective rights, etc.). In this situation, the only terms on which the two parties will be able to agree is a "universal" conception of human rights—an minimal acknowledgement that human rights, whatever they may be, can be claimed by anyone who happens to be "human," leaving substance to be determined by procedure.

Let us return to the illustration in Figure 3 above. If same two states are negotiating over the substantive content of a human rights treaty, state *j* will want to either include an explicit clause or mechanism that effectively makes a legal distinction between women's rights and individual rights. State *i*, on the other hand, would want to exclude such a mechanism in the hope that a pre-commitment to individual rights can justify subsequent measures for the protection of women's rights, the latter being treated as a subset of the former. State *j* at this point would probably offer a counter-argument somewhere along the lines of, say, that the fact of

---

ILC on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Commission, 2001, vol. II (Part Two)*, would also count.

a separate "core" convention on women's rights[34] exists, apart from the UDHR, other treaty texts as well as general principles of international law respecting individual rights, implies the non-redundancy of articulating a separate set of principles for women's rights. If State *j* were to insist on this point, that is, if this categorical separation were necessary for the maintenance of domestic stability, and if State *i* strictly preferred to have an agreement as opposed to none, for the protection of, at the least, individual rights, then *j* would eventually win out.

However, *j* would only have won the argument in terms of excluding an explicit provision specifying that women's rights are indeed a subset of individual rights. Recall that the process of negotiating over the meaning of substantive content continues until it becomes evident that a minimal procedural framework is the only thing that both parties can agree upon. At this point, the final round of negotiations can be considered to have been reached. State *i* can then argue that women's rights truly are a subset of individual rights because State *j* has already acknowledged the substance of individual rights by agreeing to their inclusion in the treaty. State *i*'s argument would be that had State *j* truly wanted doctrinal control in the direction that it originally argued was most conducive to its society, it should have asserted instead that individual rights are a special subset of women's rights,[35] whether this is based on political expediency or cultural tradition. The *implication* would be that by agreeing to the minimal standards for the protection of substantive rights, complete with procedural safeguards, State *j* has already agreed to the realization of all substantive rights that belong to the subset of individual rights. State *i* can legitimately assert the expectation that *j* would be committed to all

[34] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN General Assembly in 1979.

[35] This is not such a far-fetched idea as one might think. Gender equality is really a recent phenomenon, when one considers the history of women's rights, even in Western states. Before women were granted the right to vote, for instance, the *individual* right to vote was subjugated to the gender of the voter (i.e. whether the individual was male or female). For much of history, therefore, individual rights were a subset of rights assigned to a particular gender.

subsets of rights with the two-fold property that 1) *i* considers as falling under the 'dominant set' of individual rights *and* 2) that *j* had *not* asserted as constituting 'dominant sets' of their own under which individual rights were instead a subset. This is possible because: 1) when State *j* agreed to the inclusion of individual rights without making this assertion in the form of an alternative ontology, this *implied* acceptance of *i*'s basic ontology (of all women's rights being a subset of the 'dominant set' of individual rights) and 2) rejection of the basic ontology asserted by State *i* and simultaneous acceptance of procedure for the safeguarding of individual rights implies a lack of understanding by *j* [36] of the substantive content of individual rights. The second condition arises from the fact that over-reliance on procedure at any stage of the negotiations indicates a lack of awareness on the part of a state exactly to what it has consented. Both conditions must be satisfied in order for State *i* to be able to assert that its expectations regarding *j's* commitment to all subsets of individual rights are valid.

Argumentation through implication therefore becomes critical once it is evident that a dialogue about the necessity of procedural safeguards has commenced. According to Walzer (ibid.), "…moralities don't have a common beginning" and therefore it is impossible to identify a "neutral starting point" for the establishment of a minimal framework (p.14). Keep in mind that legal norms, such as those representing the principles of humanitarian intervention, possess only a quasi-formal status. This implies that that there is no pre-determined direction for their final and conclusive categorization as either legal exceptions or the "normalized" substantive content

[36] Recall from the discussion above that minimal substance is the equivalent of procedure. Thus it could be argued that State *j* has already implicitly consented to the safeguarding of women's rights when it consented to the procedural safeguards for individual rights. If State *j* were to contest that it had already accepted the procedural safeguards and instead asserted that the debate concerning their implementation was still ongoing, State *i* could instead assert that the mutuality condition ensures that a reliance on procedure alone indicates a lack of awareness about the substantive content related to procedure. In this case, however, since *j* had failed to specify an alternative ontology, complete with procedural safeguards, for *women's* rights, it could be considered as the only party who was unaware of the relevant substantive content.

that is to be interpreted by a central authority. It is precisely this lack of determinative content that allows the intentional formulation of the 'dominant set' in the first place.

