

# The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law

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## Abstract

*The New Haven School of Jurisprudence offers a rich framework of interdisciplinary analysis of societal problems and a heuristic for inventing policy alternatives and recommending solutions that apply across cultures, throughout the planet, and over time. This lecture demonstrates the usefulness of this approach at the dawn of the 21st century, discussing the idea of 'hegemonic international law' and addressing discrete issues in the fields of international trade and investment as well as regulation of the global commons.*

If there is one global trend in legal education, it is the movement to better prepare students for the practice of law. It may surprise you to hear, though, that 'there is nothing so practical as a good theory.'<sup>1</sup> A theory that helps you do your job as a lawyer, as a judge, as a policymaker, as a diplomat, as a legislator, etc – the various roles you may play in your professional life – more effectively, and in a personally more satisfying way. I speak about a particular theory about law developed in New Haven, Connecticut at the site of one of the most illustrious academic venues, the Yale Law School. Due to this place of birth, it has been labeled the 'New Haven School.' It has also variously been called 'Policy-Oriented Jurisprudence,' or 'Law, Science and Policy,' which concentrates the audience's attention on the key content of this intellectual framework: a heuristic of effective multi-method analysis and development of solutions to pressing problems of society.

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<sup>1</sup> Kurt Lewin, quoted in W Michael Reisman & Aaron M Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven Press, New Haven, 1987), p 1.

Despite its history going back more than three generations, there is a strong likelihood you haven't heard of it in the walls of academia – unless you took classes with Dean Wang, Professor Reisman or some of us assembled at this conference. It does represent a challenge to engrained views of the law as a body of rules which leaves lawyers only the task of discerning the meaning of words from lexica, legislative history, or the narrow context of decisions of the past. In fact, the theory has been perceived as so threatening to methodological orthodoxy that it was put on the index of the citadels of academic purity. Professor Colin Warbrick wrote about this exclusionary climate at the time of his socialisation into law:

When I was a law student in Cambridge in the 1960s, two things were forbidden: one was not permitted to entertain (sic!) women in one's rooms overnight and was not allowed to make reference to the copious writings of Myres S McDougal and his associates. McDougal, so it was put about, 'had a theory' – much as one might speak in the same deprecating way about someone who 'had a theory' that the Earth was flat or that the bad weather was caused by the Germans. Under the curious mentality that prevailed in Cambridge, it was all right to engage in carnal activities during the hours of daylight ... . However, McDougal was as dangerous by day as by night.<sup>2</sup>

Conceptions of law prevalent in legal education focus on what judges are supposedly doing, not what they actually do. They have the paradigmatic legal professional, ie the judge, apply what is called 'the law,' conceived as command of the sovereign, to the facts – the classical syllogism. In that intellectual framework, the making of the law is of no particular concern. The syllogism paradigm presumes that the determination of the law is a logical exercise; a textual given, the sovereign's command as expressed through a statute, treaty, or judicial decision is subjected to the ritual treatment of deriving its meaning through the mechanistic application of the limited universe of so-called canons of construction with the expectation that the result of this cogitative process of 'interpretation' leads to one coherent result, one that makes 'analytical sense.'

Positivism had its troubles recognising international law as law as its original theorist John Austin found that it was not ordained by a sovereign, but a reflection of 'positive morality.'<sup>3</sup> There is a broader range of discussion of this

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<sup>2</sup> Colin Warbrick, 'Introduction,' in Philip Allott *et al*, *Theory and International Law: An Introduction* (British Institute of International and Comparative Law, London, 1991), p xi.

<sup>3</sup> John Austin, *The Province of Jurisprudence Determined* (1832, Wilfrid E Rumble ed, Cambridge University Press, Cambridge, 1995), p 123.

issue now within analytical jurisprudence, within legal philosophy.<sup>4</sup> Still, this traditional view of the law is unrealistic on a number of levels.

The major flaw of traditional legal theory is the implied assumption that there is one correct decision that any authorised decision maker would make on a point of law irrespective of the personality of the decision maker, irrespective of a particular factual scenario – one right answer to a particular set of facts that the law, properly interpreted, would always give you. Students of the law would ask their professors: where do you find this one right solution? Professors would respond that it is the highest court in the State that will give you that answer in its decision on the point at issue. Students would come back with the question: what happens if the highest court overrules its prior decision: which one is right now, the earlier decision or the one later in time? Logically coherent answers to this question are difficult to obtain. So I would suggest to you a more fruitful, more helpful, and more practical theory about law. One ought not to be deterred from considering it by the language that its proponents have developed. They have created a useful heuristic to find proper solutions to problems outside of established, positive legal systems as they exist now.

