CLOSING PLENARY: GLOBAL GOVERNANCE, STATE SOVEREIGNTY, AND THE FUTURE OF INTERNATIONAL LAW

This panel was convened at 11:00 am, Saturday, April 6, by its moderator, José Alvarez of New York University School of Law, who introduced the panelists: Bruno Simma of the Iran-U.S. Claims Tribunal; Xue Hanqin of the International Court of Justice; and Joel Trachtman of the Fletcher School of Law and Diplomacy, Tufts University.

José Alvarez

I'm José Alvarez, from New York University Law School. Welcome to the final panel of the entire Annual Meeting.

In conducting this panel, I will begin by briefly introducing the three wonderful panelists, and then descend from the stage in order to engage in a genuine conversation. I have prepared a script but if, at any moment, a question occurs to you, please write it down on the index cards our staff are holding. I will put as many of your questions into our conversation as possible, hopefully with a natural flow.

So let me begin with introductions. Professor, Judge—I'm not sure what to call you now—Bruno Simma was a judge on the International Court of Justice from 2003 to 2012. Before that, he was a member of the International Law Commission from 1996 to 2003, and on the UN Committee on Economic, Social, and Cultural Rights from '87 through '96. He has been an arbitrator and continues to do arbitrations to this day. He is a member of the Iran-U.S. Claims Tribunal. He is also the William W. Cook Global Law Professor at the University of Michigan, as well as Professor of International Law and European Community Law and Director of the Institute of International Law at the University of Munich.

Joel Trachtman and I go back to when we were practically teenagers. He is a foremost expert in international trade law. He is a member of the faculty of the Fletcher School of Law and Diplomacy, Tufts University, and the author of a number of books including, most recently, *The Future of International Law: Global Government*. Other titles are *Developing Countries in the WTO Legal System*; *Ruling the World?: Constitutionalism, International Law and Global Governance*; *The Economic Structure of International Law*; and *The International Economic Law Revolution*. His latest book will partly inspire how we think about the three themes of this panel—namely, global governance, state sovereignty, and the future of international law.

Our third panelist is a little less familiar to this Society but not to the world. Judge Hanqin Xue has been on the ICJ since June 29, 2010, was reelected in 2012, and has done everything that you could imagine of an international lawyer. She has been a professor at Wuhan University and Vice President of the Chinese Society of International Law, while also serving on the Chinese Society of Private International Law. She entered the Foreign Ministry of China in 1980 and served in every conceivable capacity at a great many treaty negotiations. She is one of the editors of *The Commentary on the Charter of the United Nation*—so Bruno, you have some competition on this panel with respect to that—and many other books and articles, including *Transboundary Damage in International Law*. We are really delighted to have her here.

The panelists have been very good about giving me total discretion in the questions I ask.

Starting with Joel Trachtman, the title of your recent book includes the term ''global government.'' You say you chose ''government,'' not ''governance,'' because the latter is

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too vague. Moreover, you think the term ''government'' should not be restricted to hierarchical authority and that in fact we do have a form of global government right now. Is that just to sell books, or are you serious?

[Laughter]

Joel Trachtman

I actually had quite a fight with my publisher to maintain the title ''government.'' I am serious, and it's based on the idea that more and more governmental functions relate to things that cross borders, functions that can't be carried out without some level of cooperation between states. Obviously, soft or informal law is important as well, but in this book I wanted to focus on formal law. I look prospectively at the needs of the international system. Generals and environmentalists think 20–30 years into the future. I wanted to do that in this book, branching out from my usual focus on trade law. Rather than examine developments in that particular tree, I consider the forest of broader international cooperation. It was important for me to avoid a kind of utopian idealism that the title of the book might connote. Instead, I sought to rehabilitate social scientific functionalism by looking at the ways in which the demand for international cooperation causes the creation of international law, and at how that international law increasingly looks governmental in its character.

José Alvarez

Other people have described global governance in various ways. Ruti Teitel calls it ''humanity's law.'' Some call it a form of ''constitutionalism.'' My own colleagues at NYU call it ''global administrative law.'' A number of German scholars are working on ''international public authority.'' I'm curious—we have two judges on this panel—how do you define global governance? Do any of those terms sound familiar or useful, or do you prefer Joel's term ''global government''?

Bruno Simma

Well, I am not on the Court anymore, but you won't be surprised to hear me tell you that within the Peace Palace the term ''governance'' is not used very often. You see governments and you see government in action, and even as somebody who has left the Peace Palace and rejoined academia, I don't have a clear vision of what ''governance'' means. Some scholars use the term as a counter to ''government,'' while others don't draw such a clear distinction.