Implications for Further Research

The course of pursuing justice in the name of human rights entails the ability to make demands on the actor from whom commitments are due (Pogge 2002; also Donnelly 2003; Sen 2004). Recall that the contract for the procedural framework was originally concluded on a consensual basis. Continual demands for compliance and enforcement through the use of force when violations occur, therefore, become justifiable for all substantive commitments satisfying the mutuality criterion and therefore belonging to proper subsets of the procedural framework. Future research should be focused on the legal justifications that are possible for trial and error in the process of clarifying substantive meaning.

References

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcik, Anne-Marie Slaughter and Duncan Snidal. (2000). "The Concept of Legalization." *International Organization* 54.3 (Summer): 401-419.

Abresch, William. (2005). "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya." *The European Journal of International Law* 16.4: 741-767.

Aceves, William J. (2000). "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Litigation." *Harvard International Law Journal* 41.1 (Winter): 129-184.

Alvarez, Jose E. (2005). *International Organizations as Law-Makers*. New York: Oxford University Press.

Aumann, Robert J. (1976). "Agreeing to Disagree." *The Annals of Statistics* 4.6(Nov.): 1236-1239.

Beitz, Charles R. (2009). *The Idea of Human Rights*. Oxford: Oxford University Press.

Beitz, Charles R. and Robert E. Goodin. (2009). "Introduction: Basic Rights and Beyond." In *Global Basic Rights*, edited by Charles R. Beitz and Robert E. Goodin, pp. 1-24. Oxford: Oxford University Press.

Brierly, J.L. (1963). *The Law of Nations: An Introduction to the Law of Peace*. Sir Humphrey Waldock, editor. 6th ed. New York: Oxford University Press.

Chesterman, Simon. (2003). *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press.

Damrosch, Lori Fisler. (1991). "Constitutional Control of Military Actions: A Comparative Dimension." *The American Journal of International Law* 85.1 (Jan.): 92-104.

Donelly, Jack. (1981). What are Human Rights?: An Historical and Conceptual Analysis. Ph.D. Dissertation. University of California, Berkeley.

Donnelly, Jack. (1998). *International Human Rights*. 2nd edition. Boulder, CO: Westview Press.

Donnelly, Jack. (2003). *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press.

Doyle, Michael W. (1986). "Liberalism and World Politics." *The American Political Science Review* 80.4 (Dec.): 1151-1169.

Doyle, Michael W. (1997). *Ways of War and Peace: Realism, Liberalism, and Socialism*. New York: W.W. Norton and Company.

Doyle, Michael W. (2008). *Striking First: Preemption and Prevention in International Conflict*. Princeton: Princeton University Press.

Falk, Richard. (2000). *Human Rights Horizons: The Pursuit of Justice in a Globalizing World.* New York: Routledge.

Fenrick, W.J. (1986). "The Exclusion Zone Device in the Law of Naval Warfare." *Canadian Yearbook of International Law* 24: 91-126.

Finnemore, Martha. (1999). "Are Legal Norms Distinctive?" 32 *N.Y.U. Journal of International Law and Politics* 699 (1999-2000).

Franck, Thomas M. (1990). *The Power of Legitimacy Among Nations*. Oxford: Oxford University Press.

Franck, Thomas, M. (2002). *Recourse to Force: State Action against Threats and Armed Attacks*. Cambridge: Cambridge University Press.

Gardiner, Richard K. (2008). *Treaty Interpretation*. Oxford: Oxford University Press.

Goldstein, Judith, Miles Kahler, Robert Keohane, and Anne-Marie Slaughter. (2000). "Introduction: Legalization and World Politics." *International Organization* 54.3(Summer): 385-399.

Grant, Ruth W. and Robert O. Keohane. (2005). "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99(1): 1-15.