## I. The New Haven School: Principles of Procedure

We start with the proposition that law is a part of the entire social process, in particular the process of making decisions. This concept of law as an empirically defined process of decision making in society sets us fundamentally apart from traditional doctrines that see law from the perspective of the ‘political inferior’ as a rather static body of commands. Decisions of law in a particular community – be they statutes, treaties, court decisions, administrative regulations – are communications characterised by three key elements: (1) the *policy content* of the message sent, ie, the injunction, express or implied, that the addressee ought to do or refrain from doing something; (2) the *authority* of the communicator, ie, the person sending the message; and (3) the messages being sent with *control intent*.<sup>5</sup> The authority of persons making decisions of law is based on the expectation of the members of that community that such decisions will come from them – an idea not so far apart from Hart’s rule of recognition of norms, who essentially does not provide us with a source of validity for a purported

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<sup>4</sup> See, eg, HLA Hart, *The Concept of Law* (2d ed, Clarendon Press, Oxford, 1994), p 213 *et seq.*

<sup>5</sup> See, eg, W Michael Reisman, ‘International Lawmaking: A Process of Communication’ (1981) 75 *Proceedings of The American Society of International Law* 101 at 108-111; Myres S McDougal & W Michael Reisman, ‘The Prescribing Function in World Constitutive Process: How International Law Is Made’ (1980) 6 *Yale Studies in World Public Order* 249 at 250.

norm other than social practice or social conventions.<sup>6</sup> We call a decision authoritative if it emanates from persons or persons expected to make such a decision in a community; so this is an essentially empirical, not a normative or conceptual issue.

The second element which separates legal from non-legal decisions in a given society is control intent. Here we agree with positivists insofar as their threat of sanctions enforcing the command of the sovereign would be somewhat paralleled by the more precise formulation of a threat of severe deprivation of values; we also add, however, as an alternative way to manifest control intent, the element of inducement to comply with the law-message, namely the expectation of high benefits or indulgences. This, as a matter of theory, would include the concept of law regulatory schemes that guide human behavior through the promise of high rewards such as subsidies or tax deductions.

Under this conception, an exercise of naked power outside the confines of the authority of an actor – as delimited, say, by constitutional rules which define the expectations of a community regarding his/her power to act – would not qualify as law.

Pursuant to this realist conception of the law, I would like to introduce to you the intellectual framework that helps us to do our job as lawyers and decision makers more effectively than by using the tools of syllogism and interpretation that have defined, and limited, our profession. The essential difference to traditional approaches to law is that the New Haven School of Jurisprudence addresses problems in society and works at finding solutions to them – not in a freewheeling exercise of Solomonic intuiting of justice in a given case, but by using a disciplined sequence of tasks – five to be precise – that allow us to find, in rational, inter-disciplinary analysis, (1) the parameters of the social ill or problem the law has to address; (2) to review the conflicting interests or claims; (3) to analyse the past legal responses in light of the factors that produced them; (4) to predict future such decisions; and (5) to assess the past legal responses, invent alternatives and recommend solutions better in line with a good order, a preferred order we term a ‘public order of human dignity.’

The first four steps of this intellectual framework, from the delimitation of the problem to the prediction of future decisions, are basically analytical; the fifth one is evaluative and prescriptive, in essence normative. Lawyers as ‘doctors of the social order’<sup>7</sup> need to first diagnose precisely the problem – the social ill – before they prescribe a treatment. Those problems are global and they are local – but often they are intertwined. Problems of a global order such as the detrimental effects of accelerated climate change are, at least allegedly, also

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<sup>6</sup> Hart (note 4 above), pp 94-95, 254-256.

<sup>7</sup> Siegfried Wiessner, ‘International Law in the 21st Century: Decision-making in Institutionalized and Non-Institutionalized Settings’ (1997) 26 *Thesaurus Acroastium* 137.

related to the seemingly exclusively local problem of regulating the traffic in Hong Kong. To analyse these problems, one has to look at all relevant disciplines and reservoirs of knowledge at the university level and beyond, scientific, technological determinants, etc, to attain a full grasp of their ramifications. Global warming is a great example of the need to perform this interdisciplinary, multi-method analysis.

Second, the New Haven School of Jurisprudence suggests identifying conflicting claims, the claimants, their bases of power and their perspectives, identifications and so on. Law is needed predominantly if there is a conflict in society, and it helps to know the arena and the players in which this battle is being pursued. Take the battle fought over attempts to improve the health care system in the United States ('US') Congress. The public attention focuses on the various lobbyists for powerful sections of the industry – health insurance companies, the pharmaceutical industry, the hospitals, the doctors, as major players. Under a New Haven analysis, all major claims, the claimants, their bases of power and motivations would be brought to the fore, including the public at large, various sections of it, etc – whether they are represented or not, in the corridors of power. To find a good solution in the public interest, it is imperative to carefully and comprehensively analyse the issues faced by the decision makers.