Leaving aside the term ''governance,'' of the various other schools of thought you mentioned, my greatest sympathy is with Ruti Teitel's and Rob Howse's humanity's law. Although I do not agree with everything they write, it is closest to what I have written myself. My work focused on developments transcending bilateral relations, developments leaving behind a traditional model of bilateralism, which I encounter now in my latest incarnation as an arbitrator at the U.S.-Iran Claims Tribunal. In short, I see and do research into the move from bilateralism to community interests, and within community interests, an interest of the international community to protect human rights. That phenomenon is of great interest to me. I hand over to Hanqin.

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XUE HANQIN

Thank you. It's a great pleasure and honor to join this panel. I notice the composition seems to be ''the west and the rest.''

[Laughter]

I think the topic is very pertinent to international law today. I agree with Judge Simma that in the Peace Palace we don't talk about governance. We talk about states all the time, we talk about state sovereignty all the time. Whatever school of thought, whether ''humanity's law'' or ''constitutionalism,'' we tend to focus on the concept of sovereignty. Actually, I think international law should focus on global governance, but the question is: What do we mean by global governance? If we mean the international regulation of state relations, then we are not far from the system now. The very question touches on the nature of the legal system we are talking about.

Personally, I feel that global governance and state sovereignty are two sides of the same coin. Without either of them, there would be no international law—or no need for international law. There is no point in arguing about whether the Westphalian system is still functioning, whether or not sovereignty remains a valid notion. From the inception of that system, there has been no absolute state sovereignty. From day one, when states engaged in relations with each other through law, they had to give up some of their sovereignty. A result of the development of international relations in recent decades is the expanding scope of international regulations and more restrictions on sovereign rights. Indeed, even as ''humanity'' has moved to the center of our attention, it has not moved to the point where global governance could replace national governance, such that we might see the formation of a world government. We should be careful about using the term ''government'' or ''world government'' or ''global government.'' We can easily confuse the two concepts.

When we talk about sovereignty and global governance, I don't think these binary systems are mutually exclusive. When you strengthen global governance, it does not mean state sovereignty necessarily has to be compromised or weakened. No state, no matter how strong or weak, is ready to give up its statehood in exchange for global government. On the other hand, no state claims it is not bound by international law. So if the international legal community focuses on the diminution of state sovereignty in thinking about global governance, it is aiming at the wrong target.

JOSÉ ALVAREZ

Your Hague lectures, Judge Xue, were really a progress narrative of China's integration into the international legal system. Other people think that international law is a progress narrative of increased legalization over time. Is that accurate, or is a dialectic at work? If international regulation goes too far or international judicialization goes too far, will we see backlash? Is it a progress narrative or a dialectic?

XUE HANQIN

It is not either/or. My Hague lectures tell the story—which is a success story—of China's practice over the last 60 years, since 1949. China's success in terms of its participation in international legal development is mainly due to two factors. One is internal economic reform

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and the adoption of open policy. The other is the fundamental transformation of international relations since the end of the Cold War. From isolation to full engagement, you may call it a success story, but in the process China paid a high price. When we reviewed China's participation in the World Trade Organization, for example, some Chinese scholars hailed this as a remarkable progress. It is true that the process has led to substantial legal reforms in China. China revised, amended, or repealed over 3,000 domestic laws just to meet the needs of a market economy, to fulfill its international obligations under the WTO. At the same time, after 15 years of participation in the WTO, Chinese scholars have also observed that while China is no longer an outsider, it is still not yet an equal. They are of the view that China has been subject to unfair treatment. So indeed, the first phase is a progress narrative. I hope the next phase will not be a dialectic.

In your book, Professor Alvarez, you talk about bilateral investment treaties. The question that now faces China and other emerging economies is: Why at this stage are the United States and European Union rethinking investment treaties? The hard fact is that the road is no longer one way; it goes in both directions. They are now thinking about the question of reciprocal treatment. What does this development show? It shows the legal sophistication of the western world and insufficient legal competence of the developing world. This is what we face today in the legal field.

José Alvarez

Let me give a chance for Joel and Bruno to respond with respect to whether what we see is either a dialectic or a progress narrative. You have a choice.

Joel Trachtman

I choose both.

José Alvarez

Oh, this is too easy.

