

Anarchy, Hierarchy, and Actio Popularis: An  
International Governance Perspective

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## Introduction

In raising an epistemological question regarding International Relations (IR) theory, James N. Rosenau<sup>1</sup> notes that the ontology prior to World War II focused on balance of power as the common sense of that epoch; and in the subsequent period, the Cold War with its bi-superpower rivalry served to organize thinking about the world. But, he hastens to add, neither of these perspectives pertains to the prevailing international order since the beginning of the 1990s. He then makes a case for a new ontology of global governance.

The major theme of this ISA 2004 convention, “Hegemony and Its Discontents,” could very well be an occasion for some rethinking about IR theory, including the relationship between international politics and international law. Some of the questions examined on this panel include: How does hegemony (as exacerbated by its unilateral and preemptive impulse) threaten the sanctity of international law? Conversely, how does international law (along with international institutions) possibly constrain hegemonic power? Is hegemony or hierarchy a better explanation for international stability and cooperative behavior? What thought should we give to the distinctive rise of certain community interests over and above the egoistic interests of states, under the doctrine of *actio popularis*, as a modification of anarchy as well as a cushion against hegemony?

The present paper is an attempt to address some of these questions from an international governance perspective. First, however, a few words are in order about

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<sup>1</sup> Rosenau 1990, 290.

international governance both as a focus and an approach. There is as yet no standard definition of international governance, a relatively new subject that began to appear in the IR literature only since the early 1990s.<sup>2</sup>

According to one source, governance is the sum of “the many ways [by which] individuals and institutions, public and private, manage their common affairs.”<sup>3</sup> In James Rosenau’s words, governance “refers to mechanisms for steering social systems toward their goals.”<sup>4</sup> Robert Keohane defines governance as “the process and institutions, both formal and informal, that guide and restrain the collective activities of a group.”<sup>5</sup> As will become obvious in the discussions below, *international governance* is broadly conceived here as the shaping or managing of some form of rule-based and often hierarchically ordered relations in the international system, through the medium of institutions and following pre-set norms, with the effect of conditioning a common pattern of thought or behavior of states and non-state actors. We reserve the term “global governance” —often used as a synonym by some writers—only for situations involving the symbiosis of the ecosystem and the Westphalian system.<sup>6</sup>

Mainstream IR theory, to date, is conceived in the neorealist paradigm of anarchy. From its central premise of the lack of a supranational authority (hence, anarchy), such as a world government would embody, comes a derivative of self-help, as states are left to their own means in defense of their survival and major interests.

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<sup>2</sup> Examples are Rosenau and Czempiel 1992; Yarbrough and Yarbrough 1992; Young 1997; and Reinicke 1998. Also, Bromley 2001, which is one of the *Governing Europe* series by the same publisher. For full citations, see the References. If it is any indication, the journal *Global Governance* was launched in 1994.

<sup>3</sup> Commission of Global Governance 1995, 2-4.

<sup>4</sup> Rosenau 1995, 14.

<sup>5</sup> Keohane 2002, 15.

<sup>6</sup> Lynton K Caldwell (1990, 8) observes that humanity lives in two realities: (a) the ecosystem (i.e., the earth and its biosphere), and (b) the world, which is a “creation of the mind.” Global system, therefore, is the symbiosis of these two realities, hence “global governance.” Save for that, governance in the Westphalian system is international governance, in our usage here.

This logic reconfirms the cardinal tenet of classical realism that the quest for power is the sine qua non of statecraft, to the exclusion of normative desiderata such as values, order, and international law.<sup>7</sup>

In this paper, I raise a basic question: To what extent is anarchy mitigated both by the element of hierarchy in the structure of international relations and by the rise of an international community (as explained below)?

### Hierarchy vs. Anarchy: What Neorealism Cannot Explain

Orthodox neorealism rejects the notion of “modified anarchy,” lest its theory’s explanatory power is vitiated by a mere promise of descriptive accuracy.<sup>8</sup> My contention is whether the strictly anarchic model can adequately explain existing international relations if the reality of hierarchical structures is not accounted for.

In a cogent study, *Hierarchy Amidst Anarchy*, Katja Weber points out that international politics over the last two centuries is “replete with cooperative arrangements that are hierarchical, that is, that require the curtailment of some freedom of action, and that display different degrees of institutionalization.”<sup>9</sup> Some of the most conspicuous examples of these hierarchical arrangements are: the Concert of Europe, the various wartime and postwar alliances, such global and regional peace organizations as the League of Nations, the successor United Nations, the Organization of American States (OAS), and the Organization of Security and Cooperation in Europe (OSCE), plus a vast array of the trading blocs (e.g., EFTA, NAFTA, ASEAN, APEC, MERCOSUR, etc.).<sup>10</sup>

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<sup>7</sup> See Hsiung 1997, 5-7.