The third phase of the analysis consists of a review of how the legal system has responded to these conflicting claims, ie, what the past trends in decision were, in light of their conditioning factors. Going back to our dynamic conception of the law, this includes an analysis of all pertinent decisions of law in the community under review, be it domestic, be it international. Unlike the traditional syllogism, which focuses only on a supposedly neutral interpretation of the text of the most recent valid norm, the School is putting the decisions of law in rough chronological order to highlight the differences over time and to explain them. To that end, it analyses the background of the decision makers, be they judges, legislators, kings, or actors in the international arena – determining the 'predispositional factors' conditioning the decisions potentially just as much as the 'environmental' factors such as the *Zeitgeist*, the mood of the times, etc. Both of these factors may, and obviously do, change over time. Without a thorough analysis of what factors led to past decisions, we are not able to predict future decisions – a task often expected of lawyers – with any sense of accuracy. This is evident in the legislative field, when parliamentary majorities change. It is also not alien to the judicial context, as the fiercely fought battles over appointments to the US Supreme Court reflect. It is important to know the backgrounds of those who make decisions in a most comprehensive sense – it is not without reason that parties to international arbitrations, for example, take great care in who they nominate as the arbitrators of their choice.

The fourth step in this suggested assemblage of intellectual tasks is the prediction of future decisions. Taking into account changes in the factors conditioning past decisions enables us to make a prediction of an outcome in a case much more precisely than solely researching and relying on a dated decision

that supposedly governs the case before a court. For traditional lawyers, decisions of the past are somewhat like the insect in the amber: they are frozen in time and they are preserved, somehow artificially, to the present day. For us, law, like life, is moving and so we see the decision making body and its environment change, from one President to the other, from one Party Central Committee to the other, from one court to the next. So it might behoove us to take a close look at background and positions of the next decision maker, the changed environment of the decision, to accurately predict the ranges of future decision. In intellectual honesty, one cannot, and one should not, simply extrapolate the decision of the past into the future. Law is a process: it includes past decisions and future decisions. To be realistic about the task of prediction, we suggest elaboration of developmental constructs of such future decision which oscillate between the most optimistic and the most pessimistic predictions of future decision outcomes. This task, completing the project of analysis, tries to predict what *will* happen.

Understanding the law in all its dimensions is not all, though, the New Haven School of Jurisprudence recommends. In order to be responsible with respect to the development of a good public order, we suggest that one ought to also put forward a statement on what *should* happen. This fifth step goes beyond what the Legal Realists have done in America in the first half of the 20th century. They told us that judges do not necessarily make their decisions on the basis of high-flying theoretical constructs or the best interpretation of a rule *lege artis*. These decisions are surprisingly often made on the basis of gut feelings, with judges not even aware of those motivating factors. They arrive at these decisions possibly over breakfast, in conversation with their spouse – in a kind of random way, never fully articulated. Like others, such as Jerome Frank, Karl Llewellyn was very clear-sighted in describing the reality of judging this way. That was in one book – about how judges really make decisions.<sup>8</sup> But then he wrote another book, later in his life, on deciding appeals<sup>9</sup> in which he minimised the relevance of his empirical insights<sup>10</sup> and taught the traditional rituals of the ‘craft of the law,’ including the traded canons of construction.<sup>11</sup> Otherwise, he may have feared he would give too much freedom to the judge. Well, may I suggest to you that judges always have to make choices. In many cases, there is no clear, predetermined outcome of what is traditionally called the

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<sup>8</sup> Karl N Llewellyn, *The Bramble Bush* (Oceana, New York, 1930).

<sup>9</sup> Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown: Boston, 1960).

<sup>10</sup> *Ibid*, pp 509-510 (‘Realism was never a philosophy, nor did any group of realists as such ever attempt to present any rounded view, or whole approach’ – overlooking, at a minimum, the New Haven School).

<sup>11</sup> *Ibid*, pp 213 *et seq*, 521 *et seq*.

process of interpretation, and lawyers have to find consensus in society on the choices recommended to be made and to articulate those suggestions as a matter of preferred policy.

To this end, I suggest to you the consideration of a substantive guiding light which is open enough and flexible to allow for different outcomes, but is still articulable and acceptable to the highly diverse perspectives of human beings and communities around the globe. This idea of a guiding light relates back to our conception of the law. We do not see the law from the perspective of a person looking up to it in abject reverie. Instead, we see law as one instrument that serves human beings, not the other way around. We ought to consider ourselves the masters of the law; we should make it serve our needs and our aspirations – particularly our aspirations. Here is where the positive – and, to an extent, normative – feature of the New Haven approach comes in. Maybe there is a grain of American optimism in it. What it is calling forth is a good law, and this is a touchstone that often is not offered, allowed or even defined by traditional jurisprudence. The touchstone would be whether the law, treaty or court decision in question responds to those needs and aspirations of human beings and, more specifically, would afford maximum access by all to all things humans value.<sup>12</sup> The New Haven School of Jurisprudence, in essence, looks at possible outcomes of the decision making process on a particular issue and recommends choosing the decision that would maximise access by all to the things humans want out of life.