[Laughter]

Joel Trachtman

I think it definitely is a dialectic where, as we see in the history of globalization and the history of the European Union, sometimes there is an error or a step too far or an imbalance, and retrenchment becomes necessary. So there is definitely an ebb and flow. I also think that there is a progress narrative, but I want to be clear about what I mean by that. International law doesn't evolve on its own, but rather in response to real social needs. In the book, I looked at changes expected in the next 25 to 50 years in terms of technology, democratization, demography, development, and other areas. I suggest how those changes will impose demands on international law in areas of cyber security, health, environment, human rights, finance, and trade. I reached three conclusions. One is that there would be greater demand for international law over time. So in that sense, it is a progress narrative. But the narrative is based on these projections, not made by me, but by other people about changes in the world. It is not hard to imagine that, in the context of globalization, new international law would

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be demanded. Much of it will be required to be nuanced and contingent in its application in order to balance national autonomy and international concerns in particular circumstances. This would require, to my mind, more adjudication. Moreover, more difficult problems where more is at stake, like global warming, would require greater enforcement of international law. So in my book I speculate that there will be a demand, based on real social facts, for increasing international law along those different dimensions.

José Alvarez

Bruno, do you want to respond, or can I give you other questions that have come up?

Bruno Simma

Maybe just very quickly. I think I know what progress is. I'm not sure I know what the dialectic method is because I grew up in a country where Marxist theory was not much in vogue.

[Laughter]

But if I may pursue how the question pertains to international tribunals and focus on the ICJ for a moment. There I see an interesting development that you might call progress and dialectics at the same time. Consider, for instance, the fate of peremptory rules or *jus cogens*, in the International Court of Justice. For a long time, the Court carefully avoided using the term *jus cogens*, while other tribunals—such as the European Court of Human Rights—did not have that problem. And just one mile away from the Peace Palace, the President of the ICTY, Nino Cassese, wrote the *Furundžija* judgment in which he spent ten pages on the doctrine and impact of *jus cogens.*

Meanwhile, the repository of general international law, the ICJ, was going into contortions to avoid using the term *jus cogens*. Then in 2005, the ICJ suddenly broke the barrier and started using the term. Yet this may be the dialectic at work (if I understand correctly what dialectics mean), with the ICJ now using the term but always qualified as ''*jus cogens* but . . .'' As in the *Congo-Rwanda* case in the year 2000, when the Court said in effect there is no doubt that the prohibition of genocide is a *jus cogens* norm, but this could not overcome a lack of jurisdiction of the ICJ. In the more recent *Belgium-Senegal* judgment, you see something similar. And the same is true of the prohibition of torture as embodied in the Convention on Torture. It is said to be a *jus cogens* norm, but that does not mean the ICJ necessarily has jurisdiction over cases where it is implicated. So that is an interesting dialectic: the Court accepts something, but immediately posits the antithesis. That is a very legalistic take on that matter.

José Alvarez

Judge Xue, do you have a response?

Xue Hanqin

I would like to add something I omitted in my earlier response. When we talk about the progress narrative of international law, we have to acknowledge the impact of economic

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globalization and the information technology revolution. In the past few decades, international law has moved out of the ivory tower and reached ordinary people. The public now has access to a great deal of international legal material, through the Internet. In the early days when we studied international law, we were always short of books and materials. When I became a member of the International Law Commission in 2002, ILC members still had to use a password to access UN treaties and ILC reports. Now these materials are all open to the public. The same is true with the ICJ. Once a case reaches the oral proceedings, all the written pleadings and documents are placed on the website, of course with the agreement of the parties. So international law has become part of the public discourse of international community. This development has a great impact at the national level as well, because it enhances national debate on such issues as environmental protection and human rights. That is a progress narrative.

At the same time, we also have to see the other side. When new ideas are pushed forward for international law, they may cause a backlash from some parts of the world. The question often boils down to who decides and prioritizes the issues of international law. We have to admit that international legal developments, even today, are still dominated by the west. In the fields of human rights and international criminal justice, for instance, debates between the west and the developing world are contentious. The developing countries do accept the cause of human rights and international criminal justice, but they disagree with the practical approaches that have been taken, which are often only directed at them.

José Alvarez

That relates to a few of the questions that came out of the audience. Is there an eastern versus a western view of international law? Is there a gap between the rich and the poor? Or do we now have a level playing field when it comes to, say, international courts? Just to pick out one of these questions, Bruno, when the rich and the poor go to the ICJ, are they on a level playing field? What do you think?

Bruno Simma

If you look at the list of states that have appeared most frequently before the ICJ, you will see that Nicaragua has been our best customer . . .

[Laughter]

That might have to do with Alain Pellet being its lawyer. What it shows is that there is at least a conviction on the part of developing countries that in the ICJ they are playing on a level playing field. Nicaragua is a poor country. Whereas, among members of the EU and other western countries, there seems to be a tendency to go before the ICJ only if it is really necessary. For the EU countries, that also has to do with the existence of the European Court of Justice. One of the Ten Commandments in force there is ‘‘Thou shalt have no other god beside me.’’ That seems to be the motto in Luxembourg when the idea of going to the ICJ is put forward.