Hart, H.L.A. (1955). "Are There Any Natural Rights?" *The Philosophical Review* 64.2(April): 175-191.

Henkin, Louis. (1995). *International Law: Politics and Values.* Dordrecht, The Netherlands:

Kluwer Academic Publishers.

Hoffmann, Stanley. (1961). "International Systems and International Law." *World Politics* 14.1 (Oct.): 205-237.

Hoffmann, Stanley. (1981). *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics*. Syracuse: Syracuse University Press.

Independent International Commission. (2000). "Report on Kosovo." Available at http://www.reliefweb.int/library/documents/thekosovoreport.htm. Accessed April 10, 2010.

Jessup, Philip C. (1956). *Transnational Law*. New Haven: Yale University Press.

Jochnick, Chris af and Roger Normand. (1994). "The Legitimation of Violence: A Critical History of the Laws of War." *Harvard International Law Journal* 35.1(Winter): 49-95.

Kamenka, Eugene. (1992). "Human Rights, Peoples' Rights." In *The Rights of Peoples*, James Crawford, ed., pp. 127-140. Oxford: Oxford University Press.

Kennedy, Ducan. (1997). *A Critique of Adjudication (Fin de Siècle)*. Cambridge: Harvard University Press.

Koh, Harold H. (1991). "Transnational Public Law Litigation." *Yale Law Journal* 100: 2347-2820.

Koh, Harold H. (1987). "Civil Remedies for Uncivil Wrongs: Combating Terrorism through Transnational Public Law Litigation." *Texas International Law Journal* 22: 169-448.

Langlois, Anthony J. (2005). "Conceiving Human Rights without Ontology." *Human Rights Review* 6.2(June): 5-24.

Leckow, Ross. (1988). "The Iran-Iraq Conflict in the Gulf: The Law of War Zones." *The International and Comparative Law Quarterly* 37.3(July): 629-644.

Macfarlane, S. Neil, Caroline J. Thielkine, and Thomas G. Weiss. (2004). "The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?" *Third World Quarterly* 25.5: 977-992

MacManus, Susan. (2009). "Cosmopolitan Exception and the Exhaustion of the Human."

Paper Presented at the 50th Annual Convention of the International Studies Association. Available at http://www.allacademic.com//meta/p_mla_apa_research_citation/3/1/2/6/8/pages312685/p312685-1.php.

Moravcsik, Andrew. (1997). "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51.4 (Autumn): 513-553.

Pogge, Thomas W. (2008). *World Poverty and Human Rights.* Cambridge: Polity.

Rawls, John. (2002). *The Law of Peoples.* Cambridge: Harvard University Press.

Rawls, John. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.

Ronzitti, Natalino. (1988). *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*. Dordrecht: Martinus Nijhoff Publishers.

Schachter, Oscar. (1986). "In Defense of International Rules on the Use of Force." *The University of Chicago Law Review* 53.1(Winter): 113-146.

Scheffer, David. (1991). "Use of Force after the Cold War: Panama, Iraq, and the New World Order." In *Right V. Might: International Law and the Use of Force,* Louis Henkin, ed., pp. 109-172. New York: Council on Foreign Relations Press.

Sen, Amartya. (2004). "Elements of a Theory of Human Rights." *Philosophy and Public Affairs* 32.4: 315:356.

Shin, Seung-Jee and Paul F. Diehl. (2008). "Mutually Hurting Stalemate: Navigating the Conceptual Minefield." Working Paper. *Presented at the 2008 annual meeting of the MPSA Annual National Conference.* Available at http://www.allacademic.com/meta/p267863 _index. html.

Simmons, Beth A. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. New York: Cambridge University Press.

Steiner, Henry J., Philip Alston, and Ryan Goodman. (2007). *International Human Rights in Context: Law, Politics, Morals*. 3rd edition. Oxford: Oxford University Press.

Sunstein, Cass. (2006). "Burkean Minimalism." *Michigan Law Review* 105 (Nov.): 353-408.

Slaughter-Burley, Anne-Marie. (1993). "International Law and International Relations Theory:

A Dual Agenda." *The American Journal of International Law* 87.2(April): 205-239.

Thompson, Dennis F. (1999). "Democratic Theory and Global Society." *The Journal of Political Philosophy* 7(2): 111-125.

