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## Paradox of Hierarchy and Conflicts of Values: International Law, Human Rights, and Global Governance

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## PARADOX OF HIERARCHY AND CONFLICTS OF VALUES: INTERNATIONAL LAW, HUMAN RIGHTS, AND GLOBAL GOVERNANCE

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**ABSTRACT**—In an international society, hierarchies are set up differently among different countries and societies based on different values, which are naturally conflicting and colliding with each other and result in unstable conditions. Is hierarchy really necessary in an international society? Does more hierarchical order in international society mean more peace? Do we need a supranational organization like the European Union whose laws can pierce state sovereignty and bind citizens of each member state? Does the United Nations need to be reformed to create an effective hierarchy, which will give international society more peace, security, and protection of human rights? This article may not answer all of these questions, but will attempt to clarify hierarchical issues in international law, particularly in the human rights field.

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I. INTRODUCTION

A hierarchy reflects cultural values within a society, evidenced by the way governments structure a society to control power and allocate resources. In a social hierarchy, people either follow orders from higher ranks or indirectly through law and policy. People may follow orders from higher-ranked individuals because hierarchical values are considered more important in the society compared to individual values. For example, in a family oriented culture, as typically seen in Asian countries such as Korea, China and Japan, ordered societal structure is more directly evident than in work oriented cultures.<sup>2</sup> This is because in family oriented cultures, the group values are appreciated over those of the individual.<sup>3</sup>

Even though hierarchical communities are considered more traditional and characteristics of the failed Communist experiment,<sup>4</sup> hierarchies are also found in the West. While modern democratic communities advocate equal protection and fundamental freedoms, hierarchical ideology still makes up the backbone of these societies because capitalism creates hierarchical societal and corporate structures. Regardless of dictatorship or democratic

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<sup>2</sup> France is one exceptional case which shows a group-oriented hierarchy within Western culture. See FONS TROMPENAARS & CHARLES HAMPEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS, 51–69 (1998); *The Seven Dimensions of Culture: Understanding and Managing Cultural Differences*, MIND TOOLS, <https://www.mindtools.com/pages/article/seven-dimensions.htm> (last visited Dec. 7, 2019).

<sup>3</sup> See TROMPENAARS, *supra* note 2.

<sup>4</sup> See *id.* at 52–53.

operation, hierarchies still exist and restrain people's freedom of thought and movement.

Law is naturally hierarchical, regulating a society and providing order. Both naturalism and positivism are built on the assumption that there is a higher value that controls and gives direction to society. Governments are organized to keep order, enforce the law, and subdue any protests. In capitalist societies, the government keeps order by controlling the wealth-generating tool: money.<sup>5</sup> Misapplying Marxism, communist and socialist countries are also built on hierarchy—dictators and governments pass laws to maintain a hierarchical order designed to protect community values. Harold Lasswell and Myres McDougal, the founders of policy-oriented jurisprudence, suggest those values a society seeks include power, enlightenment, wealth, well-being, skill, affection, respect and rectitude.<sup>6</sup> These values are “empirically open,” and law regulates how individuals try to shape and share each of the eight values.<sup>7</sup> In policy-oriented jurisprudence, law is “an ongoing process of authoritative and controlling decision”<sup>8</sup> and the “conveyor belt of human action.”<sup>9</sup> Values are constantly reflected into the decision making process, and through this authoritative process, the daily life of individuals and their unilateral actions are controlled and acted upon accordingly in a legal hierarchy consisting of the Constitution, statutes, rules and regulations, and local ordinances and their interpretation by courts.

In constitutive process theory, William Michael Reisman suggests legal systems establish a hierarchy to control unilateral actions.<sup>10</sup> Out of the four types of constitutive arrangements—first, unorganized and non-hierarchical constitutive structures; second, ineffective constitutive structures; third, effective but limited constitutive structures; and fourth, effective constitutive structures<sup>11</sup>—the second, third and fourth types establish hierarchical decision-making institutions. Furthermore, unilateral action is not justified

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<sup>5</sup> It is interesting to see the new development of block-chain technology, which denies this hierarchy of capitalism and seeks a new order.

<sup>6</sup> Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, in *GENERAL THEORY OF INTERNATIONAL LAW* 207, 210 (Siegfried Wiessner ed., 2017) (citing HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 211 (quoting Siegfried Wiessner, *International Law in the 21<sup>st</sup> Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 23 *THESAURUS ACROASIMUM* 137, 145 (1997)).