[Laughter]

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So I think the ICJ has developed into what I would call a judicial institution where the playing field is level. Maybe I'll have an opportunity a bit later to say a few words about developments in investment arbitration.

José Alvarez

Well, I want to pose the same question to Joel about the WTO. It does not seem to be used equally by developing versus developed states. What do you think? Is there a level playing field in the WTO dispute settlement mechanism?

Joel Trachtman

I think the larger developing countries have been quite successful in using the WTO dispute settlement mechanism. I believe that the greater disparity is between large and small countries, and it may simply be because of the inability to justify spending large sums for litigation at the WTO. So I think there is something of a disparity in adjudication. I also think there is a disparity in legislation. We have to recognize, going back to one of your earlier points, José, that the needs and the views of developing countries are often different from those of wealthier countries because they have different positions, not only different cultures, but different economic positions. There are projections of great growth in the developing world, and I think that will address the disparity in part. There will still be great differences among states, but economic growth will reduce the asymmetries of desires for global public goods between what are now the poor countries and the wealthy countries. It may even be that some types of international law will become less necessary as states decide to achieve certain goals without the need for international legal inducement.

José Alvarez

So on investor-state relations, are the actors on an equal playing field? Do any of you want to tackle that question? The accusation has often been made in the literature that the system is biased in favor of the investor. Yet some empirical work suggests that is not borne out by the outcomes of the cases. I'm curious about your views.

Xue Hanqin

I think the question has to be addressed from a broader perspective. When you talk about the rich and the poor appearing before the ICJ, certainly the state parties are equal. The Court conducts the proceedings in accordance with the rules, whichever state appears before it. That is not the point. Take the legal counsels for example. Look at the counsels who argue cases in the ICJ. Sometimes you see two African countries in front of you, yet no counsel from those countries. It does not mean that the foreign lawyers don't serve their clients well. They do, because they are the top litigants. But you wonder why developing countries cannot produce top legal counsels. Is it simply a matter of the level of education? When it comes to investor-state relations, the most important question is, who interprets the law? Who decides on law? And who has the ability to influence the development of the law? So when we talk about the developed and developing world, we are not talking about specific countries, but rather about the general structure of international law.

A fact we have to face is that when states identify themselves with the basic principles of international law, they put their trust in the legal system for a just world order. But we

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have to realize that the law oftentimes is not interpreted and applied equally. This is the problem, and the challenge that our international lawyers have to face.

José Alvarez

Bruno, you suggested in something you wrote that in investor-state relations, Article 31(3)(c) of the Vienna Convention on the Law of Treaties was a way of bringing human rights into investment disputes because it allows ''for any relevant rules of international law applicable in the relations between the parties'' to be taken into account. You used those words to draw on soft law and to argue that human rights could be read into these treaties. Did I misunderstand?

Bruno Simma

You misunderstood if you read me as having claimed that soft law could be read into the operation of 31(3)(c), which I never intended, and I think I never wrote. Maybe you understand human rights obligations—like the Covenant on Economic, Social, and Cultural rights—as a soft law, but—

José Alvarez

No, you talked about rules as opposed to norms as opposed to laws.

Bruno Simma

May I just add to what Hanqin said about counsel before the ICJ? The fact is, poor and rich countries use the same lawyers, so in that sense there is a level playing field. Of course, that begs the question, why is the representation of states before the ICJ a monopoly of 20 or 25 mainly western nationals and western-educated people? Part of the answer is that international legal education in the United States, the U.K., and France is the best you can get. Taking the question further, why don't we see more lawyers from developing countries appearing before the ICJ that have received at least part of their education in western countries? I think that has to do with attitudes in foreign offices. I guess that in many foreign offices they don't consider hiring somebody from their own country, even a renowned professor from a national university. When will this change? With the Pellets and Crawfords of the world, we know what we have; there will be no surprises. Therefore you end up with the same crowd all the time. Only by hazard do you see a newcomer. Remember, I got the chance to appear before the ICJ in the *Cameroon-Nigeria* case only because part of the relevant treaties had been concluded with the Germans. So I profited from good old colonialism—

[Laughter]

—because the Crawfords and the Pellets were not able to read German. Once you have demonstrated that you can stand upright before the ICJ, that you won't faint, and that you speak decent English, you are in. And if you are lucky, then you will get another case. But, of course, I'm also a product of western—that is Innsbruck—legal education. One other point: when I became counsel in the *Cameroon* case, Alain Pellet hired me. When I asked about fees, he said, ''You know, Bruno, in the case of a country like Cameroon, I apply a

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social tariff.'' He drew a distinction between representing Liechtenstein on the one hand (and losing), and representing Cameroon on the other hand, for less money (and winning). So you find level playing fields in small ways like that.