It was felicitous that Professor Myres Smith McDougal, in developing this intellectual framework, had the cooperation of a social scientist, Harold Dwight Lasswell. Lasswell served as the Professor of Political Science at Yale Law School. He was a famous social psychologist as well, and part of his life was dedicated to looking at human aspirations in cross-cultural, comparative perspective. For many years, for example, he observed an indigenous community in Vicos, Peru. He himself lived in Manhattan. He concluded that whether he dealt with stone-age communities in Papua New Guinea or the indigenous people in Peru, or the most ‘modern’ communities on the face of the planet, parents uniformly wanted for their kids to have a better life than they themselves had, defined in empirically observed human aspirations: they desired a better education for them, and they wanted more access to the processes of control – increasing their power, one of the key values of human dignity. Lasswell actually presented eight values, eight essential human strivings. According to his list, which is not closed, humans variously aspire to power; they desire wealth, material things; others would like to lead their lives according to the tenets of their faith, or a

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<sup>12</sup> Hence the term ‘value’ to designate preferred outcomes. For details, see Harold D Lasswell & Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press, New Haven 1992), Volume 1, pp 336-338.

humanistic code of ethics. Others would idealise respect for others, others again the maximisation of skills, knowledge, well-being or affection.

To familiarise students, with these essentially trans-cultural concepts, I use to inquire of the students in my seminar what they wished to do when they graduated from law school. From their answers, one could gauge their preferences as between those values – which are not hierarchically ordered. Students who preferred the value of enlightenment wanted to know more about the world, its history and future; they were analytical and research-oriented. People aspiring to optimise their skills wanted to be, say, the best lawyer in Court, or the best race-car driver. Another student told me that she wanted to see her kids grow up, thus she wanted to have a part time job after she graduated. Obviously, for her, the most important value was affection. Those who preferred well-being wanted to have a good time – to enjoy the sun and the beach, whether in Miami or in Hong Kong.

This classification of what humans value is an open one, not closed to empirical expansion. It constitutes a hypothesis encompassing all human aspirations, which can be disproved. What should jurisprudence do with this insight? We suggest that it use the goal of maximisation of access to the processes of shaping and sharing these values as the measuring stick for the evaluation of existing law, and as guiding light for future law. Any legal solution to a societal problem should ideally provide everybody with maximum access to the processes of shaping and sharing of all these things humans value. This is our definition of a world public order of human dignity. In essence, this is a goal anchored in the ideal of human self-realization. It does not reflect an atomistic, individualist worldview, though, as we know that individuals vitally need the community of others as much as the community needs them. Humans are social beings and dependent upon others, most visibly at the beginning and at the end of life. In the meantime, our identities are to a great extent shaped by the groups that we are born into and those we choose. We influence those groups, and, vice-versa, we are being influenced by them.<sup>13</sup>

So our suggested evaluation in the beginning of the fifth part of the New Haven School's framework will ask: are the past decisions and the forecasted ones in line with the goal of maximum access to all these values by all, and not just to a couple of the privileged few? If they are not, we strive to invent alternatives. From those alternate decisions, we choose the ones most in line with the ideal of a world order of human dignity as defined before, and develop concrete recommendations for a suggested solution. Unlike natural law or

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<sup>13</sup> See, eg, George Herbert Mead, *Mind, Self and Society: From the Standpoint of a Social Behaviorist* (Charles W Morris ed, University of Chicago Press, Chicago, 1934); George Herbert Mead, *On Social Psychology. Selected Papers* (Anselm Strauss rev ed, University of Chicago Press, Chicago, 1964).



formalistic positivism, however, our methodology does not present this solution as the only possible one. It is presented to convince by persuasion, and we would try to achieve consensus on this preferred measure both domestically and internationally. Such consensus is often difficult to reach, especially at the international level. The discussion over global human rights is evidence of that. We suggest that in a world of many, often radically different cultures, we need to listen to others, try to engage them in a dialogue to achieve consensus on minimum standards of treatment of human beings across cultures and respect for cultural diversity alike in order to protect human dignity as well as celebrate needed difference.

The New Haven School, properly conceived, is not confined by any one cultural background, particularly a Eurocentric one. This feature of inclusiveness has always been attractive to scholars from outside the US, especially the 'Third World', as Richard Falk once critically remarked.<sup>14</sup> We invite others to join in that struggle for a world order of human dignity defined in a respectful dialogue of equals. In the context of human rights, we look forward to hearing the story of those previously excluded. Besides the ashes of the Holocaust, it includes the story of fighting against slavery and fighting against colonialism and so on. These are under-represented narratives in the struggle for human rights.

