Foreword

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> "International law has always been messy, the Law of Nations has always been unclear, and the national sovereignty we cherish is a fragile creation . . . ."[1]

International law is the child of a paradox. For its life, it depends on the consensus of sovereign nation-states. Yet the concept of the nation-state,[2] the very notion of sovereignty,[3] derives from international law. How did this happen?

The process of reaching consensus among so-called sovereign nation-states is ultimately a process of persuading people. That persuasion may come through exemplary action. For example, Cardinal Richelieu's ruthless assertion of seventeenth-century French interests was an instance of "state practice" that helped shape international law's vision of the state.[4]

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1. Stephen B. Presser, *The Use and Abuse of U.S. Constitutional Law as a Model for Others*, *in* 2 FOREIGN POL'Y RES. INST., WATCH ON THE WEST: A NEWSLETTER OF FPRI'S CENTER FOR THE STUDY OF AMERICA AND THE WEST (Philadelphia, Pa.), July 2001, at No. 3.

2. Territories are only nation-states, possessed of independent sovereignty, if other nation-states recognize them as such. This seems an oddly self-referential criterion. It leaves nationhood looking more like a club membership than an inherent characteristic.

3. Sovereignty is what defines the nation-state and explains the growth of the modern nation-state; but sovereignty itself is a curious concept, generally understood to mean that a nation-state has exclusive jurisdiction over all persons and property within its territory, but also often believed to mean that the nation-state may enforce internally its own conception of rights without another nation's interference. Furthermore, customary international law posits that every nation-state is considered equally sovereign; however, in reality do we see the balance of power envisioned by this concept?

4. Since Cardinal Richelieu introduced this modern approach to international relations based on the sovereign nation-state, motivated by national interest as its ultimate purpose, our international system has adopted this vision and has become the complex web of independently sovereign nation-states in which we live.

When exemplary action persuades, it creates customary international law. But exemplary action is not the only path to the persuasion that creates international law.

Persuasion may also come through argument. When peoples of the world send representatives to talk with each other in international fora, another path to creating international law opens up. When argument persuades, it often produces explicit agreement among nations. That agreement may be reflected in bilateral treaties, in multilateral conventions, or in other written understandings among the peoples of the world.[5]

Aside from being features of international law in themselves as conventional international law, such concrete agreements may, when sufficiently universal, feed into the content of customary international law. Early in the life of the American Republic, Chief Justice John Marshall recognized that positive change in international law may depend on persuasion through argument. In *The Antelope*,[6] Marshall needed to decide whether an American cruiser had acted legally when it seized a foreign vessel engaged in the African slave trade. He concluded, for the Supreme Court, that though the slave trade was contrary to the law of nature,[7] it was not yet contrary to the law of nations:

> No principle of general law is more universally acknowledged than the perfect equality of nations . . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be devested only by consent, and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.[8]

The exponential expansion of international law in the twentieth century was produced by persuasion through argument. What are often examined by scholars of international law are the arguments a nation-state uses to persuade other nation-states to support a treaty, a resolution, or an international act. The diversity of subjects addressed in this Volume reflects the modern transformation of international law and analyzes a variety of international legal arguments. No longer is the concern of international law limited to what nation-states do or forbear from doing to each other. Now how nation-states behave at home is widely

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5. A nation-state thus chooses to forego part of its independent sovereignty for what it deems to be the greater good. A clear example of this relinquishment is the United Nations, whose member nation-states oblige themselves to restrain the exercise of national sovereignty when persuaded to do so by other nation-states, often for the prevention of human rights violations or at-will aggressions.

6. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

7. *Id.* at 120.

8. *Id.* at 122.

recognized to be a legitimate concern of the international legal order. What caused that wide recognition of a domestic role for international norms? A process of persuasion through argument, reflected in countless multilateral agreements, from the International Covenant on Civil and Political Rights to the World Heritage Convention to the U.N. Framework Convention on Climate Change and the Kyoto Protocol. Sometimes persuasive arguments have been grounded in enlightened self-interest, in the proposition that bad things ultimately affect everyone, no matter where those things occur. On other occasions, persuasive arguments have been grounded in abstract moral principle. One way or another, argument has repeatedly persuaded, and international law has been profoundly changed.