<sup>8</sup> Waltz 1979, 114-115.

<sup>9</sup> K. Weber 2000, 1.

<sup>10</sup> EFTA stands for European Free Trade Association; NAFTA, for North American Free Trade Association; ASEAN, for Association of Southeast Asian Nations; APEC, for the Asia Pacific Economic Cooperation forum; and MERCOSUR, for Southern American Common Market, which has four members: Argentina, Brazil, Paraguay, and Uruguay.

Hierarchies are characterized by divisions of labor, specialization, and authority structures, thus recalling a governance model. Anarchies show the opposite characteristics: there is no division of labor, and no presumption of obedience. War is the ultimate arbiter of conflicts of interest, and self-help is the only reliable strategy for survival or defense of national interest. When pushed to the logical (or illogical) extreme, this conviction leads to hegemonic unilateralism and preemption in the case of a dominant power.

While most hierarchical structures are formal and institutionalized, hierarchy is not necessarily always associated with institutionalization. One example is found in the long East Asian history of international relations, which is woefully understudied in the West. For hundreds of years, going back even before the rise of the West after 1500, East Asian international relations were always hierarchical, yet without formal institutional underpinnings.<sup>11</sup>

The details of the behavior of states in the East Asian hierarchical system in history need not detain us. But, certain lessons from that body of experience have contemporary significance, more especially on the mystifying question why China is not behaving in such a way as to balance against the United States, the world's sole superpower, as neorealist theory predicts it will.<sup>12</sup>

#### The Explanatory Power of a Hierarchical Model: Lessons from the East Asian Experience

Extrapolating from the long record of East Asian international relations of 1300 through 1900, and using social-scientific language, David Kang has developed a model of Asian hierarchical order.<sup>13</sup> It stood in sharp contrast to the Eurocentric order,

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<sup>11</sup> Fairbank 1968; Krasner 2001; Kang 2001.

<sup>12</sup> Cf. Waltz 2000, 28-32; 41. Also Layne 1993.

<sup>13</sup> Kang 2001, 135.

which “consisted of formal equality of sovereign states combined with informal hierarchy since the largest powers had disproportionate influence on the system.” In the Asian model, on the other hand, the system “consisted of formal hierarchy [but] informal equality.” In this system, which consisted of China as the central state and the peripheral states as the lesser states or “vassals,” Kang points out, “as long as hierarchy was observed, there was little need for interstate war.” Thus, he finds fewer wars in the Asian system than in the Eurocentric system over six centuries.

I hasten to add that the Chinese view of hierarchy was not a one-way street; it allowed for China’s acceptance of an inferior status for itself in the event of an inverse hierarchy. This point came to the fore in some in-depth studies of China’s pre-modern relations with neighboring states on its periphery. A classic Harvard study of the traditional Chinese world order, orchestrated by John Fairbank, the doyen of Sinology, for example, found that the so-called “tribute system” (encompassing China’s hierarchical relationship with the so-called “vassal” states on its periphery) was not based on ethnic Sinic superiority, as many in the West (especially adherents to any cultural theory) might assume.<sup>14</sup> Translated into modern social-scientific terms, the hierarchy was formed by the natural interaction of states up and down the rungs of the prevailing ladder of relational power, although it was often expressed in quasi-familial terms (like uncle-nephew or big brother-small brother relations).

In normal pre-modern times, the power ratio was usually overwhelmingly in China’s favor. During the mid-fourteenth through the mid-seventeenth centuries, for example, China’s GNP was 28-30 percent of the world’s total output,<sup>15</sup> or about where the United States at the peak of its power stood, relative to the rest of the world during the 1950s. By 1800, or on the eve of the West’s inroads in the nineteenth

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<sup>14</sup> Fairbank 1968, 1-10.

<sup>15</sup> Frank 1998, 52-130.

century, China still accounted for 33 percent of the world's manufacturing output.<sup>16</sup> Hence, China was at the center of the East Asian hierarchy, as reflected in the country's Chinese name, Chung-kuo (or Zhongguo), literally meaning the Central Kingdom. However, it needs to be emphasized, during times when China was weak relative to its neighbors, as during periods of internal division or unrest, the Chinese court showed flexibility enough to accept a reversal of the patron-client status in the hierarchical order.

