A UNIFIED THEORY OF INTERNATIONAL LAW, THE STATE, AND THE INDIVIDUAL: TRANSNATIONAL LEGAL HARMONIZATION IN THE CONTEXT OF ECONOMIC AND LEGAL GLOBALIZATION

James D Wilets, Nova Southeastern University
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ABSTRACT

This article presents an original theory of international law which reconciles the norm-making processes occurring at the international, state and individual level. It is the central thesis of this paper that economic globalization is not happening in a vacuum, but is rather engendering legal globalization, much in the way that centralized regulation followed trans-state economic globalization within the United States and Europe.

Traditional definitions of international do not address this phenomenon and consider these new forms of transnational norm creation as simply exceptions to the general rule that international law is created by nation-states within the framework of multinational institutions. This article addresses this serious shortcoming in our current definition and understanding of international law, and the manner in which it is created.

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1 Professor of Law, Nova Southeastern University, Shepard Broad Law Center and Chair, Inter-American Center for Human Rights. M.A., Yale University, 1994; J.D., Columbia University School of Law, 1987; B.A., University of Washington, 1982. The author would like to thank Melissa Szwanke and Christopher Ray for their valuable research assistance and insights.
I. INTRODUCTION

The current theoretical foundations of international law are inadequate to explain, or address, the interrelationship among three concurrent and interrelated phenomena: (1) economic globalization, (2) legal globalization, i.e., the harmonization of legal rules and norms among
sovereign entities, a process that itself frequently results from economic globalization; and (3) the changing role of the nation-state as the principal foundation of international law, and as the exclusive protector of the legal, economic and security expectations of the individuals living within it.

The only manner in which to understand these concurrent phenomena is through a unified theory of international law that recognizes the linkages among each of these historical phenomena. Each phenomenon impacts each other process, and is being impacted in return, in a dialectical manner. These three processes require a revision of our conception of international law as being solely the creation of states, either among themselves or within global legal institutions such as the United Nations or the World Trade Organization. The process of international lawmaking is much more complex, decentralized, and provides often overlooked opportunities for non-state actors to effect progressive change in the creation of global legal norms. The unified theory presented in this article is termed “Transnational Legal Harmonization,” or “TLH.”

TLH is strictly descriptive, not normative. It does not attempt to describe how the world should be, but rather to explain current global processes in a manner that avoids the conceptual pitfalls associated with viewing international and domestic law as discrete, static processes, occurring in opposition to each other. TLH is a description of a dynamic, organic process. TLH occurs as a result of phenomena that are already occurring by a myriad of unconnected entities, each of which acts according to its own normative value system, priorities and goals.

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2 See Restatement Section 101, infra at note __.
3 TLH is therefore agnostic on political theories that advocate “one world government” or which attempt to argue for greater protection of individual rights through increased powers for international institutions.
4 The term “organic” is used in this article according to the definition of the term found in the Encarta Encyclopedia: “Developing naturally: occurring or developing gradually and naturally, without being forced or contrived.”
Those entities include not only states, but also non-governmental organizations (NGO’s), multinational corporations (MNC’s), regional entities, and other non-state actors. TLH is not imposed from above, but is organic to the natural historical evolution of the world economy.

The globalization of norms that result from the process of TLH frequently consists of harmonization of rules rather than direct application of international norms. It has implications for the state as the nation-state loses its role as sole propagator of rules protecting and governing its citizens, implications for the individual as individuals assert norm creation ability in increasingly diverse manners. Ultimately, the process of TLH will impact even traditional international law institutions as those bodies respond to pressure from below, instead of merely imposing their norms from above.

Before discussing this unified theory in greater depth, however, it would be helpful to examine the traditional definition of international law, and examine how its shortcomings bespeak the need for not only a new definition of international law, but also a new theory to explain how international law is presently created and applied.

A. THE TRADITIONAL DEFINITION OF INTERNATIONAL LAW

The need for a revised definition of international law, and a reconceptualization of the way it is created, is apparent from the definition of international law used in the American Law Institute’s Restatement of the Foreign Relations Law of the United States. The Restatement reflects the outmoded view of international law as simply a legalization of diplomacy\(^5\) and a product of international institutions. The Restatement states:

\(^5\) See also J.L. Brierly, The Law of Nations (6\(^{th}\) ed. 1963), which defines international law as: “... the body of rules and principles of action which are binding upon civilized states in their relations with one another.”
“International law,” as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.\textsuperscript{6}

It appears from the language of the Restatement that the authors were attempting to grapple with the expanding scope of international law by including the last clause “as well as with some of their relations with persons, whether natural or juridical.” This last clause, however, is hopelessly vague since it doesn’t define in any meaningful way which additional relations are covered by international law, but simply states “some.” The Restatement is an apt example of how contemporary international law theory suffers from incoherence as it clings to a traditional view of international law as a kind of legalized diplomacy, while simultaneously attempting to grapple with the changing manner in which international law is created and applied.

\textbf{B. A Revised Theory of International Law: Transnational Legal Harmonization}

To the extent international law is simply one rule binding on more than one country, international law is created whenever there is convergence or harmonization in law among countries. It is not just an assemblage of rules governing the conduct of states and their relations with each other, but rather the end product of a process of legal harmonization. This can occur through traditional forms of international law such as agreements among states, and customary international law. In addition, however, international law may be effectuated in at least five other ways that do not involve international organizations. As we shall see, these forms of legal harmonization frequently result, at least in part, as a correlate of economic harmonization.

\textsuperscript{6} Restatement Section 101.
First, through regional integration such as the kind of “federal” process occurring in the European Union, whereby the norms of a central legal authority are imposed on the member states, albeit with the direct or indirect consent of the member states.

Second, by individual states imposing their own norms on other countries or entities by means of: (a) extraterritorial application of their own domestic law; (b) conditioning of aid or trade benefits upon a foreign country, corporation or individual’s compliance with certain norms; and (c) judicial processes whereby international law norms are applied in domestic courts with domestic courts defining the scope and substance of the presumably international law norm involved.

Third, through the creation by non-state actors of what is commonly called “private international law.” Such law can include standardized rules, definitions or terms adopted by international private commercial actors such as the International Chamber of Commerce or the International Institute for the Unification of Private Law (UNIDROIT), which then are uniformly used globally by commercial actors. Since those rules, definitions or terms are then incorporated into global contracts, they form the binding legal rules for the relevant business transaction. Some examples include INCOTERMS 2000, which consist of standardized trade definitions incorporated into the great majority of international trade contracts. Other examples include banking terms provided in the Uniform Customs and Practices for Documentary Credits, which constitute the operative legal rules for the vast majority of letter of credit transactions.

Moreover, the International Chamber of Commerce has a role in creating international rules in

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7 Some examples include the European Union’s application of European anti-trust law to mergers of two US corporation, or extraterritorial application of environmental law.
8 Some examples of this would be certain countries’ application of international criminal law to try individuals in domestic courts, with the domestic courts determining the substance and scope of the international rule in question. See, e.g., Pinochet case.
such diverse areas as E-business, telecoms, financial services, insurance, taxation, trade and investment, international transportation, anti-corruption rules, arbitration and customs, to name just a few.\textsuperscript{10}

Fourth, through harmonization of legal rules among countries that may not consist of formal treaties. For example, the European Union and the United States have sought to harmonize their anti-trust, securities and other law to avoid inconsistent legal actions against corporations operating in both jurisdictions. Another example would be the recent efforts to coordinate banking policies in light of the global fiscal crisis. But such harmonization is not limited to formal harmonization among governments.

For example, the United States Uniform Commercial Code (“UCC”) recognizes a type of law binding on contractual parties which bears a great deal of resemblance to TLH, and a traditional form of international law creation which is really a subset of TLH: customary international law. Customary International Law is created when a norm is recognized by the great majority of countries and those countries comply with that norm out of a sense of obligation.\textsuperscript{11} Thus, customary international law, like TLH, arises from an organic process of practice rather than norm creation from above.

U.S. Uniform Commercial § 1-205, titled “Course of Dealing and Usage of Trade” provides an excellent analogy to the creation of customary international law and to the process of TLH.

UCC Section 1-205 provides:

\textsuperscript{10} The International Chamber of Commerce specifically claims to make “policy” in all of the above-enumerated fields. \textit{See} International Chamber of Commerce at http://www.iccwbo.org/.

\textsuperscript{11} This sense of legal obligation on the part of countries is commonly referred to as \textit{opinion juris}. It distinguishes simple custom, which may be followed from simple tradition or habit, from legally binding customary international law, which is followed because countries believe they are supposed to follow particular practice or custom, whether or not there is a binding treaty or other positive law addressing the issue. One way to view customary international law is that it creates a reasonable expectation interest that a particular practice will be followed by a country, as long as that country has not previously indicated its intent not to follow the widely practiced custom.
(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Under UCC § 1-205, the course of dealing among parties, or the customary usage of trade in the particular business of the parties, can give rise to legal norms that are binding on a court when two parties are in a dispute and the contract among the parties does not squarely address the specific issue before the court. The customs of the trade or the course of dealing can thus give rise to norms that are as binding as if there were a contract between the parties. In other words, the practices of businesses can create transnational norms which is a quintessential form of TLH.

Fifth, through market forces whereby consumers or retailers in one country insist on the producer country implementing certain product safety, environmental or other standards in the producer country that are consistent with those of the country in which the products are sold. Some examples would include the controversy over product safety standards in China, and the requirement of automakers to comply with the auto emissions standards of the market in which they intend to sell their vehicles. In other words, as the marketplace for goods becomes global, the quality standards for the production of those goods increasingly becomes harmonized as well. It is nevertheless important not to confuse quality standards for production of goods with labor standards associated with the production of goods. As discussed later in this paper, the labor conditions in the locale of production remain much less affected by TLH, although even here
these is some very modest movement towards harmonization, albeit primarily in those countries that are subject to other forms of pressures for TLH such as regional integration.

II. IMPLICATIONS OF TRANsnATIONAL LEGAL HARMONIZATION

A. THE DEBATE OVER FREE TRADE

Globalization, and the associated process of TLH, has frequently been viewed, with considerable justification, as adverse to human rights, labor rights and environmental protection. This article nevertheless makes the counter-intuitive argument that TLH has the potential to result in greater net protection of human rights, worker rights, consumer protection, and even the environment, although this article will discuss the very important caveats inherent in this assumption. TLH can be viewed, to some extent, as a remedy to the nocent consequences of economic globalization. Economic globalization has usually been adverse to individual, labor and environmental protection in the short and medium term, and not infrequently in the long-term as well. Nevertheless, this article will argue that TLH provides an opportunity to expand individual, labor and environmental protection in a manner that traditional international law has not accomplished.

Economic globalization has frequently been associated with environmental degradation, human exploitation, and other social ills. Critics of economic globalization would argue that it does not benefit the people of either developed or developing countries. Rather globalization only helps multinational corporations by enabling them to seek production locales with weak

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12 Enormous demonstrations and furious street clashes between riot police and anti-globalization protestors have characterized almost every meeting associated with globalization since the Seattle meeting of the World Trade Organization in 1999, including Prague in September 2000, Genoa in July 2001, Washington D.C. in September 2002, Santiago in November 2004 and Melbourne in November 2006. These protests have included union members, environmentalists, human rights and environmental activists and various other groups and individuals opposed to various aspects of economic globalization. Their opposition has included fierce criticisms of the process of globalization generally, and the global institutions created to facilitate globalization, principally the World Trade Organisation, the International Monetary Fund and the World Bank.
labor and environmental protections and other low social and economic costs for doing business. These corporations can then sell their goods produced at low-site locales without limitation in high-cost markets with elevated environmental, labor and other societal protections. This “race to the bottom” forces countries to abandon their own environmental and worker protections in an effort to either attract foreign investment, or to avoid losing already existing manufacturing capacity. Critics of globalization also argue that there is a socio-cultural element of globalization that poses a real threat to social stability and indigenous cultures, particularly in developing countries.