With regard to investment arbitration, I remember when I first came to the field, I did a little research and, of course, what the NGOs and some academics tell you is that this has really worked for the benefit of the capital-exporting countries and investors. At current what you experience is a disillusionment with the system. What ICSID statistics tell you is that maybe this does not signify a backlash, but rather a phase in which the major participants in investment arbitration consider their options. What you see is Ecuador, Bolivia, and maybe others leaving the system, and Argentina, of course, not paying the compensation it is supposed to pay. You also see countries like Australia negotiating more comprehensive treaties with investment chapters that don't provide for arbitration. I have the impression that Canada might opt for a similar approach. This may be a consequence of Canada's experience with NAFTA. It may be put a bit too bluntly, but it appears to be fed up with the way arbitration works out.

Moreover, despite conventional wisdom, arbitration takes a long time. Document production alone can be very time-consuming, which is fine if you are an arbitrator, but it certainly is not a quick process. In fact, some interstate arbitral proceedings have been quicker than some investment arbitrations.

Of course, one remedy would be to give more space for public policy concerns in the law that arbitrators have to apply. I would regard it as a healthy development if investment arbitration were not left solely to civil law/commercial law arbitrators, who sit in judgment of public policy matters. They have made awards that force states to repeal domestic legislation on environment and other fields, which they have enacted in good faith. To me, this is a real problem. I think one remedy would be to give more space to public policy concerns, such as human rights.

José Alvarez

One of the questions that came up in terms of a level playing field is institutional reform. Some folks think that the IMF and the World Bank should be reformed, through their voting structures, accountability mechanisms, and so forth. Joel, let's start with the financial field, which you have written about. Is there a way to improve the position of the global south through institutional reforms? A separate question is whether we should put UN Security Council reform back on the agenda, including the possibility of expanding permanent membership with veto power, or eliminating the veto altogether.

Joel Trachtman

Institutional reform has to be based on and respond to the interests of states. The interests of both powerful and weak states count, but I don't think you can have institutional reform that contradicts the underlying power structure. And so any reforms must reflect the power structure to some extent. That may allow some states to enhance their position within institutions, but not necessarily in a way that would remedy the problems poor states face. The remedy for poor states is development through globalization, and through technology transfer, over time. I also think it is important that these states have the ability to represent themselves well, not only in adjudication but, very importantly, in the development of new international law and new institutions.

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One thing I would question in the context of institutional reform is the principle of sovereign equality. This is inconsistent with individual equality. If you have a country like Nauru, with 10,000 people, and a country like China, with a population of 1.3 billion, then one country-one vote hardly seems fair from the individual Chinese person's point of view. We have important formal departures from sovereign equality in the Security Council, the IMF, and the European Union (with its qualified majority voting). We also have significant informal departures from sovereign equality, with differences in power being reflected in other ways. So to have realistic institutional reform and realistic institutions, it is important to recognize the interests and power positions of states.

José Alvarez

Judge Xue, your country enjoys a veto on the Security Council. Do you want to give it up?

[Laughter]

Xue Hanqin

I have not heard that China is going to give up its veto power, but I agree with Professor Trachtman that international institutions reflect the global power structure. This is why we are not going to have global government. This is why international law is still based on states. When you talk about the power structure, you are talking about the power of states. This is the first point.

The second point is that, if these institutions are based on the power structure, it implies that as power shifts, the institutions will change accordingly. This is not a theoretical issue, but rather a practical matter. There are many variables. It depends on whether the new economies will become strong enough to demand some change of these institutions.

Third, sovereign equality has never fully applied in certain institutions. The IMF, for example, is ruled by financial power. But sovereign equality, as one of the fundamental principles of international law, will remain valid and important—not in the sense of how power is divided, but in the sense that strong states must respect the weak. This is the essence of it.

Also, consistent with the principle of sovereign equality, we have Article 2(7) of the UN Charter—the non-interference principle. But as the global environment changes, if we really mean to have a more just world based on law, there will be some change. It is not purely a legal matter. These changes must be understood in a broader context.

José Alvarez

The second theme in the title of this panel is sovereignty. In his book, Joel describes sovereignty as contingent. Some folks have said it is waning, dying, or even dead. I want to start with Bruno, who has written about the UN Charter. The Charter talks about sovereign equality and the preserve of domestic jurisdiction. Some would call it an engine for creating more states, and it successfully did so during the de-colonization era. But the Charter also mentions human rights. So how should we think about sovereignty, the continuing value of it as a concept, as a principle?

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Bruno Simma

May I follow my routine by first taking up something that came up in the preceding round of questions?