During the weak Southern Sung Dynasty (1127-1279 A.D.), for instance, the Chinese Emperor received Chin (Jin) ambassador in an East-West position, instead of the usual North-South position that suggested Chinese primacy in the hierarchy.<sup>17</sup> To make peace in 1138 with Jin (a state founded by the Tungusic people, also known as Nuchen, in the Sungari basin in Manchuria), the founder of the Southern Sung empire in China even accepted the status of a "vassal" (chen) himself. His successor improved the status to that of a nephew (chih, also transliterated as zhi) and addressed the Jin emperor as younger uncle (shu), i.e., the father's younger brother. The Sung emperors sent to their powerful northern neighboring states annual presents of large amount and value, nominally as a kind of economic aid, but actually as tribute in reverse.<sup>18</sup>

These little known episodes are enough to indicate that in the traditional Sinocentric hierarchy of East Asian international relations, the patron-client relationship was at times reversible, although for most of the time Chinese primacy was the norm. After the West came and especially after China's defeat in the Opium War of 1840, however, the hierarchy was permanently reversed, and the Chinese learned to live with the reversal. The key is whether China is "in" the world's existing

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<sup>16</sup> Segal 1999, 25.

<sup>17</sup> Schwartz 1968, 280.

<sup>18</sup> Tang 1968, 20-21.

hierarchical system. Maoist China, despite its weakness and an economy in disarray, revolted against U.S. hegemony precisely because the regime was excluded from the international system by dint of the U.S. non-recognition policy.

In the Kang model of hierarchical order, extrapolated from six centuries of East Asian international relations, he finds bandwagoning, not power balancing, to be a “central feature” in the behavior of the secondary states, if the hierarchical structure is overwhelming.<sup>19</sup> To the extent that the “central state” has no territorial ambitions, and when there exists a method for resolving conflicts, the model shows “all nations in the system can find an equilibrium that involves acquiescence to the dominant state.” Because other states know opposing the central state is near-impossible or too costly and that conquest also entails costs, “they thus defer to [the central state] precisely to the point where expected costs of conquering them slightly exceed the expected benefits.” From this equilibrium by acquiescence, the secondary states are able to retain their autonomy and de facto equality while enjoying the stability and other benefits the hierarchical order bestows. Hence, bandwagoning occurs because it is the optimal choice for the secondary states in a steep hierarchical structure. Because of this rule of bandwagoning and the underlying equilibrium by acquiescence, Kang finds greater stability and fewer wars in the East Asian system than in the Westphalian system over a span of six centuries.

If there is any inferential value from this finding from Kang’s model, it offers a plausible explanation why Chinese behavior, in not balancing against the United States today, is consistent with the bandwagoning behavior of secondary states in a steep hierarchical system. The kind of power-balancing that rivets the attention of neorealists like Waltz and Layne was indeed the norm in the Westphalian system from 1648 to at least 1814. And the reason, as K. J. Holsti observes, is that the

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<sup>19</sup> Kang 2001, 123, 129-130.

## Westphalian

system during most of the said period was one of polyarchical order (made up of eight major powers and many lesser states), in which anarchy, not hierarchy, dominated.<sup>20</sup> One could argue that the polyarchical (hence anarchical) structure returned after 1848 and continued through the first part of the twentieth century.<sup>21</sup> The neorealist model can explain these periods of the Westphalian system, but obviously not others, including the new post-Cold War era, as we have seen, and possibly even the Cold War period. During the latter, in retrospect, two separate hierarchies were pitted against each other, in each of which bandwagoning, not power balancing, was the optimal choice for the secondary states. Steep hierarchy, to reiterate, explains the difference, or divergence from the realist iron law of power balancing.

I might add that if bandwagoning is the rule for secondary-states in a steep hierarchical system, a protest by them may take the form of feet dragging—i.e., refusal to do the bidding of the dominant power--rather than outright power balancing against it. Thus, the refusal of France, Germany, along with Russia and China, to support America's war against Iraq in the spring of 2003 may be considered feet-dragging behavior of this nature.

To reiterate, China's disposition toward hierarchy, due to its conditioning historical legacy, as just noted, may readily account for why China's behavior is not one seeking to balance against the United States, contrary to the expectations of Neorealist theory. The critical point is that in contrast to Maoist times, China is now "in" the system, albeit a hierarchical one overshadowed by predominant U.S. power.

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<sup>20</sup> Holsti 1995, 44.

<sup>21</sup> After a brief interregnum of Concert of Europe (1815-1848), the world saw the return of competitive alliances, or a system of balance of power. See Albrecht-Carré 1958; E. H. Carr 1961; and A.J.P. Taylor 1971.

Mainstream IR theory holds that the U.S. predominance, after the collapse of Soviet power, will illicit efforts by other states (one candidate is China) to balance against it. For “unbalanced power, whoever wields it,” in a famous Waltzian refrain, “is a potential danger to others.”<sup>22</sup> Indeed, in support of Waltz’s view, plentiful precedents can be found in the Western history of international relations, as states rose to stem the drive for dominance of Charles V, Hapsburg ruler of Spain, of Louis XIV of France, of Wilhelm II and Adolph Hitler of Germany. But, in stark contrast, the bandwagoning behavior of China, in not challenging the U.S. hegemony, defies the iron law of power balancing in mainstream IR theory.