The solutions found need to convince on the basis of their inherent merits. New Haven is not another theory of natural law. On the one hand, it is not natural law in the sense that its content is always the same – unchangeable, immutable. Second, it is not natural law in the sense that it would have only one solution to a problem, arrived at through either the interpretation of the will of a supreme being, or of axiomatic postulates proposed by humanists such as Kant. Instead, it relies on its own intellectual force in the marketplace of ideas – its solutions measured by the yardstick of everybody having access to the values humans cherish.

This is an overview, as brief as I could make it,<sup>15</sup> of how we should conceive of the New Haven School or Policy-oriented Jurisprudence. I have not yet proven to you, in concrete examples, why this intellectual framework is so eminently helpful to our lives as professionals in the law. I expect this conference in its entirety to highlight this point. Let me discuss a few more or less

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<sup>14</sup> Richard A Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 *Yale Law Journal* 1991 at 1997.

<sup>15</sup> For more detail, see W Michael Reisman, Siegfried Wiessner & Andrew R Willard, 'The New Haven School: A Brief Introduction' (2007) 32 *Yale Journal of International Law* 575. See also Siegfried Wiessner & Andrew R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *American Journal of International Law* 316; and Siegfried Wiessner & Andrew R Willard, 'Policy-Oriented Jurisprudence' (2001) 44 *German Yearbook of International Law* 96.

controversial issues, though, to illustrate its usefulness. They go to the assertion of a novel ‘hegemonic international law,’ recent developments in international trade and investment law, and a particular legal regime of the global commons, ie, the geostationary satellite orbit.

## II. The New Haven School Applied

### 1. ‘Hegemonic International Law’

One trendy point of discussion is the statement that international law has developed into some kind of *hegemonic system*. It was first described in October, 2001 by Professor Detlev Vagts of Harvard Law School in an article in the *American Journal of International Law*.<sup>16</sup> This article was essentially written before September 11, 2001. According to the author, the US at that time was widely perceived as the pre-eminent economic and military power, and some influential members of the Bush Administration denied the traditional view of international law, asserting that ‘we can mould it into our interests.’ Reacting to them, Professor Vagts wrote about the normative consequences if the United States were the hegemon of the world. Law, in his view, could then be simply equated with power in the crude vision of *Realpolitik* through Hans Morgenthau’s lens after World War II. But, Vagts suggests, maybe it would be more advantageous to the hegemon to use the law to its advantage. After all, the US has an interest in unimpeded global trade and investment, which needs to be protected by legal rules, a special class of arbitrators and so forth.

Such international law tailored to the interests of the hegemon was epitomised, in his view, by the Platt Amendment to the Cuban constitution in 1903. There the US reserved to itself a right to intervene in Cuba if, *inter alia*, property interests of American nationals were violated. Referring to Carl Schmitt’s theory of decisionism developed in the context of Nazi Germany, he described a hegemon’s desire to bind itself by very few treaties and invoke the *clausula rebus sic stantibus* frequently; also, the hegemon prefers to enter into the treaties with quite indeterminate terms to preserve its freedom of action. Hegemons also aim at minimising the effect of international law domestically. One might see an example of such tendency in the recent *Medellín* case,<sup>17</sup> where binding decisions of the International Court of Justice were treated by the US Supreme Court as ‘non-self-executing’ because Article 94 of the UN Charter did

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<sup>16</sup> Detlev F Vagts, ‘Hegemonic International Law’ (2001) 95 *American Journal of International Law* 843.

<sup>17</sup> *Medellín v Texas*, 129 S Ct 360, 171 L Ed 2d 833 (2008).

not say states ‘shall’ comply with the decisions of the Court, but used the more diplomatic terms ‘undertake to comply.’ And ‘undertake,’ in the view of a slight, and novel, majority of judges, leaves some kind of leeway of implementation. If one looks at the reality of diplomatic communications, one ought to understand what this means: a country promises to comply and is expected to comply with a decision of the World Court affecting it. A country’s word should be its bond. That would be a natural interpretation. But with this new interpretation by the majority of the Supreme Court, a narrow interpretation of treaties to be applied domestically is ordained. Another historic example of restriction of the effect of international law domestically, is the *Chinese Exclusion Case*<sup>18</sup> which affirmed a statute that, in the eyes of the Court, overrode a treaty obligation between China and United States laws and barred immigration from China.