Conversely, many proponents of free trade have argued that issues related to worker rights, human rights and the environment should be separated from free trade. These proponents would argue that free trade, in and of itself, is a positive thing and that any nocent consequences of pure free trade pale in comparison to its benefits. Again, because the arguments in favor of globalization have been the source of enormous literature, the bulk of that discussion will be limited to the footnotes herein. Those benefits can, however, be very briefly summarized as including the enormous and historically unprecedented lifting of millions of people from poverty

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13 Critics of free trade argue that it inevitably compromises the rule of law, environmental protectionism and basic human rights by promoting weak regulatory institutions to attract foreign investment. The growing disparity in wealth between the developed West and the developing Third World is often cited as further proof of the negative effects of globalization. While the total world income increased by 2.5% annually on average, the number of people struggling in poverty also increased to 100 million. See World Bank, Global Economic Prospects and Developing Countries 2000, at 29. Even in Europe, where international economic institutions engineered the Russian transition from communism to a market economy, globalization at times appeared to injure instead of help. Russia’s gross national product fell to 60% of China’s GDP within a decade and suffered an unprecedented increase in poverty.

14 Many of those opposed to free trade argue that it and erode cultural diversity by destroying traditional cultural expression (the “McDonald’s effect”). Sir James Goldsmith writes that “the loss of rural employment and [subsequent] migration from the countryside to the cities cause a fundamental and irreversible shift. It has contributed throughout the world to the destabilization of rural society and to the growth of vast urban concentrations. The urban slums congregate uprooted individuals whose families have been splintered, whose cultural traditions have been extinguished and who have been reduced to dependence on welfare from the state”. See Sir James Goldsmith, The Trap, 1994, at 103. Globally mobile capital produces financial circumstances that undermine socio-political stability such as the Asian financial crises of 1997.
as countries such as China, India and other countries\(^\text{15}\) develop a substantial middle class for the first time in recent history. Of course it must be acknowledged that the reduction of poverty in sheer numbers in the world may be accompanied by growing inequality \textit{within} developing countries. Nevertheless, the emerging middle classes have traditionally been strong advocates for greater individual and political freedom,\(^\text{16}\) although this traditional development has been notably lacking in countries such as China and Russia. This traditional development derives in part from the greater participation of women in the economic\(^\text{17}\) and even political systems,\(^\text{18}\) and greater

\(^{15}\) See, e.g., David Dollar and Aart Kraay \textit{Spreading the Wealth}, \textit{FOREIGN AFFAIRS} 81, 1 (2002): at 120-33, wherein the authors argue that developing countries that opened their economies by easing barriers to trade and seeking direct foreign investment accelerated their national growth versus those countries that chose to restrict foreign investment and impose high tariffs on imports. As an example, the last twenty years in China and India exemplify this connection between economic growth and a subsequent reduction in poverty. World Bank studies estimate that China’s gross domestic product grew at ten percent on average per year whereas real income increased by six percent a year in India. The Asian Development Bank reported that Chinese poverty declined from approximately twenty eight percent in 1978 to nine percent in 1998. Official Indian statistics document a similar decrease: poverty rates in India declined from fifty one percent in 1977-78 to twenty-six percent in 1999-2000. \textit{See also} World Bank Group, \textit{World Development Indicators} 2002, (International Bank for Reconstruction and Development, 2002); See also \url{http://www.adb.org/statistics/} (basic statistics and statistical database system); \textit{See generally} Surjit Bhalla, \textit{Imagine There’s No Country: Poverty, Inequality, and Growth in the Era of Globalization} (Washington D.C., Institute for International Economics, 2002).

\(^{16}\) See, e.g., Gary Marks * Larry Diamond, \textit{Economic Development and Democracy Reconsidered} in \textit{Reexamining Democracy} (Newbury Park Sage, 1992), critiquing Seymour Martin Lipsett, \textit{Some Social Requisites of Democracy}, \textit{AMERICAN POLITICAL SCIENCE REVIEW} 53 (1959) at 71-85. In the former article, the authors argue that an increase in economic prosperity creates a middle class. This middle class inevitably vocalizes its desire for more political representation resulting in the rise of democratic institutions. The authors acknowledge that scholars criticized Lipsett’s connection between economic growth and democracy during the 1960’s and 1970’s when the world watched almost every fledgling democratic nation disappear into authoritarian regimes. But the political transformations throughout Europe, East Asia and Latin America in the 1980’s, that followed robust periods of economic development or coincided with a shift to a free market economy, appear to affirm the link between increased economic prosperity and the development of democracy. Thus where the existing government functions as an authoritarian regime, “prolonged economic success can contribute to the [public] perception that the exceptional coercive measures of the non-democratic regime are no longer necessary” and inspire the populace to force political change. \textit{See}, e.g., Juan Linz and Alfred Stepan, \textit{Problems of Democratic Transition and Consolidation}, Johns Hopkins University Press, 1996, at 76-81.

\(^{17}\) Between 1990 and 2004, in Argentina, Brazil, Chile, Peru and Uruguay, the percentage of women in each country’s population earning a non-farm wage increased an average of 5.4% over the period. \textit{Refer Population Reference Bureau 2005 Women of Our World at} \url{http://www.prb.org/Datafinder}.

\(^{18}\) Between 1990 and 2004, in Argentina, Brazil, Chile, Peru and Uruguay, the percentage of women in each country’s parliament increased 6.4% on average. \textit{Refer Population Reference Bureau 2005 Women
access of the population to technological resources that connect them with diverse views,\textsuperscript{19} although the efforts of China’s government to block internet sites, and the efforts of the Russian government to manipulate domestic internet sites, and the media in general, suggest that increased internet usage is not perfectly correlated with greater access to diverse viewpoints.

With respect to the environment, it has been argued that overall economic growth as a result of trade can contribute to the development of cleaner technologies within a country’s manufacturing sector,\textsuperscript{20} although the extensive environmental degradation in China’s industrial sector suggests that the correlation between a country’s economic wealth and environmental improvement is shaky, and in any event, far from immediate.

This article will demonstrate that both sides of the debate over free trade make the conceptual mistake of viewing economic globalization as a separate process from legal globalization and/or harmonization. In part, this conceptual misunderstanding arises from the

\textit{of Our World at} \url{http://www.prb.org/Datafinder}. The Freedom in the World survey by Freedom House measured freedom in Argentina, Peru, Brazil, Uruguay and Chile between 2002 and 2008. The survey examined the opportunity to act spontaneously in a variety of fields outside the control of the government and other centers of potential domination—according to two broad categories: political rights and civil liberties. Political rights enable people to participate freely in the political process, including the right to vote freely for distinct alternatives in legitimate elections, compete for public office, join political parties and organizations, and elect representatives who have a decisive impact on public policies and are accountable to the electorate. Civil liberties allow for the freedoms of expression and belief, associational and organizational rights, rule of law, and personal autonomy without interference from the state. Freedom House rated both Brazil and Argentina as only partly free in 2002 with a score of 3.0 on a scale of 1 to 7—for political rights and an analogous rating for civil liberties; a rating of 1 indicates the highest degree of freedom and 7 the lowest level of freedom. Chile and Peru earned a score of 2.0, free on the scale, in 2002. Uruguay had a score of 1.0 in 2002. In 2008, every country except Peru increased freedom for its citizens. Argentina and Brazil rose to 2.0; Chile shifted to 1.0 and Uruguay remained constant whereas Peru slipped to 2.5. \textit{See Freedom in the World Report 2002, 2005, and 2008 at} \url{http://www.freedomhouse.org}.


\textsuperscript{20} See, e.g., David I. Stern, \textit{The rise and fall of the environmental Kuznets curve}, World Development 32(8), 2004, at 1419-1439., wherein the author argues that an increase in economic prosperity may reduce pollution. The author employs a statistical analysis of this relationship through a bell shaped curve – called the Kuznets environmental curve – that depicts pollution levels initially rising with income then falling as income continues to increase. \textit{See generally} Gene Grossman and Alan Krueger, “Economic Growth and the Environment”, \textit{Quarterly Journal of Economics} 110 (1995): p. 352-377, wherein the authors discuss estimates by economists of the income level at which certain kinds of pollution peak.
widespread perception that the only possible regulator of the multinational corporation and the
global economy is the nation-state. This will article will argue, however, that the process of
TLH has the potential for changing the traditional role of the state, international institutions, and
even the individual in making international law.

This perception of immunity from regulation is buttressed by the World Trade
Organisation’s prohibition of unilateral imposition of environmental, labor or human rights
standards that restrict trade, with some exceptions. As discussed infra, this refusal of the WTO to
link trade with issues of human rights, the environment and business regulation is a clear
limitation on the expansion of non-trade legal regulation through a global “commerce clause.”
Nevertheless, the process of TLH may make it easier to link the issues in a manner independent
of the WTO, but still legally recognized by the WTO.21

The United Nations cannot effectively regulate market forces since it is limited by the
lowest common denominator of its diverse and numerous members and its focus on international
security rather than regulation.

These traditional views of free trade and regulation overlook the central thesis of this
article that economic globalization very frequently leads to harmonization of law with respect to
vast areas of legal regulation that are normally considered the province of state or domestic law.
This last correlation is not inevitable, but there are simply too many historical and contemporary
eamples of the correlation to argue that the correlation does not exist.22 For example, as
discussed in greater length below, the United States and the European Union have “federalized”
individual liberties in the United States and the European Union. The Council of Europe has
harmonized individual liberties at a somewhat lower level throughout Europe, and this article

21 See discussion infra at ___.
22 REFERENCE.
would argue that the reasons for the Council’s lower level of protection is precisely because it is not linked to a common market. MERCOSUR has increasingly established minimum human rights norms having little to do with trade within its enormous trading block. The OAS has, somewhat less successfully, attempted to harmonize human rights standards in the Americas. It has been hamstrung by the lack of any linkage with trade, whereas membership in the Council of Europe was at least viewed as a precursor to membership in the EU common market, although Russia’s membership has weakened this assumption and also weakened the credibility of the Council of Europe’s human rights enforcement credibility. Cars sold on a global level have to meet California emission standards, and the product safety concerns raised over China’s products have demonstrated that even goods produced in countries with traditionally lower safety standards will, to some extent, have to meet the safety standards of those markets with higher standards. The United States and the European Union are in the process of harmonizing their anti-trust and securities standards as the European Union has blocked numerous mergers between United States companies because of the effect of those mergers on the European Union market. Microsoft faced greater scrutiny in the European Union even as it eventually passed the anti-trust hurdles raised by the United States Department of Justice. Various countries, including the United States, require that developing countries must comply with “international labor rights” before they are granted tariff treatment more favorable than the standard Most Favored Nation treatment required by the World Trade Organization. Despite these developments, economic globalization has been its most exploitative in the areas of labor rights and environmental

\[\text{\footnotesize 21 In fact, it could be argued that some of its success is related to membership in the Council of Europe as a prerequisite to joining the European Union. Indeed, the admission of Russia, with little chance of ultimate EU membership has, weakened the credibility of the Council of Europe human rights system as binding on member nations.}\]

\[\text{\footnotesize 22 See discussion infra at \_\_.}\]

regulation, and these are also the areas in which TLH has had the least success in effectuating substantial progress. Nevertheless, TLH, because it does not require the imposition of norms on recalcitrant countries, also has the greatest potential to effectuate progressive change in these areas. As the discussion immediately below demonstrates, TLH has the potential to effectuate this progressive change because it operates on the same principle that has underlined federalism and other regional integrative systems; namely the linkage between commerce and legal rights directly, and most importantly, *indirectly* to trade.