In a larger sense, the same reason—i.e., hierarchy-- may account for why Japan and the European powers, the only other states (than China) that are for Waltz the rightful candidates to be America’s challengers, have not acted any differently, as they also have not acted to balance against U. S. dominance. (Parenthetically, Russia is still trying to put its house in order after the collapse of its Communist system.) This point makes more sense if we recall Susan Strange’s suggestion that the more reliable way of comparing the United States and its allies (and foes) is to use the measure of “structural power,”<sup>23</sup> as distinct from the usual relational power. In each of the four structures—i.e., security, production, finance, and knowledge structures-- her study found that the United States enjoyed an indisputable edge. “Neither Europe nor Japan,” she concluded, “can equal Americans’ performance across all four structures. Since each of them interacts with the other three, and the Europeans and Japanese are so far behind militarily, it seems likely that America will enjoy the power to act as hegemon for some time to come.” In other words, America’s relations with its traditional European allies and Japan were hierarchical by this measure.

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<sup>22</sup> Waltz 2000, 28-32.

<sup>23</sup> Strange 1987.

The time has changed since Strange's study, but the structural power ratio she mapped out has largely remained true. Although the erstwhile Cold-War alliance system has lost its original meaning, the cross-Atlantic security structure has survived, and NATO has expanded in membership to accommodate the new European geopolitical realities. So have the other three structures survived the change of times. Triumphant capitalism following the collapse of Soviet power has only bred a resurgent American self-confidence, so much so that at the beginning of the new millennium there are signs of a "new [U.S.] hegemony."<sup>24</sup> By the end of the 1990s, or a decade following the end of the Cold War, America's military expenditure had reached the same level as the defense expenditures of all the rest of the world,<sup>25</sup> and its military prowess is second to none. The almighty dollar is the only national currency recognized by all countries.<sup>26</sup> Finally, only the United States has global reach that extends across the Pacific and the Atlantic, into Central and Latin America, and deep into the heart of the Middle East and South Asia.

The question remains: Is it hierarchy or hegemony that better characterizes the U.S.'s relations with the rest of the world. Peter Van Ness calls it hegemony, which in his usage "is not an anarchical system"<sup>27</sup> but connotes hierarchy. Hence, it boils down to hierarchy as a better explanation for the bandwagoning behavior of the secondary states noted above.

In an interesting thesis regarding the post-Cold War world politics, John Ikenberry<sup>28</sup> suggests that the United States, unlike the last sole superpower (Great Britain) before World War II, relies more on working through a web of multilateral institutions (that is, at least until George W. Bush) than on the balance of power in

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<sup>24</sup> Cox 2001, 122.

<sup>25</sup> U.S. defense budget for 2003 stood at a whopping \$393 billion, the highest since Ronald Reagan.

<sup>26</sup> Ohmae 1995.

<sup>27</sup> Van Ness 2002, 132-133.

<sup>28</sup> Ikenberry 2000.

order to maintain stable relations despite the extreme disparities in power among the actors. This thesis also tangentially touches on the question why no country thus far is power-balancing against the United States. If the thesis is true, what has changed is the name (i.e., nature) of the game, from the traditional power balancing to a new game of power constraining by means of international institutions. It adds an institutional explanation to the bandwagoning behavior of the secondary states in the system. What has not changed, however, is the fact that the system marked by the extreme disparity in power that Ikenberry refers to remains a hierarchical one. Hence, institutionalized hierarchy under pax americana, in this case, has substituted for the erstwhile power balancing game under British hegemony.

Community Concerns vs. Egoistic Interests of States:  
Need for a Community-Centered Paradigm?

In this section, we shall explore the implications of a growing world community with its own larger concerns and values, often challenging the egoistic interests of individual states. The goal of this discussion is likewise to ascertain the interplay of international politics and international law, as seen through the prism of international governance.

From the international governance perspective, states have rights and duties not only vis-à-vis one another, but also vis-à-vis the world community (or international society). Since mainstream IR theory is silent on this point, we need first to dwell briefly on the concept of community (or society) as in the term “community of nations.”

Unlike Kenneth Waltz, not all realists are agreed on isolating the state from community, any more than excluding all normative principles from discussions of IR theory. In his 1939 classic (republished in 1961), E. H. Carr, for example, saw politics as being made up of both utopia and reality. He spoke of “man in society” as

displaying alternately the qualities of “egoism” and “sociability.”<sup>29</sup> By the same token, states-in-society do not behave the same way as states-in-themselves. Obviously, Waltz and the Waltzian neorealists looked only at egoism of states, not their likely sociability --nor the community of which they are a component.