With respect to customary international law, Professor Vagts wrote that a hegemon would be able to prevent the emergence of new rules of customary international law by not participating in the practice, by doing nothing to support it, and the hegemon could change such international law at any time by breaking it, referring to Attorney General Barr’s comment on the extra-territorial abduction of Mr Alvarez-Machain from Mexico. The Supreme Court did not deny the jurisdiction of US criminal courts over Alvarez-Machain irrespective of the legality of his abduction under international law. Domestically, the Court retained jurisdiction. De facto, it gave a green light to the practice of bringing criminals to justice through abduction abroad.

After September 11, Professor José Alvarez updated this criticism of purported US legal hegemony and said the US in essence controlled the Security Council; the Council allowed for the US reaction to the September 11 event by sanctioning a right to pre-emptive self-defense; and it set up the counter-terrorism committee blacklisting financial supporters of terrorism and so on, creating problems with due process rights of those included on the list. Also, President Bush announced the harbor and support rule according to which a country that harbors and supports terrorists incurs state responsibility, at first blush difficult to reconcile with the existing rules of attribution under the Articles on State Responsibility, combined with the absence of a clear definition of terrorism.<sup>19</sup>

In my view, these contributions on a system-wide change of international law through the emergence of a perceived hegemon mythologise power in the same way that Carl Schmitt did it in inter-World War Germany. He was wrong as well, as he underestimated both the complexity and the fluidity, if not fleetingness, of power relations and relative strength. Nazi Germany may

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<sup>18</sup> *Chae Chan Ping v United States*, 130 US 581 (1889).

<sup>19</sup> José E Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 *American Journal of International Law* 873.

have been a formidable power of some pre-eminence at some point in time, but Germany today certainly is not a hegemon. More importantly, the concept of hegemony as fundamentally changing international legal relations not only oversimplifies the complex game of power, it disregards other values that influence state behavior in certain circumstances as much as, or more than, military and economic might. Mahatma Gandhi ultimately, and nonviolently, defeated the British Empire's overweening military power and forced the colonial regime out of India. As a matter of empirical fact, it is simply not true that overwhelming military and economic might would necessarily predetermine the outcome of any conflict. Thus one would be well advised to analyse the complex inter-relationships between the actors involved, formal and informal, their interests at stake, their base values, and so on. The New Haven School recommends focusing on the concrete problem at issue – be it immigration, the struggle with terrorists, etc – with its various distinct participants, claims, situations, etc and work on devising a possible solution, rather than reducing the complexity of possible and preferred outcomes in various situations to the shibboleth of hegemony, the elevation of the legal authority of any one state or states under international law in the absence of agreement by the world community. Thus the proper response to the proposition of a new hegemonic international law would be to engage in a detailed phase- and value-analysis and take each problem at a time. Probable and recommended outcomes will differ according to the relevant context, irrespective of what major power is involved.

One example would be the rules on the use of force. One will have to look at the circumstances of each case whether certain exceptions to the prohibition of armed intervention have been accepted beyond the texts of Chapter VII and Article 51 of the UN Charter. Maybe states have now at least tacitly approved, following the world's outrage over the attacks on September 11, a state's responsibility for harboring and supporting terrorists on its territory, whether or not such attribution is acceptable under the Articles on State Responsibility. But what if, say, India had claimed the right to invade Pakistan in immediate reaction to the terrorist attack in Mumbai? Also, many states did not approve the invasion of Iraq in 2003, although the world community widely favored, and participated in, the removal of Saddam Hussein's forces from Kuwait in 1990. Situations, especially regarding the use of force, differ and are extremely fact-sensitive. There is a need to carefully evaluate what is in the best interest of the people involved, keeping in mind the goal of maximum access by all to an order of human dignity. So I would conclude that the idea of hegemonic international law as a legal paradigm is hollow in content and empirically untenable. Moreover, floating it is dangerous to the concept of preservation of minimum order. Methodologically, it is flawed as it shows again that disembodied ideas have the potential of blocking the view of the totality of any given problem in its context, the actors involved, the political interests, and so on.