**B. FEDERAL LAW AND INTERNATIONAL LAW**

In undertaking this analysis, this article will call upon contemporary and historical case studies of independent countries forming a federal, confederative or other multinational integrative *legal* structure with regulatory power over a wide number of issues, even though such associations derived initially from efforts at *economic* integration. Those case studies will principally focus individually on the European Union, the United States, MERCOSUR, NAFTA and the African Union, as well as efforts at legal harmonization among those entities. As should be evident from the discussion, the legal harmonization resulting from these different national associations vary widely, and some of the associations help to demonstrate the challenges facing the process of TLH in balancing the interests of economic globalization and insuring the health and individual liberties of the world’s citizens.

As the Introduction to this article discusses, TLH has its parallels in the development of federalism in the United States, the development of the European Union, and the growing legal harmonization among different countries and economic regional groupings. This article will argue that TLH also has its parallels in the incorporation of fundamental human rights of a civil, political, economic and social nature on a federal level in the US and the European Union. This
“federalization” of economic, social, economic and human rights could not, and would not, have occurred without the initial economic harmonization that provided the initial impetus for these regional groupings. These regional groupings then eventually metamorphasized into something much more profound and much more protective of the human rights of the individual than could have been envisioned by the original protagonists of economic integration.

TLH has resulted in increasing transnational and trans-regional harmonization of laws and legal rules with respect to such diverse substantive areas as anti-trust, securities regulation, labor standards, environmental regulation, human rights, contract law, and human health and safety, as the world community attempts to effectuate a global market, and finds that other kinds of regulation are necessary in order to do so effectively.


This article will argue that the process of economic globalization is leading to a globalization of law and, to some extent, replacing the traditional role of the state as the guarantor of individual protections against the untrammeled power of economic forces. TLH, almost by definition, involves the concurrent transformation of the traditional role of the state

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itself as the sole guarantor of individual social, economic and other human rights, cultural identity, and individual security against domestic and external threats. This article argues that the traditional model of the nation-state in both traditional international law and political scientific terms is obsolete. This model of the nation-state is obsolete from an empirical perspective, since it does not accurately describe current or historical reality. It is also problematic from a normative perspective, since the very notion of the nation-state is often incompatible with fundamental human rights principles, particularly when the state is the juridical embodiment of the dominant ethnic or cultural group.

Examples of such incompatibility between the traditional nation-state and fundamental human rights and democracy can be seen in the increasing phenomena of separate nations arising within a common political state. Some examples include the post-Franco emergence of the nation of Catalonia within the State of Spain, the establishment of Scottish and Welsh parliaments in the United Kingdom, the uneasy co-existence of the Flemish and Walloon national groups within the State of Belgium with parallel political parties, educational systems and other parallel state institutions, the existence of officially recognized French, German, Italian and Romansch cantons in Switzerland, and Quebec’s emergence as a separate nation within the state of Canada, with sovereignty over language, immigration, culture, and a myriad of other issues.


31 Andreas Wimmer, Nationalist Exclusion and Ethnic Conflict: Shadows of Modernity 233 (2002) (“French, Italian and Romansch are not considered to be less ‘typically Swiss’ or less representative of the Swiss nation than German”).

Finally, to the extent the European Union has assumed many of the traditional economic and other regulatory functions of the state, the EU can increasingly be viewed as a state composed of numerous nations. This has become increasingly true as the elimination of borders within the EU has meant that not only the regulatory functions of the state have become increasingly centralized, but also the security functions of the state related to protection of the territorial region, regulation of immigration and protection of EU citizens from threats to their personal security. This article will provide an empirical and historical examination of the historically aberrational and increasingly obsolete role of the nation-state as the fundamental building block and source of international law.

III. OLLIE’S BARBEQUE AS AN ILLUSTRATION OF THE PARALLELS BETWEEN FEDERALISM AND INTERNATIONAL NORM CREATION

It may seem odd to introduce a unified theory of international law, the state and the individual with a United States case involving the outlawing of segregation in a modest barbeque restaurant in Birmingham, Alabama. Nevertheless, the U.S. Supreme Court cases that did so, Katzenbach v. McClung,33 and its companion case Heart of Atlanta,34 provides a vivid illustration of one of the central themes of this work: the ways in which “supra-state” authority such as federal law and international law have operated in similar ways to vastly expand individual human rights protections, environmental regulations and economic regulation in ways that have blurred the traditional view of states as sovereign entities with plenary authority to regulate individuals and other non-state actors within their territory. This article will explore how U.S. federal law, European Union “federal” law, and international law have used their

34 379 U.S. 241 (1964)
respective equivalents of the Commerce Clause, and the implied power associated with that commerce power, to regulate areas of the law quite removed from those associated with trade. In other words, the process of legal harmonization at work in the United States is qualitatively not radically different from the process of legal harmonization at work elsewhere in the world.

As this article will illustrate, the distinction between federal law and international law is much hazier than commonly supposed, and in fact the process of implied power of supra-state authority based on trade power in *Katzenbach* is, in many respects, equally applicable to international law. Federal and international law can thus be viewed as points along a spectrum ranging from pure international law, such as that embodied in international institutions like the United Nations, to purely unitary, domestic law exemplified by non-federal states such as Japan or Romania. This article will explore how international law is being created in ways that fall outside the traditional definition of international law, and traditional concepts of how international law is created. To this end, this article will discuss the ways in which international law is created by non-state actors and in ways far removed from the traditional view of international law as a creation of international institutions.

In December 1964, the United States Supreme Court upheld the Civil Rights Act of 1964 (the “Civil Rights Act”)\(^{35}\) in the seminal case *Katzenburg v. Clung*. The Civil Rights Act, among other things, eliminated segregation in public accommodations, including hotels, restaurants, theaters, retail stores, and similar establishments. The challenge to the Civil Rights Act presented in *Katzenburg* resulted from the absence of any explicit Constitutional basis for the federal government to regulate systematic discrimination by individuals within the several states.

\(^{35}\) 42 U.S.C. 21 et seq.
Indeed, prior to the passage of the 14th Amendment following the Civil War, the federal government had little Constitutional power to regulate US states’ treatment of their own residents, even when those actions, such as slavery, which would now be characterized as crimes against humanity. States were largely free to treat their own citizens however cruelly or arbitrarily they wished, as long as such policies did not affect the common market, foreign policy, or other limited area of federal jurisdiction. At the risk of stating the obvious, states could even enslave their own inhabitants and no state was under any requirement to provide any of the rights contained in the federal bill of rights to their own citizens.

In other words, Prior to the 14th Amendment, the U.S. federal government had less legal power to regulate human rights abuses by U.S. states against their citizens than international law has to regulate human rights abuses by nations against their own citizens. In this respect, U.S. states enjoyed more sovereignty and autonomy from federal interference than individual nations currently enjoy in the international legal system.

However, even after the Civil War and the passage of the 14th Amendment, U.S. states still enjoyed certain kinds of sovereignty that even sovereign nations do not currently enjoy under international law. The concept of sovereignty normally implies the power to regulate the activity of individuals residing within the territory of the sovereign. Nevertheless, the U.S. Constitution originally envisioned the several states as the primary regulators of individual activity, not the federal government, and this regulatory division continued even after the Civil War.

The inability of federal law to protect, or regulate the conduct of, individuals, as opposed to the respective states, is much more characteristic of traditional international law, not domestic law. Indeed, the growth of international criminal law has even shattered that fundamental distinction between international and domestic law.
This division of power left the federal government unable to prevent creation by the states of a pervasive system of private segregation that would now be characterized as a violation of *jus cogens* international law.\(^{36}\) Nevertheless, the division of powers between the federal and state government left the federal government powerless to require states to eliminate the pervasive system of private segregation, at least until Ollie’s Barbeque was forced to serve its delectable, artery-hardening ribs on an equal basis to black and white customers.

The U.S. Supreme Court was forced to resort to the Commerce Clause of the U.S. Constitution because, as mentioned above, no other Constitutional authority existed for federal regulation of individual discrimination of the kind presented by Ollie’s Barbeque. However, as noted by the U.S. Supreme Court, Ollie’s Barbeque, was not alleged to have served customers from other states and certainly not customers from other nations.\(^{37}\) The Supreme Court ultimately found the link between the restaurant’s discrimination and the Commerce Clause in the $70,000 worth of food served annually by the restaurant, some of which arrived at Ollie’s Barbeque via interstate commerce.\(^{38}\) *Katzenbug* and its progeny enabled the federal government to exercise almost full sovereignty over its citizens until the application of the implied power of

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\(^{36}\) It is true that segregation was not limited to private actors after the Civil War, at least until Brown *v.* Board of Education and its progeny dismantled state-sponsored segregation. Nevertheless, the 14\(^{th}\) Amendment *could have* permitted federal prevention of state laws requiring segregation if the U.S. Supreme Court had viewed such laws as a violation of equal protection. Thus, the existence of state segregation was not technically a lacunae in federal power, but the characterization of segregation itself by the US Supreme Court.

\(^{37}\) Katzenburg, supra at 294. The Court found that “[t]here is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress.”

\(^{38}\) Congress had provided in Section 201(a) of Title II that the Civil Rights Act covers any “restaurant . . . principally engaged in selling food for consumption on the premises” under the Act “if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce.”
the federal government to regulate individual activity was checked in a limited fashion by *United States v. Lopez*. 39

Thus, it was only with the successful implementation of the Civil Rights Act that U.S. federalism achieved a full conceptual break with traditional international concepts of the full sovereignty of each state to regulate its own citizens. Whereas prior to the Civil War, and even afterwards, U.S. states enjoyed more sovereignty in some respects than nations today enjoy under international law, the analogy between U.S. federalism and international law appears inapposite. Nevertheless, the history of U.S. federalism is not an isolated example of sovereign entities coming together and delegating power to a central authority over limited areas of substantive law – it is simply an earlier example, preceded even earlier by the Swiss Confederation.

A. THE CREATION OF THE UNITED STATES: FROM CONFEDERATION TO FEDERALISM

It is helpful to go back to the creation of the United States to fully appreciate the evolution of US federalism from a form of government that would now be characterized as a kind of international law, to a form of government that is now unquestionably “domestic” law. Some scholars have gone so far as to posit that the U.S. Constitution itself was, in substance, an international treaty among sovereign entities rather than an organic creation of a unitary sovereign entity. 40

The states of the United States did not transform themselves from a collection of British colonies to a single country upon their declaration of independence from Britain. Rather the process of political integration of the states of the United States has been much more gradual,

and it can be argued that the United States, in many respects, did not even achieve the level of political and economic integration achieved by the present-day European Union until the very recent past.

Antebellum United States resembled a confederation of truly sovereign, independent states much more than the current European Union. This was reflected in much of the U.S. legal literature of the period, and reflected in the legal reality of the period. For example, antebellum legal theorists such as Calhoun viewed the American union in terms that would currently be considered confederative, rather than federal. These legal theorists took the 10th Amendment to the U.S. Constitution and state sovereignty seriously, not just as jingoistic assertions of anti-Northern sentiment, but as expressions of the original concept of US federalism as thirteen independent nations delegating certain limited powers to a central government and otherwise retaining the other attributes of state sovereignty. This view of state sovereignty is consistent with the empirical political reality of the United States. There is no other historical example in the last three centuries of one legally unified country where a class of people were full citizens in some jurisdictions and slaves in other jurisdictions in the same country. It is similarly uncharacteristic of a single unified country that as late as 1966, a mixed-race couple could be legally married in one state and be arrested and imprisoned for being married in another state.

B. The Articles of Confederation

The Articles of Confederation, in existence from 1776 to 1787 were not just a failed, ineffectual historical blip on the way to the inevitable creation of a “federal” United States. Rather, the Articles were an accurate representation of the self-perception of the newly
independent states that they were sovereign, independent countries. As such, they maintained their own currencies, customs controls and port fees. They imposed tariffs on goods from other states and Congress had no ability to regulate trade. Consistent with a collection of sovereign states, the Congress had no power to enforce its laws and had no power to impose taxes. As with any collection of independent countries, each state had an equal vote in Congress, as reflected in the current United States Senate. The Articles of Confederation were simply a pragmatic effort to create greater unity among those independent states in the face of the threat from Britain during an ongoing War of Independence and in foreign policy in general. In no way did the countries under the Articles view themselves as anything other than fully sovereign countries with full control over their economic, legal and domestic political affairs, except to the extent such matters might be delegated on a limited basis to other entities, much as contemporary countries delegate certain discrete economic, political and security matters to transnational or international entities.