José Alvarez

Sure.

Bruno Simma

I agree with most of what both Hanqin and Joel said. I like what they said about the constitutions of international institutions changing with the change in power structures. It just occurred to me that, with regard to the Security Council, Germany might simply have missed the train. It is not 1945, and now Germany is back as a global leader. But fighting for a permanent seat in the UN Security Council is yesterday's issue. Changes in the power structure have overtaken the problem, made it obsolete. Germany would be wiser to expend effort concentrating on the role of the EU in the Security Council, or else leave the Council as it is. I don't know whether anyone from the German mission to the UN is in the room, but that is my conviction.

Another point about institutional reform is that membership should also depend on the conviction and capability of a state to use its role in these institutions effectively. There again, with regard to issues that the Security Council is debating, Germany is reluctant for reasons of domestic politics.

Now you asked about human rights, correct?

José Alvarez

Sovereignty. Is it a legal concept or is it—

Bruno Simma

Yes. I like sovereignty.

[Laughter]

José Alvarez

The ''S'' word—should it be demolished? What is it?

Bruno Simma

The meaning of the term ''sovereignty'' has changed. It is not just a barrier to outside interference, a right to be left alone. Sovereignty now also entails responsibility. Sovereignty will shield a government as long as it acts responsibly and respects the human rights and the human dignity of its people. By that definition, sovereignty is fine.

I agree with an observation Martti Koskenniemi made a few years ago when he said the sovereign state is in many instances the protector of human rights, and not all developments at the international or supranational level really work in favor of the individual. Consider

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the Security Council's targeted sanctions regimes, by which people are placed on a list and their assets frozen. In the *Kadi* case, the European Union popped up as a kind of protective shield. The same can and should happen with national governments protecting the citizens, because they are still sovereign.

José Alvarez

You mentioned the ''R'' word—''responsibility.'' That raises the issue of the ''responsibility to protect'' (R2P), about which there are several questions from the audience. Is R2P part of this contingent sovereignty? If you violate the duty to protect your own nationals, your sovereignty goes ''poof.'' Is that right? Do any of you disagree with that?

Bruno Simma

I've always looked at R2P from the historical viewpoint, how it came about. It emerged in the aftermath of the Kosovo intervention, from the report of the International Commission on Intervention and State Sovereignty, sponsored by Canada. I am not a fan of R2P, but I have followed the debate. The question is: How far does it go with respect to military means to enforce human rights? I accept the argument that if a state is not able or willing to protect its citizens, the international community kicks in. That is fine with me, as long as the Security Council authorizes the intervention under Chapter VII. But if it is understood to mean humanitarian intervention by individual states or a coalition of states without Security Council authorization, then governments likely to be on the receiving end continue to view it with great suspicion, for good reason. So R2P is fine. When you talk to students and you know what it means, you show that you're up to date.

[Laughter]

If you took a vote in the Peace Palace about R2P, I don't know what the result would be. But outside the Palace, I think I know.

José Alvarez

Any other comments on R2P?

Joel Trachtman

Can I start with sovereignty and work my way back to R2P?

José Alvarez

Briefly. We're running short on time, and we have many questions.

Joel Trachtman

So very briefly, I agree with what Judge Xue said about sovereignty and about the fact that states bind themselves according to the *Lotus* principle, and then in a sense reduce what is left of their sovereignty. I follow the functionalist perspective of Haas and Mitrany, but I believe there was an error in their understanding. They thought there would come a tipping

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point when loyalty would shift and the state would disappear. I agree with Judge Xue that we should not expect that to happen. But I do, in the functionalist/federalist vein, see a possibility of governmental functions being exercised at the international level. Now, it's important to say that, according to the principle of subsidiarity, those are different government functions than the governmental functions of the state. They are governmental functions governing states. That's the job of international law. So I believe there is a problem with the teleological approach of the functionalists in that they assume a move towards a world state.

But I also believe—and there's a nice statement of this by Amartya Sen in his recent book—that there is a tyranny of ideas in seeing states, not as practical constraints to be addressed, but as divisions of basic significance in ethics and political philosophy. So I think the job of international lawyers is to recognize that contingency, to recognize that many—and this is the subject of my book—many issues that governments must deal with cross borders. International law plays a remarkable role as a kind of transmission belt or interface between the governments of different states to allow them to engage in a different kind of governmental function. We need to begin to think about multiple sovereignties or multiple centers of government in a federalist vein.

José Alvarez

Back to R2P. I want to pose a question to Judge Xue. How do you see the recent action in Libya, as well as the Security Council's authorization of ''targeted offensive operations'' in the Congo? Are these a vindication of R2P, whenever we have nine votes in the Security Council?