## 2. *Global Trade and Investment*

My second example documenting the good use of the New Haven approach relates to the field of global trade and investment. Again, here one ought to look at the individual problem at hand. To start with, the New Haven School provides the benefit of analysing decisions over time. One key example is the question of the lawfulness of acts of expropriation, evaluated in the context of a state's right to protect its nature, its heritage, its environment, and so on. Chronologically, one may begin with the Hull formula developed in the 1930s against Mexican expropriations of foreign properties under President Lazaro Cardenas, requiring adequate, prompt, and effective compensation. In the process of decolonisation, the developing world claimed that this formula was illegitimate as a rule imposed by colonial empires; legally, the world should start out the newly independent former colonies on a clean slate. By rejecting the inherited customary international law rule of the Hull formula through, *inter alia*, the UN General Assembly's declaration of a New International Economic Order, the new states claimed they could nationalise all the colonising power's assets and their nationals' commercial enterprises according to their nation's laws, in their nation's courts, without necessarily paying compensation. International law standards of compensation, in the face of such rebellion, were thus becoming quite unclear. In the 1970s, therefore, major investment source countries such as Germany started to engage in bilateral investment protection treaties with developing countries and reinstated the essence of the Hull formula in a much more precise way. If you take the investment made by an investor protected by the BIT, you may have to pay back its book value, the investor's expectation of return, or any variation of this. These treaties returned the international minimum standard for diplomatic protection of property back to life, reinvigorated it via the modality of treaties, and guaranteed fair and equitable treatment, even the total protection and security of the investment. The treaties even protected investments against indirect expropriations by substantial impairment through governmental regulations. Originally, investment was defined rather narrowly as requiring, *inter alia*, a long duration and a quality of helping the development of the country. *Toto v Lebanon*,<sup>20</sup> a recent investment arbitration case, rendered these restrictions moot as the definition was reduced to simply profit-motivated economic activities. Such broad protections now run into significant problems with other interests the state has to protect – the protection of nature, the environment, the land and culture of indigenous peoples. In a first reaction, Ecuador withdrew from a number of those bilateral investments treaties. There are also concerns that the special guild of arbitrators set up to resolve disputes under these bilateral investment treaties

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<sup>20</sup> *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12 (Italy/Lebanon BIT), Decision on Jurisdiction, 11 September 2009.

are trusted to protect the interests of investors over the interests of the public. The concept of a 'self-contained regime' may be used to maintain that human rights, environment, public health, cultural concerns, etc should stay out of the realm of trade and investment.

As to the goal of protecting cultural diversity: in Paraguay, German investors had made an investment in land that was claimed by indigenous peoples for their exclusive use under Article 21 of the American Convention of Human Rights. The Inter-American Court of Human Rights had recognised similar claims in a long line of cases.<sup>21</sup> A classical clash: the indigenous community claimed its collective right to property; the investors responded: 'Well, we have special rights.' Ultimately, the Inter-American Court sided with the indigenous people.<sup>22</sup> More generally, the International Commission looked at self-contained regimes as part of the problem of the fragmentation of international law. If the self-contained regime 'fails,' it stated in its 2006 report, general international law may fill the gap, but under what circumstances exactly will such a failure occur or be recognised?<sup>23</sup> What about current efforts of arbitral bodies to balance private and public interests? What guiding light should they follow?

The New Haven School of Jurisprudence would analyse these pressures as conflicting claims in the second step of the intellectual framework outlined before. It would overcome the pigeon holing of legal responses into self-contained regimes. It would state the problem and come to a solution based on each case in microcosmic analysis, taking the economy into account, cultural diversity as a policy goal, and so on. Realising the goal of widespread shaping and sharing of wealth for investment abroad but also recognising values such as cultural diversity due to the value of affection impacted by living within one's culture, within one's region, leading to the recognised legal claim to exclusive usage of one's traditional lands are critically important goals. Without giving one boilerplate solution, it would give more guidance to decisions that ultimately arbitrators will have to be making under their concept of balancing. At present, guidance for such balancing is sorely lacking.

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<sup>21</sup> Cf Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples' 2008 41 *Vanderbilt Journal of Transnational Law* 1141 at 1158.

<sup>22</sup> *Sawboyamaxa Indigenous Community v Paraguay*, 2006 Inter-American Court of Human Rights (Ser C) No 146 (29 March 2006) (enforcement of investment treaties 'should always be compatible with the American Convention [on Human Rights]', which generates rights for individuals that cannot be sold off by states. *Ibid*, para 140).

<sup>23</sup> ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006), available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf), at para 16 ('[f]ailure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted').

### ***3. Regulating the Global Commons: The Case of the Geostationary Satellite Orbit***

Finally, I would like to give you a personal example of the New Haven School at work. It goes to an issue in the field of regulation of the so-called ‘global commons.’

I had the pleasure of writing two articles in the 1980s on the urgent problem of the regulation of the so-called geostationary satellite orbit. There were conflicting claims of countries regarding the use of a satellite orbit 20,000 miles above the equator that can only accommodate a certain number of satellites necessary for communications because they stay at the same point relative to the Earth and move at the same speed as the Earth itself. Those satellites are essential to performing telephone, data, navigation, and other radiocommunication services; three of them can form a global telecommunications network. Only a limited number of these devices can be placed in this orbit. Some countries, the space powers, had already placed their satellites there. The fear was that other countries, developing countries in particular, would be excluded from access to this resource. Policy-wise, there was only one decision under existing international law: Article 33 of the International Telecommunication Convention refers to the need for equitable sharing of geostationary orbital slots and frequencies. The policy of first-come, first served applied generally when a state occupied a frequency for one of its radio stations. Article 33 ITC did not explain how equitable sharing of these special slots and frequencies was to be effectuated.