<sup>10</sup> W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment*, in *GENERAL THEORY OF INTERNATIONAL LAW*, *supra* note 6, at 129, 136.

<sup>11</sup> *See id.* at 133–37.

in the fourth type of effective hierarchical institution.<sup>12</sup> Here, it is worthwhile to note that out of the four types of constitutive structures, only one type of constitutive process will establish an effective hierarchical structure that will successfully enforce the law, removing unilateral delictual action.<sup>13</sup> It is highly possible that hierarchical structure is ineffective or limited in an authoritarian legal system or in an incomplete legal system that allows *exception*—unilateral individual violations of law excused under certain conditions.<sup>14</sup>

In order to assess the validity of a hierarchy instead of blindly following it, we must ask the following questions: (1) Does the hierarchy provide effectiveness and economic benefits to a society; (2) Does it have more pros than cons; (3) Is a hierarchy a necessary evil to maintain a society; and (4) How is this hierarchy supported by a legal regime.

If a societal value is located at the top of a hierarchy, people will invest time and money to protect and reach that value. That is the basis of a democratic, capitalist society because the highest value is reachable and attainable. On the other hand, if an entity, such as a political party, is located at the top of the hierarchy, it will have the power to control the lower echelons and allocate resources under its own rules. When an entity sets a value and maintains it through hierarchical ethical and legal mechanisms, the minority group cannot change the value set by the majority. Thus, the hierarchical mechanism has the high possibility to be misused as a conservative tool to keep the status quo of the current value system.

It is a misconception, however, to assume people will always try to reach the top of the hierarchy, and this causes problems. While a society creates a hierarchy with the intent to control its citizens, not all members make an effort to climb the ladder. When the highest value of a society, such as fundamental freedoms, well-being, peace and security, is not appreciated and is not motivational, people will ignore their moral duties to each other and instability will follow. Conservative hierarchies can widen the gap between the top and bottom, which is often followed by dissatisfaction of the bottom of the hierarchy and ultimately, instability. If the highest authority or power is not respected or sought, the resulting anarchistic society needs to find measures to allocate resources among its constituents. In the 19th century, Karl Marx and Friedrich Engels rejected the existing hierarchical structure between the bourgeois and proletarians; law, morality, and religion were seen as biased toward the bourgeois, and as tools based on class

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<sup>12</sup> *Id.* at 136.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

oppression.<sup>15</sup> They asserted that the hierarchy be changed by open revolution and the violent overthrow by the proletariat.<sup>16</sup> State governments dominated by the capitalistic bourgeois and its law disappeared during the revolution, and as a result, international law based on states also disappeared.<sup>17</sup> They sought an ideological society, where everyone would be equal without hierarchy,<sup>18</sup> but their theories were misused by communists who created another type of hierarchy: the failed authoritarian state.

A hierarchical structure to preserve and realize values set by the majority is not perforce justified, especially when it applies to indigenous or local minority group. This is even true when the values justifying the hierarchy are not properly communicated to local indigenous societies due to lack of transportation, infrastructure and communication, among other reasons. Living in the Arctic Circle, tropical forests, deserts, or islands, indigenous groups such as the Inuits in Canada, San in Botswana, Dayak in Indonesia, and Andamanese in the Andaman Islands, are maintaining their societies outside the hierarchical structure or legal system set by the central government for thousands of years.<sup>19</sup> Their values and mechanism of allocating resources may have been completely different from the main society and culture. Thus, it can be problematic to enforce a hierarchy upon an indigenous group.

In the international context, hierarchies are set up in various ways among different countries, reflecting diverse social, cultural, and economic values, which are naturally conflicting and colliding, resulting in an unstable international society. A hierarchical society can also collide with a society without a hierarchy. A structurally flat society such as pre-colonial indigenous groups may not want to follow an imposed hierarchy to which it did not give informed consent or participate in creating. Furthermore, different hierarchical structures between the international and national societies will also cause conflict. International law, with its civil law characteristics, is not easily incorporated into common law countries. This conflict intensifies when international law reflects differing national values. Formation of new international custom may, in effect, boycott countries with

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<sup>15</sup> KARL MARX & FRIEDRICH ENGELS, *Bourgeois and Proletarians*, in MANIFESTO OF THE COMMUNIST PARTY 14 (1848), <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>.