C. THE US CONSTITUTION

Similarly, there has been a great deal of misunderstanding about the process by which the creation of the US Constitution took place, and the intent of the creators of that instrument, to the extent any kinds of generalizations can be derived from the collective intent of the Founders.

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41 See, e.g., Article II of the Articles of Confederation: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”; See also Keith L. Dougherty, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION: STATE SUPPORT OF THE FEDERAL GOVERNMENT (Cambridge Univ. Press, 2001); See also Larry Catá Backer, The Extra-National State: American Confederate Federalism and the European Union, 7 COLUM. J. EUR. L. 173 (2001).
43 Reference
44 Reference
This misunderstanding has been compounded by the subsequent history of the United States which has transformed the Constitution into a very different document than it was at its creation.

It goes without saying that the differences between the US Constitution and the Articles of Confederation are enormous. However, the size of those differences appears even greater when viewed in hindsight than was apparent at the time the Constitution was created.

First, at the danger of echoing the rhetoric of those who promoted slavery, segregation and other evils under the banner of “states rights,” it is nevertheless important to recognize as a historical and legal matter that the structure of the Constitution reflects the widespread view at the time of the Constitution’s creation of the US as a collection of sovereign entities who delegated an admittedly broad, but limited array of powers to the central government. Some of those attributes of sovereignty include:

1. The creation of a central government of limited powers. The Constitution, as originally created, specifically enumerated the powers of the federal government, and retaining all other rights of sovereignty to the individual states, as evidenced by the Tenth Amendment.

2. The limited powers granted to the federal government. Although the list of federal powers articulated in the Constitution appear impressive, in fact they are largely limited to addressing: (a) the creation of a common market with free movement of goods, peoples and services across state boundaries, much like the common market that exists in the European Union; and (b) the creation of a coherent, unified voice of the United States in its relations with other countries. Although these two areas of federal jurisdiction arguably embody many of the

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45 A central thesis of this article is that the experience of growing federalization of civil rights in the United States, contrary to those advocates of states’ rights, resulted in a vast increase in net individual and human rights in the United States, even if this laudable development may not have been explicitly intended by many of the Founders.
aspects of national sovereignty, it is important to consider what the original pre-Constitution did not cover.

As noted previously, the federal government had absolutely no power to regulate the treatment of a state of its own citizens, no matter how extreme that treatment might be. Nor did it originally have much power to regulate the actions of US citizens within the several states, commonly called the “police power.” The sovereign US states in pre-Civil War United States thus retained many of the attributes of what we would currently normally consider independent states in an age where sovereignty is normally curtailed by certain supranational institutional rules affecting economics, taxation, labor, human and animal health, product safety, anti-trust and securities regulation, to name just a few. Thus, the United States, prior to the Civil War evolved into a collection of states that differed from each other much more than the presumably non-federal European Union. Those limitations, however, even survived the Civil War, allowing, as noted above, some states, to practice rigid apartheid in all aspects of public and private life, while other states resembled the rest of the democratic world. Even two individuals married in one state could be arrested in another state for the simple act of being married until 1967, hardly a legal characteristic of a country with one coherent domestic legal system.

46 For example, the World Trade Organisation, for the purpose of creating an integrated world market, has had a tremendous impact on US law, requiring the US to modify a substantial number of its laws and regulation regarding the environment, taxation, product health and safety, and of course domestic rules regarding trade.

47 Id.

48 REFERENCE

49 Even sections of US domestic statutes protecting dolphins and sea turtles have been ruled violative of the General Agreement on Tariffs and Trade, even though there has never been any allegation of any protectionist intent behind the passage of such acts.

50 REFERENCE

The enormous advances in human rights protection in the United States resulting from the elimination of slavery resulted not from a consensual political process within the slave states, but because the values and mores of the North were imposed on the South through a violent strengthening of the federalist process. Similarly, the end of apartheid in the United States also came about only through a strengthening of the implied powers of federalism, piggybacking on the Commerce Clause of the Constitution, which itself was intended only to create a common market, not create a national civil rights law.

D. THE EUROPEAN UNION: FROM “CONFEDERATION” TO “FEDERALISM.”

Similarly, the European Union started out as an effort to create a common market that would make war impossible on the European Continent. The European Union, however, has evolved from a common market into an entity that is perhaps the most potent protector of individual human, economic and social rights the world has ever seen, arguably surpassing even the Council of Europe as the most effective and comprehensive protector of basic human rights in the world.

This position is likely to be controversial since most human rights commentators regard the Council of Europe and its European Court of Human Rights as the preeminent human rights regional body in the world. In fact, this article argues below that the European Union’s European Court of Justice is an even more potent example of such regional human rights protection as it addresses the increasingly broad human rights protections offered by the European Union treaties. The failure of most human rights theorists to recognize this reality reflects this classical and increasingly outdated dichotomy between international and domestic law. When international norms are incorporated into “federal law” such as European Union law, with much more direct, expansive and binding authority, than traditional international bodies
such as the European Court of Human Rights, that federal body has now effectively become a much more effective enforcer of human rights norms. Needless to say, the same principle applies to United States federalism as well.

As will be discussed later in this article, this transformation of international law into federal law has been occurring at an accelerating rate in the European Union, and to a lesser extent in other regions of the world. As this article will explore, this transformative process from international law to “federal law” has profound implications for international implementation of individual protections and regulation of labor, the environment and other substantive areas of the law normally associated with national law.

As discussed above, the federalization of US law has frequently occurred in substantive areas having little connection with the original powers granted to the federal government by the Constitution. Such federalization has, however, resulted in a tremendous increase in overall enjoyment of human rights by US inhabitants, albeit principally by raising the low floor of minimum human rights protection in the least protective states. Putting aside, for the moment, the enormous expansion of federal power as a result of the Civil War, this federalization of U.S. law was made possible by using the implied powers of the federal government under the Commerce Clause, and to some extent the Spending Clause. It was the creation of a unitary economic market, as provided by the Commerce Clause, which gave the federal government the implied power to regulate an issue which had only a very attenuated relationship with interstate commerce. The federal government’s exercise of implied power to regulate entities not explicitly subject to federal regulation occurred as the American market and economy became more national. Legal regulation of a wide variety of economic and social issues then moved from the state level to the federal. Similarly, as economic and other issues become global with
the increasing globalization of the world economy, a similar phenomenon is occurring on the international level.

E. THE IMPLICATIONS OF ECONOMIC AND EGAL HARMONIZATION IN THE UNITED STATES FOR INDIVIDUAL POLITICAL, ECONOMIC, SOCIAL AND HUMAN RIGHTS.

As noted above, prior to the passage of the application of the post Civil War Amendments to the US Constitution, the United States practiced one of the most barbaric systems of racial slavery ever promulgated. Even after the passage of the Equal Protection Clause, many Southern states promulgated a system of racial apartheid unique to the industrialized world and, as of the early 1960s, officially practiced only in the outlaw nations of Rhodesia and South Africa. The federalization of civil rights law, originally only a concern of the individual state, brought the citizens of numerous US states up to a minimum, albeit highly imperfect, standard of human rights protection, while permitting other states in the United States to grant their citizens even greater rights.

Similarly, the process of TLH can result in substantial increases in net individual rights, primarily by raising the floor of minimal human rights protections of the least protective jurisdictions.54

IV. A CASE STUDY OF TRANSNATIONAL LEGAL HARMONIZATION: THE “FEDERALIZATION” OF EUROPEAN LAW

54 It must also be noted, however, that this process of guaranteeing individual rights and providing minimal environmental, labor and other standards was under considerable pressure in the United States during the Bush Administration, and to some extent in the European Union as well. For example, under the Bush Administration, federal supremacy has been used as a means of attacking the relatively more stringent environmental standards in California and other states, and as a means of preempting state law on issues related to same-sex marriage, drug regulation, abortion, euthanasia and stem-cell research. Congress passed a statute that deprived all same sex couples legally married in a US state from receiving the more than 1,000 federal benefits flowing from marriage. Conversely, the conservative justices on the federal Supreme Court have invoked the limited power of the federal government in striking down several federal laws buttressing individual civil rights. See, e.g., 1 U.S.C. § 7 and 28 U.S.C. § 1738C.
Part of the reason for the relative dearth of literature on the parallel aspects of US federalism and European integration is because many legal and social commentators on both sides of the Atlantic resist any equivalency between the United States and Europe. Scholars on both sides of the Atlantic tend to view federalism in the US through the lens of domestic law, without recognizing the striking parallels between U.S. federalism and the process by which international law is created, although increasingly greater numbers of scholars have noted the parallels between the two phenomena. Legal harmonization in the European Union has been viewed, arguably incorrectly, as a *sui generis* phenomenon with no other parallels, but definitely much more a creation of traditional international law than the United States. They would argue that the European Union is a creation of specific treaties among fully independent and sovereign countries, as opposed to the US Constitution which supposedly was created organically from the “people.” As has been discussed previously, this distinction is more illusory than real in practice. The creation and development of United States federalism bears much more similarity to contemporary notions of international law than most commentators in the United States would currently admit. Similarly, many European commentators have themselves overlooked the similarities between the ostensibly international EU law and federal law in the United States. Indeed, as noted above, EU law has all the traditional characteristics of US federal law: supremacy and direct effect of EU law, implied powers of EU institutions to implement that law, 

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55 Part of the problem lies in the contemporary tendency to overlook the plain intent of the Constitutional framers to preserve many of the sovereign characteristics of the originally independent states of the United States. Indeed, a number of Constitutional scholars have argued that it would be more accurate to characterize the U.S. Constitution as a treaty among independent countries, rather than a document originating solely with the American people as a unified whole.

56 See, e.g., Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001). In this article, Backer discusses John C. Calhoun's theories of federalism in antebellum United States and how those theories of federalism may represent a conceptual framework upon which non-national federal systems of government, like the EU, can be best understood by comparing contemporary European federalism to the American federalist model post-1865.
and a system of judicial review that is, in some respects, more effective in ensuring compliance with EU law than US courts are in ensuring compliance with federal law. In some ways, the European Union has even surpassed the United States in the “federalization” of its law and the elimination of barriers to the free movement of people, goods, services and capital, and the elimination of discrimination by EU states against nationals of other states.

In many respects the evolution of European “federalism” has been even more dramatic than that of US federalism. The members of the European Union began the process as not just independent countries, but often violent adversaries. The members spoke different languages and had vast cultural differences. It was almost inconceivable in 1945 that the countries of Western and Central Europe would emerge from the Second World War and the Cold War as a unified common market with most physical borders eliminated.

In 1956, Italy, France, Germany, The Netherlands, Belgium and Luxembourg, the six original members of the European Union (then known as the European Economic Community), signed the Treaty of Rome. The Rome Treaty provided for the creation of a true common market with complete freedom of movement of goods, people, services and labor among the member nations, a European version of the United States Commerce Clause. As discussed above, these freedoms are enforced through a body of EU law, consisting of a series of treaties that enjoy supremacy over inconsistent state law, equivalent to federal supremacy in US constitutional law. The EU treaties, commonly although technically inaccurately referred to as the “EU Constitution,” are enforced by the European Court of Justice, which has the power to invalidate any provision of an EU countries’ constitution or laws which conflicts with the EU treaties. EU

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57 For example, any court at any level in any EU national court system can refer an issue involving EU law directly to the European Court of Justice for immediate adjudication of that EU legal issue for remand to the national court. Moreover, after a national constitutional court has made a final ruling on an issue of EU law, the ECJ is required to review that national court decision for compliance with EU law.
law usually has “direct effect,” which means that it, like US federal law, has immediate effect without any action necessary by the EU member state. The EU lawmaking bodies also have the implied power, as does the US federal government, to pass laws related to subject areas not explicitly granted to them by the treaties, but which are deemed necessary to effectuate the goals and purposes of the treaties. As in the United States, the determination of the extent of those implied powers lies with the European Court of Justice, not the individual states.