I co-wrote an article on this topic in 1981, which was published in the *Austrian Journal of Public and International Law* under the title of ‘The International Legal Regime of the Geostationary Satellite Orbit.’<sup>24</sup> All we could do under the prevailing positivist paradigm was to draw an analogy to existing international legal regimes. But the analogy would have to be to a similar resource; the only one around then, fledgling at best, was the other exhaustible resource within a perceivedly unlimited supply of the other resources of the high seas, ie the deep sea-bed, or, in the parlance of UNCLOS, the ‘Area.’ Without deep factual analysis, we suggested to analogise the treatment of the geostationary satellite orbit to that of the deep sea-bed in UNCLOS: administer internationally the use of this scarce international, non-appropriable resource.

When I went to Yale in 1982 and had my first glimpse of the New Haven approach, I decided to write a totally new article, which was ultimately

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<sup>24</sup> Siegfried Wiessner & Rüdiger Jung, ‘Das völkerrechtliche Regime der geostationären Umlaufbahn’ 1982 32 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 209.

published in 1985 in the *Yale Journal of World Public Order* under the title *The Public Order of the Geostationary Orbit: Blueprints for the Future*.<sup>25</sup>

That article started out quite differently, as one can imagine. It first analysed the problem, looking at its astrophysical determinants, answering questions such as: Why can there be 'stationariness' relative to the earth only within that particular orbit? How many satellites can be placed in that orbit? Can one remove the problem of scarcity by increasing the use of that orbit by putting multiple applications on one hybrid satellite? How long is the life time of the satellite? I had not researched these issues before in any great detail. This part constituted the scientific delimitation of the problem. The problem also included a specific regulatory environment, ie, the ITU registration procedures regarding the use of radiocommunication frequencies. The ITU allocates radio frequencies according to the principle of first come, first served. The first one registered enjoys the right to use the frequency in a given area. This regime favors existing space powers.

Then I looked at conflicting claims. The equatorial countries, over whose territory the geostationary orbit is situated, claimed an unlimited extension of their sovereignty up into the sky. In absence of a firm delimitation between inner space and outer space, since the earth rotates, every second they would own different stars and galaxies. The more powerful claim was advanced by existing space powers: first come, first served, ie unrestricted access and use on the basis of the general regime of outer space. The developing countries strongly clamoured for equitable access as they should not be forced out from using this scarce resource because they were not there first.

As to past trends in decision, one could adduce Article 33 of the ITU Convention, describe UN activities in the field, and so on. One could predict the outcome of world and regional administrative radio conferences going on or planned at that time. And one is encouraged to invent alternatives, ways to square the circle, harmonise the idea of free access with some kind of international regulation that would ensure latecomers' access to this key area of space.

Because of the analysis of the technological and scientific factors surrounding the problem, I developed the idea of allocating slots to individual country based on need irrespective of their development. I also knew that the life time of the satellite is about ten years. No state could ever appropriate the slot because they were not allowed to appropriate outer space. My recommendation was to allocate use of the orbital slot to individual countries for a period of ten years. But if countries are not able to use their slot(s) at the time of allocation, then its use should be auctioned to the highest bidder for a period of ten years, a feature

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<sup>25</sup> Siegfried Wiessner, 'The Public Order of the Geostationary Orbit: Blueprints for the Future' 1983 [1985] 9 *Yale Journal of World Public Order* 217.



of a market model. The revenues from that auction would flow into a space technology center which would buy space technology for the benefit of third world countries, obviating the need for compulsory licensing so divisive in the case of the deep sea-bed.

The novel idea was to combine the market model with the regulatory model and with the equitable access goal with respect to scarce resources. This solution was seen as quite helpful by the ITU, which published a short version of the article in its *Telecommunication Journal*<sup>26</sup> – an unusual event as they were in the middle of negotiations on that issue. There was a need for a compromise which could be aided by the effective use of our intellectual framework.

### III. Conclusion

In sum, for a lawyer it is essential to know what problem he/she is addressing, to know what the conflicting claims are, and what the text and relevant context of the past legal decisions regarding the problem have been. The framework presented here empowers one to make more accurate forecasts of future decisions. Most importantly, the New Haven School of Jurisprudence enables one to make decisions of higher quality. It asks questions that one would never ask following traditional approaches to law. I hope we will continue to work with you expanding the use of this framework to address problems of ever more pressing nature and find solutions in dialogue across the cultural, political and economic divisions of our time.

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<sup>26</sup> Siegfried Wiessner, 'Communications in the Earth-Space Arena: Translating Equity into Hertz and Degrees From the Greenwich Meridian' 1985 52 *ITU Telecommunication Journal* 304.