Fellow realist Hedley Bull, agreeing with Carr, considered that international order --or “order in world politics. . . [that] exists in the modern system of states”-- is both possible and desirable in the anarchic system. For him, this order among states reflects the coexistence of all key elements singled out respectively by the Hobbesian, the Kantian, and the Grotian traditions.<sup>30</sup> Bull’s discussion of international order, unusual for a realist, comes in the course of his introduction of the “idea of international society,” which is even more unusual.<sup>31</sup> Because of this, some critics may disown Bull as a realist. However, in their widely-consulted, annotated survey of contending IR theories, James Dougherty and Robert Pfaltzgraff lumped together Hedley Bull and Kenneth Waltz as exemplary writers on the “anarchical system” in neorealist literature.<sup>32</sup>

According to the English School of International Relations, to which Bull belonged, an international system is a prerequisite for international society, and it exists when there is interaction among states, such as diplomatic communications, exchange of ambassadors, conclusion of agreements, etc. By contrast, Bull points out, an international society exists when a group of states “conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions . . . such as . . . international law, the machinery of diplomacy and general international organization, and the customs and conventions of

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<sup>29</sup> Carr 1961, 93-95.

<sup>30</sup> Bull 1995 (first published in 1977), 51.

<sup>31</sup> Pp. 23-26. Bull goes one step further to discuss “world order,” and describes it as “order among mankind,” which is “morally prior to international order,” which is order among states (p. 21).

<sup>32</sup> Dougherty and Pfaltzgraff 2001, 623.

war.”<sup>33</sup>

While an international society “presupposes an international system,” he adds, “an international system may exist that is not an international society.” Above all, in international society, states are conscious of certain “common interests and common values” that they share together (p.13). Neorealist theory as expounded by Waltz stops at the stage of system but never looks beyond that; and by spurning society it also spews the common interests and common values inherent in it.

In our usage, for a number of reasons we prefer the term “community” to “society,” although they are mostly synonyms. First, “society” smacks too much of *Gesellschaft*, characterized by formal, contractual bonds and arrangements. “Community,” on the other hand, connotes more an organic grouping, like *Gemeinschaft*, in which members are aware of one another and share certain common loyalties and values, while, like in a *Gesellschaft*, they manifest a feeling of belonging together. Second, community is a more decomposable concept. It may encompass a “global civil society,”<sup>i</sup> but it may also be at a lower than global level, such as the regional preferential trade associations. Third, functionally-defined groupings in certain issue areas are referred to as a community, not society. For example, in the security area, NATO is more apt to be thought of as a community than a society. Whaling nations in aggregate may be identified as the international whaling community. The G-7 group invokes the image of an esoteric community concerned with the global economic health. (When one talks about the cloistered *tete-a-tete* of G-7, it probably is thought of as a society *qua* club.) Lastly, when endowed with sufficient institutional sophistication, a community of nations, such as is found within the WTO or the EU, may actually partake of the qualities that Bull attributes to an “international society.” In that sense, community’s connotation may include society,

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<sup>33</sup> Bull 1995 [1977], 13.

but not the other way round. The more elastic concept of community, therefore, fits in more comfortably with our discussion of the international equivalent of “man in society,” or state in the collectivity of nation-states (community).

The *Jus Cogens* and Obligations *Erga Omnes*  
in the Community of Nations

The most dramatic indication of the rise of community in the consciousness of nation-states is the universal acceptance of the concept of *jus cogens*, or a body of peremptory norms that transcend, and override, the wills of national sovereignties. The concept, a legal emanation that grew out of the natural law school, was known to exist as *ordre public international*<sup>34</sup> in Europe, where the concept of and identification with an international community has existed the longest in modern history. It was codified as a new rule into the 1969 Vienna Convention on the Law of Treaties (Article 53), the body of norms that govern the making and breaking as well as interpretation of international agreements. *Jus cogens* is non-derogable and invalidates subsequent norms generated by treaty or by custom that militate against some larger community interests. An example is a hypothetical agreement contracted by two or more sovereign states to engage in, say, slave trade or narcotics trafficking, or to launch an armed attack against a third party or otherwise disturb peace and stability of the world community.