The European Union has witnessed a similar “federalization” of broad substantive areas of law as the European Union’s lawmaking institutions have exercised their implied powers in the creation of the European Union. European Union law currently enjoys each of the principal hallmarks of federal law as practiced in the United States. First, European Union law is supreme over individual national law, and in fact is even supreme over each country’s constitution.58 Second, European Union law has direct effect within each EU country’s legal system.59 Third, there is judicial review of each country’s laws by a central European Union court. Fourth, as noted above, the European Union lawmaking institutions have implied power to enact law not directly delegated to it under the European Union treaties, as long as there is even an indirect

58 It should be noted that some EU states such as Italy and Germany dispute the supremacy of EU law over their constitutional law in theory, but have recognized the principle in practice. See Solange, German Constitutional Court (1975) 2 CMLRev 434 (supremacy of EC law recognized so long as the provisions of Community law fulfill the requirements of the German Constitution); Frontini, Italian Constitutional Court (1973) 2 CMLRev 372 (if European law violated the fundamental rights contained in the constitution, the Court would not have applied the European law. 59 See http://ec.europa.eu/community_law/introduction/what_regulation_en.htm (last visited Mar. 13, 2009) (“Regulations are the most direct form of EU law - as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU regulations.” ) It should be noted that EU regulations enjoy this status in European law, as opposed to EU directives which require each EU state to implement the goals and purposes of the directive. See http://ec.europa.eu/community_law/introduction/what_directive_en.htm (last visited Mar. 13, 2009) (“EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.”)
connection with the powers granted under the EU treaties. Aside from defense and foreign
policy, admittedly a substantial exception, it is difficult to see how European Union law differs
from US federal law in terms of its effect as domestic law. Moreover, increasing areas of law
and policy related to foreign policy and external relations are being “federalized” to the extent
that: (1) many foreign policy issues are trade issues, which by definition must be dealt with at the
EU, not national, level; (2) the freedom of movement of people, goods, capital and services
within the European Union has meant that the relevant borders for issues related to business
regulation, immigration, criminal control, product safety, public safety are usually the borders of
the EU, not the borders of each EU state.

By 2009, the European Union enjoyed a completely unified market largely identical to
the interstate economy of the United States. Upon entry of a good in any European Union port, it
is an EU domestic good and faces no internal obstacles or discrimination in its sale or
distribution anywhere in the EU. As a result of the Schengen Convention, most countries now
have completely eliminated any type of border controls whatsoever, so that it is often not even
apparent when a traveler leaves one EU country and enters another. Moreover, it is easier for
lawyers to practice law in a different EU state than it is for lawyers in the United States. Unlike


\footnote{For example, most countries in the European Union are parties to the Schengen Convention, which facilitates the free movement of people, goods and services between EU member countries by removing all internal border checks among the signatory countries, thus literally creating a single, external border. The Amsterdam Treaty on the European Union incorporated the Schengen policies into the EU’s legal and institutional framework as the Schengen acquis to create a common set of rules to govern cross-border movement of EU citizens and immigration, to enhance security by enabling greater cooperation between customs, police and judicial officials of member countries and to establish the Schengen Information System designed to combat terrorism and organized crime by centralizing data for access by all member countries.}
the United States, students wishing to study in another EU state not only cannot be charged higher tuition than citizens of the other EU state, they are entitled to receive the same living stipends as students from the host country.

However, over the years it became increasingly apparent that the creation of a Common Market inevitably implicated much more than a unified economy. The lack of borders between EU states meant that the only meaningful border was that between the EU itself and non-EU states. Accordingly, immigration and asylum standards are in the process of being harmonized to prevent non-EU individuals from immigrating to the most permissive EU states, and then freely relocating elsewhere in the EU. Open borders have meant that criminal regulation has had to be harmonized and coordinated. Extradition standards now are not based on international law, but permit an arrest warrant or extradition for crimes that may not necessarily be illegal in the country from which the alleged criminal is sought, a deviation from the “double-criminality” requirement in extradition law. Environmental law has become increasingly “federalized” with environmental protection a central stated goal of the EU treaties.

It is, however, in the area of civil, political, economic and social human rights that the European Union has most clearly demonstrated the connection between economic and legal harmonization exemplified by TLH. The jurisdiction of the EU’s European Court of Justice is limited to the law encompassed by the EU’s treaties. Until relatively recently, the EU treaties have largely focused on issues relating to the creation of the common market and largely avoided addressing human rights issues per se, much like the original US Constitution before the creation of the Bill of Rights. Human rights in the European Union, and Europe in general, were traditionally enforced by the European Court of Human Rights, with jurisdiction over all the member countries of the Council of Europe, which encompasses almost all of the countries of the
continent of Europe. The European Court of Human Rights, in turn is governed by the European Convention on Human Rights and Fundamental Freedoms. The European Court of Human Rights is an enormously respected institution, and its decisions are almost universally recognized and enforced by the member states of the Council of Europe.

However, as the EU treaties have begun incorporating increasingly greater human rights protections above and beyond those guaranteed by the European Convention, the role of the EU’s European Court of Justice as a guarantor of human rights has vastly increased. This has resulted in the European Union’s “federalization” of what were previously European international human rights norms. Because the human rights criteria for entry into the European Union are much more stringent than for entry into the Council of Europe, and because the benefits of EU membership are so much more valuable than membership in the Council of Europe because of the attendant economic and other benefits, the European Union is able to force all of its member states to comply with its more rigorous human rights norms. It is not that the Council of Europe cannot effectively enforce the norms in the European Convention, but it is much harder to reach a consensus among the more numerous and politically diverse members of the Council of Europe regarding what precisely those norms are. With the entry of Russia into the Council of Europe, it has become vastly more difficult to reach that consensus.

Before the incorporation of expansive human rights norms into the EU treaties, EU countries exhibited substantial differentiation in their level of human rights protections. Now, the EU is effectively a single country with a harmonized level of stringent human rights protection in a larger, international entity with a somewhat lower standard of human rights protection. The “federalization” of human rights law in the European Union, which incorporates
labor, economic and social rights unimaginable in the United States, has resulted in an enormous increase of the “floor” of human rights protection for its approximately 495 million citizens.

V. OTHER EXAMPLES OF INCIPIENT TLH ON A REGIONAL AND NATIONAL LEVEL

A. REGIONAL INSTITUTIONS

Apart from the European Union, NAFTA, MERCOSUR, ECOWAS, and other regional economic associations, are already tentatively moving towards basing their economic relationships on mutual respect for certain fundamental human rights norms, particularly those human rights encompassing labor rights and other social and economic rights. The forums in which regional standards are discussed and debated produces a particularly valuable opportunity for NGO’s and other societal actors to participate in development of these regional norms in a manner that is frequently not recognized in traditional political science or international law theories of norm development. These non-state actors have much more influence in regional forums than in global forums and the personal and professional links resulting from these forums are much more effective in norm creation than in global forums. This author has participated in numerous such forums, and it was evident that the NGO impact on state and regional policy was significant.

NAFTA, through its labor side agreement, provides an admittedly weak, but historically novel mechanism for labor unions or government bodies to bring complaints against

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63 See, e.g., North American Agreement on Labor Cooperation, ______________ (“NAALC”).

Art. 1 of the NAALC, provides that “[t]he objectives of this Agreement are to . . . (b) promote, to the maximum extent possible, the labor principles set out in Annex 1 . . .”. Annex 1, in turn, provides 11 labor principles that the parties to NAFTA and the NAALC are obligated to respect:

1. Freedom of association and protection of the right to organize
   The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.

2. The right to bargain collectively
   - The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.

3. The right to strike
   - The protection of the right of workers to strike in order to defend their collective interests.

4. Prohibition of forced labor
   - The prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labor not for private purposes and work exacted in cases of emergency.

5. Labor protections for children and young persons
   - The establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements.

6. Minimum employment standards
   - The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.

7. Elimination of employment discrimination
   - Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.

8. Equal pay for women and men
   - Equal wages for women and men by applying the principle of equal pay for equal work in the same establishment.

9. Prevention of occupational injuries and illnesses
   - Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.
another NAFTA member for violations of labor rights, many of which are universally recognized human rights. The NAFTA Environmental Side Agreement provides for an analogous, although weaker mechanism, for environmental violations. MERCOSUR has begun implementing association-wide labor, human rights, environmental and other standards not explicitly related to trade among the countries. For example, MERCOSUR had taken measures addressing discrimination based on race, ethnicity, gender, and sexual orientation on an association-wide basis. It is particularly

10. Compensation in cases of occupational injuries and illnesses

The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.

11. Protection of migrant workers

Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions.

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66 See Federico Luis Larrinaga, 53 Naval War College Review 11 (April 1, 2000). In that article, the author notes that "For example, five countries (Argentina, Brazil, Paraguay, Uruguay, and the United States) joined forces in a peacekeeping exercise. Since then, multinational training and exercises have started in different countries. In the present environment, defense agreements within the structure of MERCOSUR are likely to succeed, particularly in the fields of peacekeeping, environmental protection, and humanitarian relief (search and rescue, for instance)." In addition, Argentina has joined with Brazil in creating a Nuclear Material and Policy Control Agency; with the Southern Cone Common Market nations in declaring MERCOSUR a "peace zone"; and with Brazil and Chile in forming confidence-building-measures committees on combined exercises, defense and security issues analysis, and information sharing on new weapons." Id.
67 Footnote this.
68 Footnote this.
69 See, e.g., REM- Specialized Meeting of Women—institutional organization formed to tend to the interests of women in Mercosur. Available at http://www.ciedur.org.uy/Publicaciones/bajar/MERCOSUR_Case_Study_FIM_FORUM_2008_Final_Version_ENG.pdf. The Tripartite Commission on Equal Opportunities for Gender and Race in the Workplace was created by the Secretariat of Women's Policies of MERCOSUR and is made up of representatives of the government, workers, and employers.
notable that MERCOSUR took a joint position regarding the recent evidence released regarding
the cooperation among the military regimes of southern South America during the 1970's and
1980's in the abduction and murder of political opponents of the military regimes of those six
countries, the countries involved frequently referred to as the “Condor Group.” Indeed, the
South American press "has christened cooperation between the dictatorships the "Mercosur of
Terror."\(^7\)

It would be reasonable to expect that as economic integration in MERCOSUR and other
regional organizations progresses, social and political harmonization will follow as a means of
reducing economic externalities with respect to investment decisions within the economic
associations.\(^2\)

**B. INDIVIDUAL STATE PARTICIPATION IN TLH**

Quite apart from quasi-“federalism” and other kinds of regionalization, individual countries
also participate in TLH through: (1) national regulatory standards with extraterritorial effect; (2)
in MECOSUR. See also International Labour Office, Equality at work: tackling the challenges : global
report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 5
(International Labour Organization 2007) (discusses the tripartite commission).

\(^{70}\) IGLHRC, First Hurdle for LGBT Rights Passed Within Latin American Union. August 30, 2007,
accessible at [http://www.iglhrc.org/site/iglhrc/section.php?id=5&pos=0&print=1&detail=770](http://www.iglhrc.org/site/iglhrc/section.php?id=5&pos=0&print=1&detail=770). See also
Mercosur Countries and associated states commit themselves to the fight against homophobia
(9/29/2006), available at:
Mercosur: First Hurdle for LGBT Rights Passed Within Latin American Economic Union (Aug. 30,
2007), (human rights committee of the Southern Common Market issued a declaration to recognize and
promote an end to discrimination against sexual and gender minorities by member countries). Available at

\(^{71}\) See Agence France Presse, Brazil lawmakers seek to prosecute Paraguayan ex-dictator for Condor
plan (May 18, 2000); see also Mario Osava, Latin America: The "Mercosur Of Terror" Or Integrated
Repression, Inter Press Service (Jan. 10, 1999).