What characteristics of argument have been critical to its success or failure to persuade, and thus critical to its success or failure as a source of change in international law? In this Foreword, I want to focus on one characteristic of successful argument. That characteristic is detachment from the rhetoric of politics and religion. It is a characteristic that enhances an argument's persuasive effect, whether the audience be a classroom, a dinner table, a legislature, or a gathering of nations. But the difference the characteristic makes to persuasive effect is greatest in the last case, for when the peoples of the world come together to discuss subjects of shared concern, they bring to the negotiating table deeply different cultural baggage.

What do I mean by the rhetoric of politics and religion? Isn't any argument *political* if it advocates a change in *policy*, whether the advocated change be in a law school's policies on what student activities receive academic credit or in a nation-state's policies on treatment of minorities or in the international community's policies on global warming? Certainly. However, I refer to politics and religion in a subtler sense. We all have ideological pre-commitments—beliefs that frame our view of the world. Where those beliefs form part of a political or religious tradition, we feel less idiosyncratic in holding them, for we find others who hold them too. What distinguishes those beliefs for us, though, is that they are held not (or not only) on the basis of mental engagement in a process of reasoning, but on the basis of self-identity. They go to the core of how we see and value ourselves, and questioning them may seem to threaten our sense of self-worth. Arguments that explicitly challenge such beliefs are less likely to persuade than arguments that do not. And wherever significant diversity is found, appeals to the *a priori* commitments of some people risk attacking the *a priori* commitments of others.

When the peoples of the world gather to negotiate the shape of international law, we encounter argument among people at their most diverse. To succeed in such an environment, argument must evade ideological pre-commitments. It must slip under the radar of beliefs identified with the self and entice rational engagement. Domestic policy discourse often degenerates into a formalistic exchange between ideological tribes who are not listening to each other, only to themselves. They argue not to persuade the other party, but to reassure themselves and to bolster their base. International policy discourse is completely pointless unless it deploys arguments that persuade the other side, because nothing can be accomplished under the international legal order without consensus. The evolution of international law depends upon our speaking to each other from beyond the parochial categories of political and religious affiliation. It also depends upon a humility that not only hears the other side, but listens. And when it is our turn to speak, we who would have others listen must articulate our vision of the good not as Democrats or Republicans, not as Christians or Muslims, but as fellow citizens of the world.

In this Foreword, I introduce the *San Diego International Law Journal* Volume 4, a volume that finds a way to celebrate the diverse international civil society—not by destroying the foundations of current international legal arguments, but by contributing ways to strengthen them and by providing scholarly works that challenge the conventional international legal discourse. At first glance, the collection of works published here appears to address wholly disparate international legal issues, each individually a contribution to the international legal forum discussing an interesting and unique topic. However, when read together, they reveal international law as more than just a twilight zone between conflicting political and religious ideologies. International law is a body of rules and principles that govern the relations and dealings of nations with each other, to which, yes, politics and religion make important contributions, but certainly not to the exclusion of economics, societal norms, health, philosophy, industry, language, art, and culture, to name a few.[9] The

9. For example, capitalism (economics) and democratic freedom (politics) do not necessarily exist in harmony such that an analysis of certain political issues dealing with the spread of democracy will answer the tangential economic on-goings. Sure we live in a global economy dominated by international financial markets suggesting an overwhelming multi-national success of capitalism. However, we cannot yet celebrate the triumph of democracy where repressive regimes maintain control and are often aided by big business seeking to maximize profit with the help of the government. Many analysts criticizing such a partnership would view the government as the perpetrator and attack the situation from the political angle arguing for an overthrow of the government to institute democratic freedom in these repressed societies; but the fact is that capitalism, although very successful in creating wealth, does not assure social justice, democratic

articles and comments in this Volume cover a wide range of topics. Appropriately, each one uses a tiered attack on an international legal issue, making the authors' expressed arguments tremendously strong. These articles represent the kind of international thinking that is and will be required of our intellectuals in the upcoming decades. I hope that the fresh, new ideas and original legal analyses of each piece in this Volume increase the number of levels and broaden the bandwidth in which we discuss every international legal issue to come.

freedom, and the rule of law. Perhaps the attack needs to come from the economic angle, criticizing the neoclassical model for its inapplicability in the real world once its strong assumptions are relaxed. If the international forum were not flooded with political rhetoric, perhaps more non-traditional solutions to everyday international problems would be argued to persuade change.