This prohibition goes against the traditional concept of state sovereignty and the positivist international law associated with it, under which any two or more consenting sovereign states would have been perfectly within their rights to enter into an agreement committing them to any such endeavor as they might choose. But the *jus cogens* rule means that any such endeavor detrimental to larger community

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<sup>34</sup> Schwarzenberger 1965, 100-103. The concept should not be confused with that of “order public” in domestic law, such as Swedish law, as discussed in Eek 1973; see also Rossi 1993, 177.

interests is null and void.<sup>35</sup> In the 1986 *Nicaragua Case (Merits)*, the International Court of Justice (ICJ) ruled that the “law of the [U.N.] Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”<sup>36</sup>

The political significance for the world community of the *jus cogens* rule and its near universal acceptance should not be lost. It signifies that states --at least the initial 91 states that became parties to the 1969 Vienna Convention, plus other states that have since acceded to or otherwise accepted it, and the ICJ and many international lawyers-- now endorse and observe the dictate, as upheld by *jus cogens*, that the world community has interests and stakes that prevail over the contrary sovereign will and egoistic interests of individual states.

Another similarly significant landmark development is the crystallization and growing acceptance by states of the principle of obligations *erga omnes* (literally, “as against all”), or the idea that certain crimes or delicts committed by one state are against all other states, or the international community. As the ICJ explained in a dictum in the 1970 *Barcelona Traction* case, “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State . . . .”<sup>37</sup> The Court went on to state that such obligations derive, in contemporary international law, “from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” The ICJ has since applied the *erga omnes* principle in a number of

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<sup>35</sup> Cf. Charney 1993, 534.; see also commentary of International Law Commission, in “U.N. Report of the ILC on the Second Part of Its 17<sup>th</sup> Session,” *American Journal of International Law*, 61,1 (January 1967), 409.

<sup>36</sup> Byres 1999, 184.

<sup>37</sup> *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*. ICJ, 1970. See 1970 ICJ Reports 43. See discussion in Ragazzi 1997 (reprinted in 2002), 3.

cases upholding the following rights and concerns of the international community, as against the interests or policies of individual states.<sup>38</sup>

- (a) The international community's right to be protected against threats to the environment (the *Nuclear Tests Cases*, 1974);
- (b) The community's concern for the right of self-determination of a subjugated people (*East Timor Case*, 1995);
- (c) Punishment against the crime of genocide (*Case Concerning Application of the Convention on the Protection and Punishment of the Crime of Genocide*, 1996);
- (d) The right of the international community to be notified of the laying of mines by one state in the harbor and internal waters of another state (*Nicaragua v. U.S.*, 1986); and
- (e) Protection of the sanctity of the Global Commons from the threat of nuclear weapons (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*<sup>39</sup>).

This list is not exhaustive of the rights, interests, and concerns of the international community that deserve to be protected from the threat, inroads, and infringement of egoism-driven states. But, it is illustrative of the point in question.

The kind of developments discussed here are not just idiosyncratic to international law. It reflects a prevailing mood and sentiments of the international community that cannot be ignored in our grappling with the true complex reality of international relations today. It should be especially noted that the principles of *jus cogens* and *erga omnes*, introduced or highlighted at the peak of the Cold War era, gained immediate wide acceptance, nearly without dissent from any quarter. One

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<sup>38</sup> Byres 1999, 195-203; Ragazzi 1997.

<sup>39</sup> ICJ Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996; 1996 ICJ Reports.

thing that should be noted is that the ICJ simply followed the political climate of the world community. As we have seen, the nations that concluded the 1969 Vienna Convention on the Law of Treaties, representing a wide cross-section of ideological commitments in the world, took the initiative in incorporating *jus cogens* into the treaty's provisions. And, the Court explained that the concept of obligations erga omnes followed the prior outlawing of acts of aggression, and of genocide, etc. I need not point out the obvious that the outlawry of aggression and genocide since the end of World War II reflects a compelling political consensus of the world community.

*Actio Popularis* & "Judicial Supervision":

Vindication of Community Interests

Viewed purely from the realist standpoint, each state is left on its own means, and its interests are always pitted against those of other states, in the anarchic system.

As Waltz puts it:

Because each state is the final judge of its own cause, any state may at any time use force to implement its policies. Because any state may at any time use force, all states must constantly be ready either to counter force with force or to pay the cost of weakness.<sup>40</sup>

The dictum "each state is the final judge of its own cause," much as it is crucial to Waltzian neorealist theory, is ominous in that it rules out acceptance by states of any community-centered interests or any body of norms, moral or legal, held out by the community as obligatory on all states. The claim, however, goes against the true reality of much that is going on in the relations of nations under an institution (*qua* practice) known as "judicial supervision." I am referring to the growing use of a right enjoyed by any member state to take legal action in vindication of community

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<sup>40</sup> Watz 1959, 160.

interests, even if itself is not a victim of a violation by another member state. The measure derives from the principle of *actio popularis* in Roman law, under which a citizen could request the courts to protect a public interest.