\(^{72}\) Progress in MERCOSUR towards recognizing labor and other human rights has been undertaken,
somewhat haltingly, but there has been a recognition that progress in this area is essential for the full
realization of MERCOSUR’s potential. See generally
[<http://www.rau.edu.uy/mercosur/faq/pre25.merco.htm>](http://www.rau.edu.uy/mercosur/faq/pre25.merco.htm) (“Fue bajo el influjo de las Administraciones
del Trabajo y de los sectores sindicales de los cuatro países, que se constituye el Sub Grupo Nro. 11
dedicado a las Relaciones Laborales, Empleo y Seguridad Social. Se asumió así el tratamiento de “las
ineludibles cuestiones laborales y sociales que traerá consigo la puesta en marcha del MERCOSUR”.)
incorporation of international legal standards into national law (“Domestic Incorporation”); (3) provision of domestic legal forums for enforcement of international law; and (4) creating unilateral conditions on foreign aid or other bilateral transactions.

1. National Regulatory Standards with Extraterritorial Effect

As discussed above, one jurisdiction can contribute to TLH simply by force of its domestic market. Most global automakers feel compelled to comply with Californian emissions standards in order not to be foreclosed from its enormous market. China has been forced to address shortfalls in its product safety standards as a result of a public outcry in Europe, the US and elsewhere over some of its dangerous products. The generally more rigorous regulatory climate of the European Union has prompted some commentators to deem the European Union the “world’s regulator.” As long as such product or other regulations are based on objective and scientifically based standards, and do not arbitrarily restrict trade, they are not foreclosed by the World Trade Organization’s prohibition of quantitative restrictions on trade.

2. Domestic Incorporation

When a country incorporates international legal norms into its domestic law, it is, by definition, harmonizing its law with that of the international community. Examples include national constitutional provisions, such as those of The Netherlands and Romania, that provide that international law shall have automatic domestic effect, and in some cases, shall be supreme to national law. The United Kingdom, one of the most resistant countries to Domestic Incorporation, has incorporated the European Convention on Human Rights into British law, giving individuals the right to bring a suit in any British court based on the Convention, the same

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73 Reference.
as with any other British law.\textsuperscript{74} Article VI of the United States Constitution gives direct effect and supremacy to international treaties, although the judicially created doctrine of “non-self execution” has limited Domestic Incorporation in practice. Countries such as The Netherlands, Romania, Greece, and others provide that international law is supreme to even those countries’ constitutions. It is thus easy to see why many Europeans would view the supremacy of EU law as consistent with international law, and not a type of federal law.

3. Domestic Legal Forums for Enforcement of International Standards

Many countries recognize the ability of individuals to enforce international legal norms, even among non-domestic entities. For example, the United States’ Alien Tort Claims Act permits an alien to bring a lawsuit against another alien for violation of customary international law, as well as against US defendants. The ATCA has also been used against multinational corporations that have been alleged to have violated international law. Needless to say, the ATCA has become the focus of enormous opposition from many in the US business community.

Belgium provided competence to its national courts to hear cases against non-Belgium nationals for violations of international criminal law, even for cases which had no factual nexus with Belgium. Essentially, the Belgium national courts were serving as a nationally operated International Criminal Court. Under pressure from the United States, Belgium changed its laws limit to its courts’ competence to cases involving a nexus with Belgium. Nevertheless, principles of universal jurisdiction and some international treaties grant the same ability to any national court to potentially exercise the same kind of jurisdiction. In the \textit{Pinochet} case, the UK’s House of Lords ruled that the United Kingdom had personal jurisdiction over former Chilean President

Pinochet under the Convention against Torture in order to extradite him to Spain to stand trial for crimes against humanity. It is not necessary under Universal Jurisdiction or the Convention to demonstrate a nexus between the defendant and his or her actions, and the forum country.

4. Unilateral Conditions on Foreign Aid or other Bilateral Transactions

Many countries impose certain human rights, labor, environmental and other conditions on their assistance to other countries. The United States, for example, requires that any country receiving unilateral tariff benefits extended by the US to lesser developed countries must comply with “international labor standards.”\(^75\) The United States imposes similar standards for other types of foreign assistance.

Such conditionality may seem unrelated to TLH, but in fact such conditionality can, in some circumstances, provide powerful incentives for the largest economic and political actors in those foreign countries to comply with these norms by harmonizing their national law.

VI. THE POSSIBILITIES AND LIMITATIONS OF GLOBAL INSTITUTIONS AS PARTICIPANTS IN TLH: THE WTO, THE UN AND OTHER GLOBAL INSTITUTIONS

A. The World Trade Organization

The World Trade Organization (“WTO”) has frequently been viewed as a pole of global governance complementary to that of the United Nations (“UN”). Whereas the UN has jurisdiction over any issue that may come before it, the WTO’s jurisdiction has been strictly limited to issues involving trade. As this article will discuss, although its substantive jurisdiction is more restricted than that of the UN, the WTO has the potential to play a much more effective

\(^75\) It should be noted, however, that the “international labor standards” referenced by US law, are essentially US formulated norms, not actually international norms.
role in TLH. Indeed, this article will argue that the WTO, in many respects bears some of the characteristics of a quasi-federal institution.

This idea is not as overreaching as it may first appear. The process of federalism was, to a great extent, grounded in a process of regional economic globalization. As barriers to the free movement of people, goods, services and capital were removed, countries realized that those four factors of economic activity implicated, to some extent, the majority of domestic law. To the extent the WTO’s goal is to replicate regional economic globalization on a truly global level, the same logical tension is present. To some extent, this tension expresses itself in the forms of TLH already discussed in this article that are occurring outside the WTO framework. To some extent, this tension may need to be resolved within the WTO itself.

The WTO, like most international institutions, makes rules that are binding on more than one state. What distinguishes the WTO and its substantive law from other international law and institutions is the scope of the WTO lawmaking power. Normally, traditional international law is created on an issue by issue basis through specific treaties or by the evolution of specific customary international law norms. As we saw in the creation of the US and the European Union, the member states did not just create agreements among themselves regarding certain issues; they delegated decisionmaking power to a central authority with jurisdiction over a wide variety of substantive areas, and gave that central power the implied authority to go beyond the explicit grant of power in the founding documents. The members of the WTO have such an important investment in WTO membership, and membership is critical to their economic functioning, that they signed up for the entire package, even if they disagree with specific rulings or rules promulgated by the WTO. US states and EU states made the same kind of bargain when they entered their union.
The member states of the WTO have delegated to the WTO broad decisionmaking and rulemaking authority over a vast array of issues relating to trade, investment, intellectual property and a myriad of other trade and economically related issues. Even though the WTO’s substantive jurisdiction is strictly limited to issues directly related to trade, WTO judgments involving trade have also necessarily implicated and sometimes overturned countries’ domestic environmental, intellectual property, investment, and other policies normally considered domestic in character. The World Trade Organization thus bears many of the characteristics of US and European federalism.

There have been a great many calls for the WTO to assume a greater role in global governance, with calls for tying trade to compliance with human rights, environmental and other norms. Many of those calling for such a greater role argue that it is unfair to have the WTO promote and enforce free trade without regulating the abuses that can accompany unlimited free trade. It has been argued that the WTO is particularly well equipped to assume this role for at least four reasons.

First, the WTO is able to enforce its judgments in a way that the UN cannot. WTO judgments involve substantial economic consequences to the violators of its norms, sometimes involving denial of trade benefits amounting to millions and sometimes billions of dollars. Conversely, the United Nations does not have a mechanism in place to force countries to comply with its rulings short of extreme sanctions in particularly egregious and rare circumstances.

Second, because membership in the WTO entails enormous benefits, the incentive for countries to agree to be subject to the WTO’s strong enforcement mechanisms is tremendous. One of the reasons the WTO enjoys global compliance with its norms in comparison with the UN is because the WTO produces tangible benefits for economic actors that are the principal
political actors in the vast majority of countries. Unfortunately, there are not extensive or powerful human rights lobbies in the great majority of countries, and human protection issues do not affect peoples’ material interests in the way that WTO membership does.

Third, although the WTO’s jurisdiction is limited to trade, the WTO’s requirements of “fair competition” and economic transparency has had a significant impact on member countries’ domestic law.\(^76\)

Fourth, environmental issues, economic regulation generally, and human rights issues, particularly labor rights issues, are in fact rationally related to trade. A company that takes advantage of weak labor, environmental, or safety standards in less protective countries and then sells its products in countries that have higher levels of protection not only enjoys an arguably unfair trade advantage, it undermines those standards in the more protective country by creating a powerful economic argument for lowering standards in those more protective countries. Labor unions obviously recognize this, and have begun to mobilize internationally, not principally out of concern for their brethren in other countries, but because they realize that raising international labor norms protects the norms in their own countries.

**B. THE LIMITATIONS OF THE WTO AS AN AGENT OF TLH**

Despite the similarities between the WTO and federal structures, it would be inappropriate to *presently* characterize the WTO as a federal or even a quasi-federal structure. The implied powers of the WTO to make rules, although vast with respect to international commerce, are strictly circumscribed to only issues directly related to trade. This differs from the original Constitution of the United States and the later “constitutional” documents of the European Union. Moreover, the powers of the WTO to implement the decisions implicates

\(^{76}\) Particularly in the area of subsidies, WTO rulings have required numerous countries to significantly modify their domestic economic policies to create an unfair advantage for their national companies over foreign competitors.
substantial differences between traditional federalism and the WTO, particularly in the basic assumptions about state sovereignty of the participating states. ⁷⁷

The WTO argues that if it were to tie trade issues with human rights, environmental and labor issues, it could not perform its central function for at least three reasons.

First, the WTO is predicated upon the participation of the vast majority of the world’s countries. The WTO argues that if it undertook the function of enforcing norms not directly related to trade through sanctions, it would run the risk of having a large number of the world’s countries leave the WTO. There are those who would argue that the power of the WTO lies precisely in its ability to impose rules without countries abandoning the entire system. Like federalism, the WTO has sufficient positive incentives for norm adherence that it is the only international entity that could effectively enforce those norms.

Second, the WTO argues that human protection norms are highly subjective. A country may be viewed by some countries as a serious human rights violator deserving of economic or other sanctions, while other countries may view that other country differently. For example, the United States attempted to impose economic sanctions on foreign companies doing business in Cuba in provisions of the Helms-Burton Act. The United States has agreed not to enforce those provision under threat of WTO sanctions since those provisions would essentially require foreign companies to observe a trade embargo against Cuba when no other country has such restrictions.

Third, the WTO argues that if it did explicitly tie trade benefits to human protection norms, it would have to essentially become the United Nations since it would be obligated to define the norms that it would enforce through trade sanctions, requiring the same negotiation

⁷⁷ It is worth remembering in this context that the assumptions about state sovereignty present in pre-Civil War United States federalism have also diminished to a point that would have been inconceivable prior to the end of the Civil War.
among very diverse countries that limits the United Nations. Moreover, such negotiation of norms would probably result in an even lower level of norm creation than that presently existing since the penalties for non-compliance would be so much more severe.

C. TLH as a Solution to the WTO Impasse

Despite the inherent, self-imposed limitations of the WTO, it is important to recognize that there exist real opportunities for synergy between the WTO and TLH.

The WTO will never enforce a trade rule that conflicts with independently created international law, even if that particular norm is recognized in a treaty signed by a limited number of nations and is not otherwise arbitrary or a disguised restriction on trade. For example, WTO rules normally prohibit quantitative limitations on imports. It nevertheless allows countries to do so in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Thus, although the WTO does not itself formulate human and environmental norms it recognizes the validity of such norms produced by TLH or other forms of international law.

Thus, there is nothing in the WTO rules that prevents countries from tying trade benefits to independently created international norms, even if such norms are not adopted by a majority of the world’s countries, as long as such norms are not arbitrary or disguised restrictions on trade.