Walzer, Michael. (1994). *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, IN: University of Notre Dame Press.

Waxman, Matthew C. (2008). "Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists." *Columbia Law Review* 108(October): 1365-1430.

Weiler, J.H.H. (1991). "The Transformation of Europe." *The Yale Law Journal* 100.8 (June): 2403-2483.

FIGURE 1

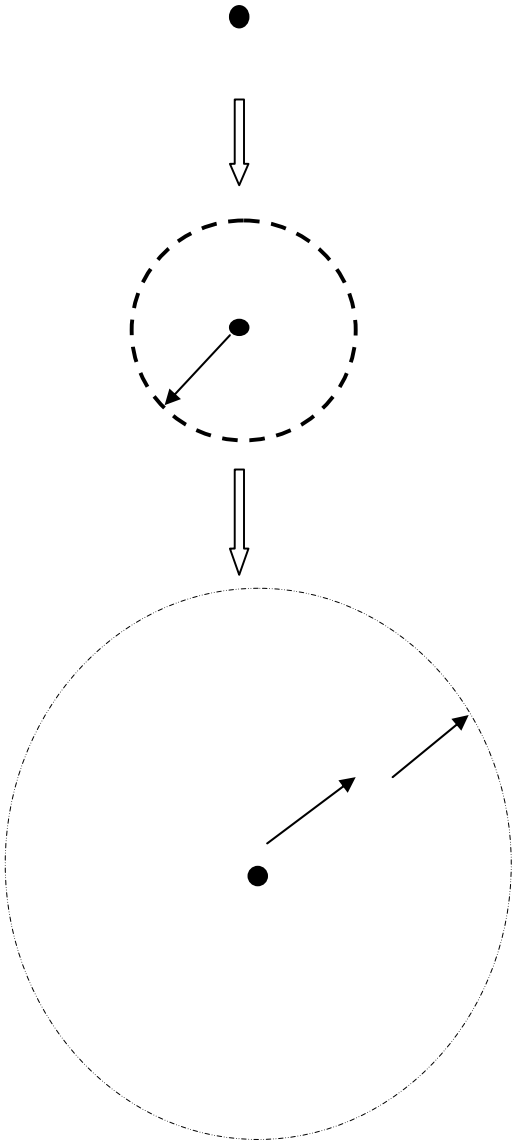

FIGURE 2

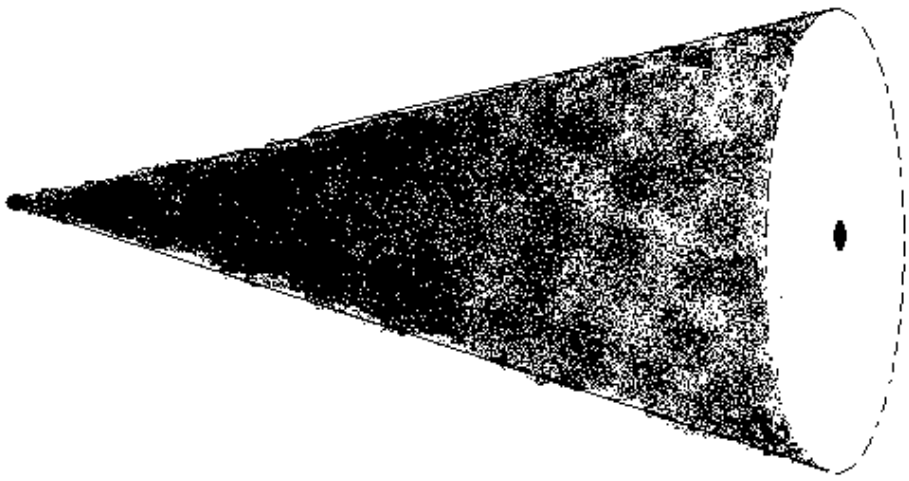

FIGURE 3

Information Set for State *i*

a	**b**	**c**	**d**	**e**	**f**	**g**	**h**

Information Set for State *j*

a	**b**	**c**	**d**	**e**	**f**	**g**	**h**

Substance that is Common Knowledge for Both *i* and *j

a	**b**	**c**	**d**	**e**	**f**	**g**	**h**