As developed through treaty norms and practice, judicial supervision is a mechanism to control and secure compliance (by other states) of international obligations by judicial means. Its remarkable feature is that states that have not been injured directly may initiate judicial proceedings for the purpose of putting an end to violations of international obligations (owed to the community) by another state in a community. For an organized domestic society, this judicial mechanism is a natural outgrowth of its governance system. *Actio popularis* is often invoked in cases before domestic Anglo-American courts -- e.g., in *Huntington v. Attrill App. Cas.* (before the Privy Council of England, 1893); *City of Atlanta v. Chattanooga Foundry & Pipe Co.* (Cir. Ct., E.D. Tennessee, So. Div., 1900); and *Hill v. Boston & M.R.R.* (Sup. Ct. of N.H., 1914).<sup>41</sup> But its duplication in the international community is both good news and a rebuttal to the Waltzian neorealist dictum that, as noted above, “each state is the final judge of its own cause.”

As Yuji Iwasawa’s study<sup>42</sup> illustrates, the institution of judicial supervision has been codified into multilateral conventions since the end of World War I, e.g., the Statute of Memel Territory, the Versailles Treaty, the Genocide Convention, the Racial Discrimination Convention, the European Convention on Human Rights, the American Convention on Human Rights, and the Treaty Establishing the European Economic Community (EEC); plus the GATT/WTO. There is a long list of cases brought under these treaties for the purpose of judicial supervision. Article 24 of the European Convention on Human Rights, for instance, provides that any contracting

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<sup>41</sup> I am indebted to Prof. Frederick Chen of Quinnipiac University Law School (Hamden, CT) for this information.

<sup>42</sup> Iwasawa 2002.

state may complain about any other contracting state for human-rights violations against the latter's own nationals—that is, no more *Nottebohm* or *Barcelona Traction* requirement that an individual be protected only by the individual's own national state with which a “genuine link” can be proven. This liberality made possible the most important set of inter-state cases that came before the European Human Rights Commission, viz., the claims brought in 1967 by Denmark, Norway, Sweden, and the Netherlands against the Greek government under the military regime on behalf of Greek nationals.<sup>43</sup> Contrary to Waltz's wishes, Greece in these instances was not “the final judge of its own cause”!

More especially, *actio popularis* underscores the dispute settlement mechanism of GATT/WTO. The WTO Agreement explicitly authorizes a member state to bring a complaint alleging that the attainment of an objective of the WTO Agreement is being impeded, even when the complainant has suffered no direct injury. In a comparison between the dispute settlement mechanism of the GATT/WTO and the ICJ, Iwasawa finds it truly “phenomenal” that states have made more frequent use of the former. During the 47-year existence of the GATT, more than 300 requests for consultation were made; and approximately 100 panel reports (containing awards or decisions) issued. In the seven years since 1995, when WTO took over, nearly 250 requests for consultations were made, and panels were established in more than 100 cases. All in all, in the combined 54 years of GATT/WTO existence, an aggregate of 230 reports on substance were issued by panels and the Appellate Body. Iwasawa did not give a

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<sup>43</sup> See discussion in Janis 1993, 254.

breakdown between complaints brought under the aegis of *actio popularis* in defense of community interests and those others brought in vindication of the victim's own interests. Nor did another, more statistical study of WTO dispute settlement cases, which showed that from 1995 to January 2002, some 242 requests for consultation were made; and 57 panel reports and 39 Appellate Body reports issued.<sup>44</sup>

Nevertheless, three points warrant special attention.

First, the authorization under WTO rules of third-party complaints in vindication of community interests, like similar measures under the regime of the European Convention of Human Rights,<sup>45</sup> bespeaks a trend of growing recognition of community concerns over nation-state egoism. And, the trend seems headed toward the eventual absorption of the present treaty norms into general international law.

Second, from the governance standpoint, the WTO's carefully designed dispute settlement mechanism has proven quite efficient. Not only does it set time limits for compliance by the losing party with the decisions of a dispute-settlement panel or the appellate body, but it also provides for sanction against noncompliance. In the face of noncompliance, the prevailing party may request authorization from the Dispute Settlement Body (DSB) to retaliate by suspending WTO tariff treatment.<sup>46</sup> Under this procedure, it should be noted, retaliation (sanction) is not a unilateral act, or self-help, strictly speaking. The authorization by a third-party governance agency (DSB), to put

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<sup>44</sup> Park and Panizzon 2002 gave a compatible statistical analysis of WTO dispute settlement cases, which showed that from 1995 to January 2002, some 242 requests for consultation were made; and 57 panel reports and 39 Appellate Body (AB) reports were issued. A total of 54 panel and AB reports was adopted. But, it did not specify how many complaints were brought on *actio popularis* basis, either.

<sup>45</sup> Re the European human rights regime, see Merrills 1993.