This could provide, for example, an opportunity for trade unions in developed countries to push for implementation of a minimum wage or other labor protections. This linkage has been a source of tremendous political debate with respect to the free trade agreements that the United States has signed with various Latin American countries. It is not the WTO that has prevented such linkages but rather domestic politics in the relevant countries. In the United States, the
Democratic Party has traditionally called for such linkages, sometimes referred to as “fair trade” whereas the Republican Party has tended to advocate unrestricted free trade policies.\(^7^8\)

There is also nothing to prevent WTO member countries from adopting such linkages in the policies of the WTO itself, although such an outcome is much less likely than TLH because of the enormous political, economic and social diversity within the WTO. Because of this diversity, the problem of the lowest common denominator makes such linkages within the WTO problematic.

TLH, on the other hand, allows groupings of countries to implement norms that *effectively* bind non-participating countries by creating rules of trade that have to be followed by all countries wishing to trade with that particular grouping of countries. The elegance of TLH is that it permits shifting coalitions of countries or other interest groups to implement such norms, creating a “ratcheting up” of protective international norms.

**D. THE UNITED NATIONS**

The United Nations and its affiliated institutions have traditionally been viewed as the principal institutions of global governance, particularly with respect to issues of human rights and international security. The United Nations system remains the only truly global body with an unrestricted mandate to develop and implement international law. Nevertheless, cognizant of its global role as a representative body of liberal and illiberal states, it has simultaneously adopted a procedurally statist approach with considerable deference towards state sovereignty and a strong bias against coercive intervention.\(^7^9\) Accordingly, consistent with its normative

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\(^7^8\) For example, Vice-President Al Gore called for such linkages in his presidential debates with George W. Bush, and versions of “fair trade” have been a staple of the Democratic Party platform for over ___ decades. The Republican Party, on the other hand, has tended to advocate unrestricted free trade with no linkage between trade benefits and the environment, labor or other human rights *Reference*.

\(^7^9\) *See, e.g.*, Article 2, paragraph 7 of the U.N. Charter:
embrace of human rights, the United Nations' bodies have frequently condemned human rights abuses in member nations, but have only infrequently authorized coercive intervention in response to those violations with economic sanctions or military force. It is this lacunae between the normative human rights framework of the United Nations, and its inability or unwillingness to enforce those rights in a more assertive manner which has provided the justification and need for regional human rights and security bodies to fill that gap. As has been discussed above, many of these regional bodies with the ability or potential to advance human rights norms and other issues are originally based on economic foundations, and have only expanded their jurisdiction to human rights and other issues as they have realized that true economic integration is difficult or impossible without harmonization of legal norms bearing only an indirect relation to economic integration.

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Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [Actions with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression].

To the extent violations of the human rights of a country's people constitutes a "threat to the peace" intervention may be permitted under the Charter. 80 Examples of such intervention include the authorization of economic sanctions and an arms embargo against Rhodesia and South Africa. As noted by Louis Sohn:

Apartheid in South Africa became transformed through interpretations of United Nations law from a social evil, to a repugnant practice, to a crime under international law, to a threat to the peace that must not be tolerated by the international community and which warranted the imposition of mandatory economic sanctions against the deviant government.

Louis Sohn, Interpreting the Law, in UNITED NATIONS LEGAL ORDER 169 (Oscar Schachter and Christopher Joyner, eds. 1995), at 211.

81 Examples of such intervention include Security Council authorization of military intervention in Haiti and the Serbian province of Kosovo.
The benefits of TLH as a complementary, non-coercive, organic, and frequently more effective means of advancing human rights and other goals of international well-being are as follows.

First, TLH avoids the problem of international norm creation and enforcement being subject to the lowest common denominator. The United Nations, as an institution composed of the world’s nations, is hindered in developing norms that many of its member states do not recognize in their own legal systems. To the extent it serves as a human rights enforcement mechanism for the entire world community (except those few countries that have been expelled for particularly egregious human rights abuses or threats to the peace), its enforcement mechanisms and norms are necessarily subject to a much “lower” common denominator. To the extent the United Nations has, in fact, developed international legal norms that many of its members do not observe, it is unable to enforce those norms. The development of legal norms in TLH, on the other hand, is aided by the ability of smaller groups of countries or other entities agreeing on a common set of norms, permitting the greatest possible promulgation and enforcement of human protections within any grouping of countries.

In terms of enforcement, the only way the United Nations could truly “enforce” even its relatively modest “floor” of human rights protections is to expel those countries that refuse to comply. The problem with this mode of enforcement is that it destroys one of the most important functions of the United Nations as a truly global body with an almost universal membership. This is not to say that the system should not constantly strive to strengthen its

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82 For example, every member of the United Nations is obligated to respect the Universal Declaration of Human Rights, either because it is incorporated into the UN Charter as a definition of the human rights member countries are obligated to observe, or because many of its provisions have become part of customary international law. *See, e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). Moreover, numerous countries are signatories to the ICCPR and other UN conventions while clearly in non-compliance with the treaties’ provisions.
enforcement mechanisms and norms, but rather that it is necessarily limited in the extent to which it can do so given the extraordinarily diverse constituency it serves.

Some international law commentators have advocated the articulation of a universal set of human rights standards applicable to all countries, and denying participation in the international community to those countries that fail to fulfill those global standards. It certainly may be appropriate to expel certain countries from the United Nations that engage in systematic and severe human rights violations, but for the “all-or-nothing” approach to mean anything other than the system that is already in place, a substantially greater number of countries would be expelled from the United Nations. A truly useful institution for world dialogue among vastly different countries would then lose much of its original purpose. Another problem with the “all or nothing” approach is that it doesn’t resolve what system of human rights protection, or even world order, would exist to regulate the conduct of those countries that do not comply with those global standards, but are short of constituting true international “outlaws.” These all-or-nothing legal commentators arguably underestimate the importance of maintaining a system of global relations which permits liberal and illiberal countries to coexist peacefully and to maintain communication and dialogue. In other words, even if one assumes the underlying normative assumptions of these advocates of creating a much more rigid and demanding universal system of human rights protection, as this author would, the all-or-nothing approach still leaves unanswered the question of what the international community's strategy should be with respect to those countries that are not eligible to "join the international community." Those countries that are ineligible will continue to exist, and unless a system of international relations provides rules that allow all of the countries of the world to coexist, the potential for conflict can only rise.

83 For example, Fernando Teson would argue that international law can only be based upon an alliance of states that respect the human rights of their own citizens. In his own words, states must "respect human rights as a precondition of joining the international community." See Fernando Teson, __________, at 2.
TLH, on the other hand, serves as a valid alternative to the “all or nothing” approach by promoting higher standards of human protection than the UN floor, while still allowing the UN to utilize its weak enforcement mechanisms on those countries that would tolerate nothing more.

There are even examples of associations of liberal, democratic states formed independently of the United Nations such as NATO addressing human rights violations outside the borders of their member states. NATO's belated intervention in Bosnia and Herzegovina, and its similarly delayed threat of military intervention in Kosovo are examples of the "democratic alliance's" refusal to recognize absolute state sovereignty in the face of systematic human rights violations occurring near the association's borders. Of course, the willingness of NATO and other democratic governments to negotiate with Slobodan Milosevic for as long as they did demonstrates that the realization of a Kantian world order, even in the limited European sphere, is far from complete.

Second, TLH is an organic process, relying on a web of mutual benefits and incentive for compliance with common rules. Thus, TLH naturally contains disincentives, of varying degrees of effectiveness, for member countries to deviate from their harmonized norms. The economic integration that is at the heart of TLH provides a clear economic incentive for members of regional groupings not to stray from international norms developed through TLH.

Third, to the extent that TLH recognizes a deeper integration and harmonization of the human protection norms existing in the participating countries, it helps to protect, in a dialectical fashion, the domestic system of human rights protection already existing in those countries. International norms will only contribute to domestic justice as long as countries are willing to recognize the authority of those norms in their domestic legal system. This willingness to
recognize international norms is much more likely to occur as a result of TLH than when imposed by an international institution from above.

Finally, the process of human protection norm creation and enforcement is most effective when done in a synergistic and dialectical manner between TLH and the UN. Just because the United Nations is limited in its ability to enforce the norms it creates doesn’t mean that the norms serve little or no purpose. The creation of ostensibly non-enforceable norms can lead to practical enforcement by other entities independently of the UN through the process of TLH. In order for TLH to develop normative standards recognized by the participants in TLH, it is helpful to have internationally recognized human protection standards with which to begin. Moreover, many international law norms have been used in litigation against companies that collaborate with countries’ human rights violations, including severe labor rights violation. After all, it can be argued that in most countries more people are affected more personally by human rights violations involving their work than specific human rights violations committed by a political leader, usually involving primarily those individuals who are courageous enough to speak out against the political leader.

The willingness of countries to entertain such suits may be affected, in turn, by the extent to which TLH has created incentives for that country to increase its human rights enforcement mechanisms.

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84 One such US example is the Alien Tort Claim Act, which has been used to bring suits against companies that have collaborated, even in an indirect manner, with human rights abuses by the government of the country in which they are doing business. See, e.g., *Doe v. Unocal*, 110 F. Supp. 2d 1294 (2000).
VII. RECONCEPTUALIZING THE STATE AS THE ULTIMATE GUARANTOR OF INDIVIDUAL RIGHTS, LABOR RIGHTS, THE ENVIRONMENT, AND COMMUNITY IDENTITY

A. TLH AND THE STATE.

There has been a tremendous amount of literature on the problematic effects of globalization on the ability of the state to regulate economic and other processes happening within itself. What has been overlooked, however, is the dialectical relationship between the state and international law, and the state and the individual as a result of TLH. There has also been relatively little research on the relationship between the state and the national and/or ethnic groups that live in the territory of the state resulting from economic and legal globalization.

To the extent that the tensions between the state and the different national, ethnic or religious groups within it have been the source of an enormous amount of armed conflict and even genocide, TLH holds the promise of ameliorating one of the greatest sources of conflict in the world today. It can do so by separating the concept of the nation from the state, and by doing so, eliminate the impetus for armed conflict by minority groups challenging state hegemony and the dominant national group with which the state is associated. Indeed, the principal underlying rationale for the European Union was to eliminate war in the European subcontinent as the functions of the state shifted from nation-states to a state authority unaffiliated with a specific national or ethnic group. This article will demonstrate that the state’s role as the creator of community identity has bee normatively problematic for exactly the reasons described above, and its role as the guarantor of individual and environmental interests is becoming increasingly irrelevant as an empirical matter.

In order to understand how the process of globalization has affected the State, and implications of that effect, it is important to define what the “state” is, and has been in terms of
the essential functions it has served, and determine how those functions have been affected by globalization.

The state, by definition, possesses a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. The functions of a state can be roughly categorized as (1) providing security and civil rights, to the extent the state chooses to, for individuals and communities within the state, with respect to other internal and external actors; (2) providing rules for the conduct of economic activity within the state, including property rights; (3) providing basic services for the population in the state such as education, provision of water, transportation and other basic needs of the population; and (4) providing a sense of common identity for the citizens of the state.

B. THE NATION-STATE.

“Nation-states,” i.e., those states which function as juridical and political embodiments of their dominant national group, take the fourth function described above one step further by tying a national identity of the state/country to the specific identity of the dominant national/ethnic group within the country. In a classic nation-state, the state expressly and directly promulgates the cultural identity and other interests of the dominant national/ethnic group within the state. Examples of classic nation-states include France, Japan, Germany, Bhutan, Nepal and Israel, where citizenship has traditionally tied to either a sanguineous or cultural connection to a particular ethnic/national identity.