Xue Hanqin

If R2P is applied with a UN mandate in accordance with UN Charter principles, it is fine. The problem is that we, in our scholarly writings, tend to treat R2P as a general principle of international law. Once you claim it as a general principle, you may say any state or group of states can intervene, on the basis of R2P. Those states in effect become the world's police. That is the situation we must try to avoid. The R2P discussion is tied to the general discussion about the relationship between sovereignty and non-interference. The whole debate is whether and to what extent we should give up on Article 2, Paragraph 7 of the UN Charter in the name of human rights and international criminal justice. That is the essence of the debate.

If there is indeed a level playing field between all states, with no imbalance in the power structure, I would say it's fine and maybe this is the goal we should try to reach. But the hard fact is that we are not there yet. Consider the International Criminal Court. After 10 years, when we look at the Court's work, we can see African countries questioning why only African leaders are being put on trial and why only developing countries seem to be criticized for human rights records. When you apply the rules, you have to keep in mind the extent to which the principles apply to everybody on equal footing. The hard fact is oftentimes we see the strong propose and the weak dispose.

José Alvarez

And do you think China is still part of the weak?

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Xue Hanqin

It is not part of the weak. But it is regarded as ideologically different, as an ''authoritarian'' country. So it is always a target for human rights criticism, which I think is unfair. That's why I used my Hague lectures to provide a comprehensive overview of what China has achieved and how China understands the cause of human rights.

José Alvarez

Judge Xue just referred to authoritarian regimes. In your book, Joel, you suggest that liberal states behave better and that the future is—what sounded to me like—a western model of democratization. The last part of our panel title is, ''The Future of International Law.'' So is the future of international law Anne-Marie Slaughter's world of liberal states?

Joel Trachtman

Well, there has been a remarkable trend towards democratization in recent years, recognizing that there is ebb and flow. I wouldn't adhere, though, to the idea that democratization is essential to the growth of international law, nor to the idea that democratic states are somehow better. I do think that accountable governments—and if accountability is your definition of democracy, then it's the same thing—will want to form international law more. I made a conjecture in the book about what kinds of governments would be more interested in international law. My idea is that more accountable governments would be more inclined to seek greater achievement of the preferences and the goals of their citizens rather than the maximization of their own ability to stay in power. In order to maximize the preferences of their citizens, they would enter the market of international relations in order to make transactions in authority: in order to establish new international legal rules and institutions. So for those reasons, with democratization, we will see more international law.

José Alvarez

Judges Xue and Simma: Any comments from either of you on that?

Xue Hanqin

I think it's natural for western democracies to apply international law because of the history, the nature, of the international legal system. We know international law derived from European Christian civilization. If you look at past sources and analogies of international law, you can see the relations between international law and western legal systems. It's only natural. But now the question is whether, when a country adopts or applies international law, it means it is moving towards western democracy. If that is the case, it would mean that by accepting international law, a country would have to give up its political system, ideology, tradition, and culture. International law would then become a dangerous thing for those countries.

We have to recognize that states, no matter from what historical or cultural background, do accept that we need an international legal order. This is the first thing. Secondly, we also accept that because western countries started the industrial revolution and modernized early, they do have good experiences from which other legal systems can learn. Thirdly, in international relations today, we need more legal dialogues. We need to help developing countries

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as they seek to strengthen the rule of law, but not at the expense of the political system, culture, religion, and tradition they have chosen for themselves.

So it is not mutually exclusive. I have to stress that nowadays there are increasing interactions and efforts at the regional level to promote international law through dialogues. For instance, in Asia recently we established the Asian Society for International Law. We now have an *Asian Journal of International Law*. Importantly, the Society has chosen English as its working language. This means that for the purpose of communication and dialogue, we have picked up a non-regional language. Language-wise, it is difficult for non-English-speaking scholars.

I appreciate very much when President Donovan the other day said we have to envisage a more just world based on law in the 21st century. This is not only for the west, it's for the world—the west and the rest. What we can do? I think we need more dialogues. And on that basis, I think sovereign equality, sovereignty, is still important because at the end of the day, if we put humanity at the center of our attention, we have to strengthen the rule of law both at the national level as well as at the international level.

José Alvarez

Bruno, the future, what do you see in terms of international courts? Should they be talking more to each other, citing each other's opinions?

Bruno Simma

Again, following the routine—

[Laughter]

—I can agree 100 percent with what Joel said on your last question, and I can agree with Judge Xue Hanqin until her first or second ''but.''