<sup>46</sup> Cf. Jackson 1997, 107-137.

it in the language used before, converts a would-be self-help into other-help. From all available sources, it seems that noncompliance is rare in the period since the new WTO dispute settlement mechanism came into effect in 1995. By Charnovitz's count, out of the 43 disputes in which a defendant government was judged "in violation," only two had led to trade sanctions by April 30, 2001.<sup>47</sup> This record attests to the wide support by member states for WTO regimes in the interest of the general weal of the *community*, in contrast to the egoistic interests of individual states.

Third, once the WTO dispute settlement process commences, even when the challenged trade restrictions that have fostered a complaint to the DSB are removed, the DSB panels will continue their proceedings and make findings as to whether the restrictions in question were consistent with the WTO Agreement.<sup>48</sup> The reason is that a larger purpose of judicial supervision is over and beyond the dispute and the specific contentions/interests of the disputing parties in question. Its ultimate purpose is to ascertain and establish a *community*-based consensus on whether the kind of trade restrictions complained of are inconsistent with the WTO Agreement, in order to prevent recurrence of the same restrictions. To establish such a consensus, therefore, third-party members of WTO (even though their interests are not directly injured) have a right to make their views heard by the panel in a case pending before it. An example is the EC – Bananas case, in which African, Caribbean, and Pacific states (the so-called ACP group consisting of former colonies of European powers in these regions) were invited to attend the panel meetings as observers. The complaining states were five, but no less than 20 states intervened as third parties. Thus, the implicit iterated game-- plus the extended participation by extra parties not directly

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<sup>47</sup> Charnovitz 2001, 794.

<sup>48</sup> Some past examples are: TATT report, EC-Measures on Animal Feed Proteins, 14 March 1978; WTO Report, U.S.-Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33R, adopted on 23 May 1997. See Iwasawa 2002, 295, n. 24.

involved but concerned with the larger community interests-- further promotes cooperation and, more important, reinforces the community identification of the member states.<sup>49</sup>

I would like to call special attention to the fact that the wide membership of WTO (148 by September 2003, and still growing) represents two-thirds of all the states in the global community. All of them, as WTO members, accept the primacy of *actio popularis* in defense of community interests. Like Greece in the 1967 instance discussed above, when faced with human-rights violations complaints brought by third-party states before the European Human Rights Commission, all of these sovereign states within WTO knowingly lose their right to be “the final judge of [their] own cause” when it comes to trade dispute matters.

This fact is truly phenomenal and should not be dismissed too easily. Despite the neorealist premise that no sovereign state accepts any interests other than its own (as a result of systemic anarchy), the evidence shows that there are enough states willing to accept certain community interests over their own, and the WTO, like the European human-rights regime discussed above and the environmental regimes that we have not touched on in this essay, is but an obvious case in point. The wide acceptance of the idea of community and that it has larger interests than individual states, as such, suggests a serious structural mitigation of systemic anarchy, to say the least.

## CONCLUSIONS

From the above discussions, we can extrapolate a few generalizations. First, anarchy is not as apt a characterization of the more hierarchically structured international relations under pax americana as that under the hegemony of Britain, the previous predominant power before the end of World War II. Second,

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<sup>49</sup> Coveli 1999, 125; Iwasawa 2002, 363.

bandwagoning by secondary states in a steep hierarchical system seems to be the norm, as contrasted with their tendency to balance against the predominant power in more anarchical systems. During the Cold War, when either of the opposing camps constituted a steep hierarchy, bandwagoning, not power balancing, was also the behavioral norm of member states. In the post-Cold War system, when wide gaps separate the secondary states from the predominant United States, in terms of power, bandwagoning behavior again is found in lieu of power balancing, notwithstanding neorealist theory predictions to the contrary. Ikenberry's thesis, as we have noted, in seeing the U.S. leadership as relying more on institutional means (that is, before George W. Bush and the onset of the anti-terrorist stage), adds a power-constraining act by the dominant power to the bandwagoning role of the secondary states. The dynamics of this two-sided interaction seems to have removed the remaining obstacles to the rise of the community in that some of the latter's concerns and interests now may transcend the egoism of individual states. In some cases, the general will of the community even trumps domestic law and policy, as members of the WTO have learned to live with. Where *actio popularis* is accepted, as in the European human rights regime, no less than within the WTO regime, sovereign states are not the "final judge" of their own cause, as diehard realists may claim.

Last, but definitely not the least, recalling our definition of international governance, we may venture a suggestion, from the governance perspective, that world politics in the twenty-first century, given the present steep hierarchy in the system, entails the shaping or managing of some form of rule-based and largely hierarchically ordered relations among nations and non-state actors, often through the medium of institutions and following pre-set norms (regimes), over which decision-makers' expectations converge.

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