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85 See, e.g., Restatement Section 201.
86 The “nation-state is traditionally defined as "a relatively homogenous group of people with a feeling of common nationality living within the defined boundaries of an independent and sovereign state: a state containing one as opposed to several nationalities." . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1505 (1986). The term "nationality" is itself vague. It is commonly defined as "a large and closely associated aggregation of people having a common and distinguishing origin, tradition and language and potentially capable of or actually being organized in a nation-state." Id. (v)
A nation-state, however, cannot fully recognize equal protection of the laws and non-discrimination for all of its citizens if the state itself is the juridical embodiment of only one ethnic/national group comprising that state. Therein lies the normative issue with those states that can be characterized as “nation-states.” As this article argues, however, the diminishing role of the state as a result of TLH suggests that the traditional role of the nation-state as the building-block of international law can be modified, and even frequently eliminated, without diminishing the four functions that citizens have traditionally received from the state.

Although the contemporary dominance of the nation-state in the international legal system would seem to suggest that it is the natural building block and basic unit in international law, the nation-state (as opposed to the state itself) has historically been an aberration.

Moreover, it is even misleading to think that the nation-state has been in existence for a significant historical period. As Stein Rokkan notes, even France, that quintessential nation-state, was still engaged in nation-building as late as the 19th Century in its peripheral territories such as Brittany and Occitania.\(^\text{87}\) Eugen Weber, in his work Peasants into Frenchmen, gives 1863 figures that show 7,426,058 Frenchmen did not speak French as their first language versus 29,956,167 who did.\(^\text{88}\) He noted that the process of integrating certain regions such as Corsica was still ongoing in the twentieth century.

C. TLH AND THE NATION-STATE.

The implications of TLH on the nation-state are profound and manifold.

First, as increasingly greater state and lawmaking functions are assumed by multi-state entities, the most prominent example being the European Union, it becomes apparent that not

\(^{87}\) Stein, supra, at 84.

only do traditional state functions not have to be tied to a particular nation, they don’t even have to be tied to a particular state. The traditional rationale for the nation-state is that the national identity promulgated by the state reinforces the cohesion and unity of the state. However, we are increasingly witnessing lawmaking power in countries such as Spain, Belgium, the United Kingdom, and many others simultaneously flowing downward to the local level with respect to issues of local concern, and upwards to the international level for issues of an economic or even security level. For example, the United Kingdom has witnessed the emergence of the Scottish and Welsh parliaments with jurisdiction over lawmaking of particular concern to the Scottish and Welsh national groups. Meanwhile, European Union law now comprises, on average, over 50% of the lawmaking done in any particular EU country, much of it resembling the kinds of federal legislation passed in the United States. The irony, of course, is that as TLH makes the central government of the nation-state increasingly irrelevant as lawmaking moves to the international or transnational level, it also empowers local jurisdictions and national groups to assume lawmaking control over the issues most important to them.

The idea of simultaneous delegation of powers to a higher level, and devolution of other powers to the local level was alluded to by James Baker in a speech before the Berlin Meeting of the Council of Foreign Ministers of the Council on Security and Cooperation in Europe:
Evolution and devolution are not alternatives, but complementary, and indeed interdependent developments. The architects of a united Europe have adopted the principle of "subsidiarity," something like American "federalism" -- that is, the devolution of responsibility to the lowest level of government capable of performing it effectively. By the same token, the process of devolution in the East will lead to fragmentation, conflict, and ultimately threaten democracy if it is not accompanied by the voluntary delegation of powers to national and even supranational levels for basic matters such as defense, trade, currency, and the protection of basic human rights -- particularly minority rights. (Emphasis added by author).

Second, TLH demonstrates that not only is the nation-state an unnecessary institution for primary lawmaking, a strong argument can be made that, as a normative matter, the nation-state can frequently, by its very definition, be violative of fundamental human rights.

D. The Process of State Dissolution and Reformulation

It may seem premature to question the suitability of the nation-state as the foundational element of international law when the last decade has seen the proliferation of ever more numerous nation-states throughout Eastern Europe and Asia, and increased demands for secession from national movements in countries as diverse as Canada, China, Georgia, India, Indonesia, Nigeria, Russia, Serbia, Spain, Sri Lanka, Sudan, The Congo, and the United Kingdom.

However, concurrent with the centrifugal process of nationalism and secession is an ongoing centripetal process of nation-states coming together to form larger political entities as more extensively discussed earlier in this article, and as exemplified by TLH.

Nevertheless, the seemingly contradictory centrifugal forces of nationalism and secession, and the centripetal forces of globalization, confederation and federation, can be

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89 James A. Baker, The Euro-Atlantic Architecture: From East to West, Address Before the CSCE Council of Foreign Ministers in Berlin (June 18, 1991), in MASTNY, at 308. (v)
understood as simply different stages of the same historical process that has been occurring since well before the 17th Century.\(^90\)

This historical process has consisted of roughly four stages: (1) the formation of groups of individuals into an identifiable “nation,” “tribe” or “people;” (2) the formation by force of large, multi-ethnic empires, incorporating numerous nations, tribes or peoples into a single “state,” (3) the dissolution of those multi-ethnic empires into their elemental tribes or nation-states; (4) the coming together of those nation-states, or national groups, into larger associations of a federative or confederate nature\(^91\) on the basis of equality and mutuality. This last stage, incorporating the concept of initial equality and mutuality, harks back to the concept of "original contract," a concept which has formed much of the theoretical foundation for our modern concepts of individual human rights and which John Locke, and more recently John Rawls, have devoted considerable attention.\(^92\) This article will refer to this entire process as that of “State Dissolution and Reformulation.”

The process of State Dissolution and Reformulation can occur by the forcible or peaceful disintegration of a multi-ethnic political entity into separate political entities ("State Dissolution"). Alternatively, the process can occur *internally*, within the political framework of an existing state, through the peaceful accommodation of the legitimate aspirations of ethnic and

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\(^90\) A cogent history of the development of the nation-state is provided by Professor Rokkan. Stein Rokkan, *Cities, States, and Nations: A Dimensional Model for the Study of Contrasts, in DEVELOPMENT IN BUILDING STATES AND NATIONS II* (S.N. Eisenstadt & Stein Rokkan eds., 1973).

\(^91\) The Swiss Confederation is a notable early historical example of this process of confederation. Another example might be the United States, which was initially a confederation of sovereign entities. A more contemporary example would be the European Union and the emerging MERCOSUR/L union in South America. (v)

\(^92\) See generally RAWLS, A THEORY OF JUSTICE (1971).
national minority groups while still preserving the political integrity of the original state. ("Internal National Accommodation").

Thus, the creation of the nation-state out of multi-ethnic empires or states is simply one (historically rarely used) alternative for a state to respond to the pressures of its multi-ethnic character. To the extent the nation-state does not accommodate its national, religious or other minorities through National Accommodation, it will do so unwillingly through State Dissolution and the ultimate independence of its national minority as a new nation-state.

It is a thesis of this article that international law must respond to the concomitant centrifugal and centripetal forces of State Dissolution and Reformulation, and avoid the worst aspects of nationalism, by recognizing ethnic and national aspirations to cultural and national development while simultaneously disassociating those aspirations from the concept of statehood. Our concept of the state must be revised to reflect a role of the state as one that does not constitute the juridical and political embodiment of a state's dominant national group. The state must be disassociated from the nation precisely because no national group should claim a monopoly or hegemonic interest in the coercive power of the state.

The stages described in the process of State Dissolution and Reformulation are far from discrete and may frequently overlap, and the states emerging from the process are themselves far from static entities. The United States, for example, is a state which was originally a confederation of several smaller states. The "American" people, or nation, which emerged from that confederation has itself evolved from one that identified itself entirely as one of European origin to one that has slowly, but still incompletely recognized its diverse ethnic and racial composition.
Moreover, it may be difficult to distinguish many contemporary nation-states from their multi-ethnic imperial predecessors. For example, Spain can be viewed as a classic nation-state, where the state is the embodiment of the dominant Castillan national identity, but tolerates the existence of other nationalities such as the Basque and Castillan nations. Yet, in definitional terms, this may be little different from the Roman Empire, where a central Latin nation asserted its political domination over other nations, while largely tolerating the existence of the other nationalities as long as they didn’t threaten the political supremacy of Rome. This resemblance exists to the extent that both entities (1) contain national minorities within their state boundaries and (2) were created by a coercive process through which subaltern nationalities were subordinated to the dominant national group’s will. In fact, this article argues that, in many cases, the process of nation-state formation has frequently been more coercive towards subaltern national groups than the process by which multi-ethnic empires have been created.

Contemporary models for the separation of national identity and the traditional functions of the state are suggested by the European Union, Switzerland, Canada and Belgium, and to a lesser extent, the emerging supranational and international economic, political and social institutions such as international human rights bodies, international trade agreements and multi-purpose political bodies such as the United Nations, the Council of Europe, the Organization of American States and the African Union. To some extent, the entire process of globalization involves the weakening of the nation-state’s monopoly control over economic, social and even political forces. The success, or lack thereof, of these national models appears to be largely determined by the extent to which the original union of different nationalities was accompanied

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93 See, e.g., Stephen Kinzer, *Germans Plan to Make it Easier for Some to Obtain Citizenship*, N.Y. TIMES, Jan. 25, 1993, at A8, where author notes that Germany currently has a citizenship law based principally on German nationality. See also Outsiders All, THE ECONOMIST, Jan. 16, 1993, at 36, in which the author discusses Japan's treatment of foreign residents and current criteria of who is a Japanese national. (v)
by mutuality and non-coercion. Thus, those multi-ethnic states whose political control over
diverse national groups lacked this mutuality and non-coercion, such as Canada, stand on less
stable ground, even as they attempt Internal National Accommodation. In Canada, this attempt
at overcoming the lack of mutuality through Internal National Accommodation appears to be
working, for now. In other cases, such as the Russian Federation, the outcome is considerably
more ambiguous.

Nevertheless, the examples of Canada, Europe, Belgium and Switzerland demonstrate the
possibility of separating the economic and defense functions of the state from the state’s
traditional function as the juridical and political embodiment of the dominant national group in a
particular geographical territory. Canada also provides an example of how Internal National
Accommodation can avoid State Dissolution, with its frequently negative consequences. The
United States, while not presently facing the likelihood of State Dissolution, nevertheless
provides a model of how principles of National Accommodation can help remedy the past
injustices to its racial and ethnic minorities, and incorporate those previously excluded groups
into the national legal and political identity.

In summary, TLH plays an integral role in the process of Internal National
Accommodation by diffusing decisionmaking to both the local and supranational level, thereby
decreasing the stakes any one national group has in entirely controlling the previously
considerable power of the state. With Internal National Accommodation all the more possible
because of TLH, the nation-state becomes all the more irrelevant and inappropriate as a
foundation of international law.

94 Gregory Marchildon & Edward Maxwell, Quebec’s Right of Secession under Canadian and
International Law, 32 VA J. INT’L L. 583, 612 (1992) (“While New France’s incorporation into the
British empire in 1763 was manifestly against the will of its people, their descendants joined the Canadian
federation in 1867 in more voluntary circumstances.”). (v)
VIII. CONCLUSION

The era has passed when international law was largely a creation of nation-states acting solely through traditional international legal institutions and through formal international law such as treaties or customary international law. The process of global legal norm formation is more decentralized than currently recognized, and operates on a global, regional, national, corporate and individual level. The traditional definition of international law is not only inaccurate, but it fails to capture the full scope of the transnational legal harmonization taking place in the world as a result of economic and legal globalization, and the potential opportunities such a process presents.

Such opportunities include: (1) the ability of the world community to regulate transnational corporations that are increasingly able to produce their products in countries with little to no regulation and sell their products in countries with effective environment, consumer, labor and human rights protection, much as federal law regulates business activity across state borders; (2) the ability to “ratchet up” environmental, human rights, labor rights and other standards for the public’s protection among a varying coalition of countries without relying solely on global institutions that are hampered by the lowest common denominator of their diverse membership; and (3) separate the economic, security and protective functions of the state from a particular dominant national or religious group within or among countries, thereby reducing the greatest single source of violent conflict in the 20th century: conflict based on race, ethnicity or religion.