[Laughter]

I agree with Joel that at the end of the day there is a greater chance that democratically governed countries will comply with international law, simply because the procedures of domestic incorporation, et cetera, are mainly to be found in constitutions that you could regard as democratic. I also agree with Hanqin when she insists that international legal obligations have to be adhered to by states irrespective of the system of government. The point I would add, in one sentence, is that if states take their human rights obligations seriously, irrespective of the system of governance, then most of the concerns we have with regard to democracy or some more Singaporean model or some other model, would just fall away. Maybe that is what has become the dialectic here.

With regard to the courts, if you look at the International Court of Justice—harking back to an earlier question—I think it would be wrong to expect of the International Court comprehensive institutional reform. I think it will remain the only Court with general competence, but it will also retain features that people like Antonio Cassese in his recent book regard as outmoded. He calls it an arbitral court, and I know how allergic Rosalyn Higgins is to that term—

[Laughter]

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—but I think it is true that the ICJ has some arbitral features. But it also has general competencies. So I think instead of waiting for institutional reform, we should accept that the Court is not simply one among many. As the only World Court of general competence, it will remain preeminent. In November 2012, I had a chance to sit in on the *Peru-Chile* case, and I watched one of the demi-gods of international arbitration with experience handling cases involving hundreds of millions of dollars more or less routinely. He stood before the ICJ pleading for 20 minutes about some pole on the coast between Peru and Chile and the relevance that pole had for the boundary. What that shows is that, irrespective of what other tribunals may pop up, even practitioners still revere the ICJ and give it a very particular degree of respect.

Of course, the Court will have more and more company. One particularly important institution is about 100 yards away, namely the Permanent Court of Arbitration. If you look at the PCA, it was considered brain-dead until a few decades ago. Now it administers 71 cases: five interstate arbitrations, 48 cases based on bilateral investment treaties and multilateral treaties, and 18 contract disputes. In the past 12 years, there have been 152 arbitrations at the PCA versus 34 in the preceding 100 years. That is really remarkable. It is remarkable what effort the PCA has made to become more user-friendly, and the consequence is really staggering. Out of eight UNCLOS cases, seven have ended up before arbitral tribunals administered by the PCA, and only one, the first one, went to ICSID.

José Alvarez

I'll ask for one final quick interjection from each of you. Looking ahead 25 years—your book, Joel, is about futurology—what piece of advice would you give this crowd about how to prepare for the Annual Meeting of the ASIL 25 years from now in terms of the future of international law? In two sentences or less.

[Laughter]

Joel Trachtman

Shall I start?

José Alvarez

Yes.

Joel Trachtman

Well, stick with it.

[Laughter]

I think it's a great time to be an international lawyer. It is an area of growing importance. It will require ever more nuanced understanding of the politics of different states and how different states can relate to one another and how international law can respond to those states' needs.

José Alvarez

Judge Xue?

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Xue Hanqin

If the power structure of the world order is more balanced, I think international lawyers will have a bigger role to play in the process of creating a more just world in the 21st century.

José Alvarez

As usual, Bruno gets the last word.

Bruno Simma

Yes, I agree with everything my co-panelists have said.

[Laughter]

In studying international law, don't neglect public international law proper.

José Alvarez

Should they study it in Europe instead?

Bruno Simma

Well, I have been influenced by Michigan Law School and the effect that transnational law has had on the teaching of public international law. Classes in the latter are becoming fewer, which in a way is understandable. But retain public international law as well, because it provides the historical, cultural, and value basis for the rest of what you study. As for the rest, concentrate on dispute settlement, not just before the ICJ, which is always interesting, but also international arbitration, investment, commercial arbitration, just to be able to make some money—

[Laughter]

—and to be able to pay the fees for attendance at the ASIL Annual Meeting 25 years from now.

[Laughter]

José Alvarez

Which will be very, very high. Well, you heard it here first, Donald.

[Applause]

Donald Francis Donovan

It is clearly the mark of a successful Annual Meeting when a discussion at the final event is as compelling and the participation as full as anything that came before. So my thanks to

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Professor Alvarez, Judge Simma, Judge Xue, and Professor Trachtman for a truly compelling final event. I would also like again to thank Kal, Laurence, and Stanimir and their colleagues on the Program Committee, and Betsy and her colleagues at Tillar House, for making this all possible and being the true facilitators of this Annual Meeting.

If I may end with one final note, I would like to endorse one of Judge Xue's final remarks and reiterate the hope of this Society that, in collaboration with our colleague societies around the world, we continue to foster, facilitate, and enable the kinds of international-transnational dialogues that will at the end of the day strengthen the rule of law on both the international and national levels. All of us can share in that goal, and we will look to you at the next ASIL event or collaborative event, but at a minimum, the mid-year ASIL meeting in New York and our joint conference with the International Law Association back here in D.C. in a year.

We're closed. See you shortly.

[Applause]

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