<sup>16</sup> KARL MARX & FRIEDRICH ENGELS, *Position of the Communists in Relation to the Various Existing Opposition Parties* in MANIFESTO OF THE COMMUNIST PARTY, *supra* note 16, at 34.

<sup>17</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 32 (6th ed., 2008).

<sup>18</sup> MARX & ENGELS, *supra* note 16.

<sup>19</sup> See Christopher. R. Duncan, *Mixed Outcomes: The Impact of Regional Autonomy and Decentralization on Indigenous Ethnic Minorities in Indonesia*, 38 DEVELOPMENT AND CHANGE 711 (2007).

inconsistent values. For example, international law prohibiting nuclear weapons' proliferation among the existing 191 member countries of the Non-Proliferation Treaty may be ignored by countries who would like to pursue self-help and seek a new balance of power by owning nuclear weapons such as India, Pakistan, Israel, and North Korea.<sup>20</sup>

In the context of what I have outlined above, my fundamental questions are as follows:

1. Is hierarchy really necessary in an international society?;
2. Does more hierarchical order in international society mean more peace?;
3. Do we need a supranational organization like the European Union whose laws can pierce state sovereignty and bind citizens of each member state?; and
4. Does the United Nations (U.N.) need more power, which will give the international society more peace, security, and protect human rights?

This article may not answer all of these questions, but will attempt to clarify hierarchical issues in international law, particularly in the human rights field.

## II. INTERNATIONAL LAW AND HIERARCHY

### *A. Philosophies, International Theories, and Hierarchy*

International law is the law of international society and assumes a legal hierarchy. It seeks to create international peace and security based on the assumption that international law governs relations among states and trumps each state's national law. Regardless of what kind of philosophy international law is based on—natural law or legal positivism—, philosophers of international law are aware of the hierarchical order of international, regional, and domestic law. The generally-applicable international law, which was agreed upon among states based on natural values of human freedom and well-being, is assumed to be higher than regional or domestic law.

The idea of international law's primacy has been challenged recently. The absence of general hierarchy in international law began to gain attention in addition to the "spontaneous, decentralized and nonhierarchical nature of international law-making."<sup>21</sup> Disputes are often directed against the legal value of international law, and most states place authority of international

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<sup>20</sup> North Korea withdrew from the Non-proliferation treaty in 1993.

<sup>21</sup> Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 485–86, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

law below their constitution.<sup>22</sup> Just as Jean-Jacques Rousseau's social contract theory and doctrine of nationalism are based on people's will to be bound by the national sovereignty for their sake, each nation and its value system reflects its homogenous culture and the people's will.<sup>23</sup> Even if international law is made by state governments, international law that is contrary to a nation's value system is difficult to respect and adhere to; this is especially true when national populism arises as seen recently in Russia, China, the U.S., the UK, and Brazil. In addition to the domestic scholar's bias toward international law as a simple discipline, many third world countries are acting against the Western-oriented international law, emphasizing global governance and development through their domestic society.<sup>24</sup> Transnational theory developed by the New Haven School also emphasizes domestic influence toward the international society and equal influence and process between domestic law and international law.<sup>25</sup>

Failure of hierarchical institutions that cannot effectively control states' unilateral wrongful actions is more serious in the international legal system, as seen in the U.N.'s failure to control illegal use of force to annex the territory of another country, unilateral migration control violating human rights, violations of climate change treaties, and nuclear weapons development in violation of the Non-Proliferation treaty. It is politically impossible to reach Reisman's fourth type of effective hierarchical institution<sup>26</sup> because international treaties are more contractual than constitutional. International custom and *jus cogens* have been developed, but no institution can enforce the order without the consent of the party to be bound by its jurisdiction. The birth of the U.N., reconstructing the tradition of the League of Nations, seemed to create an effective hierarchical institution endowed with exclusive right to use force against threats to peace and acts of aggression with *exceptio* for self-defense.<sup>27</sup> The hierarchy,

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<sup>22</sup> U.S. and Republic of Korea are such examples. For the destructuralization of the relationship between international law and constitutional law based on Kelsenian monism, see Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. OF CONST. L. 397 (2008).

<sup>23</sup> See MADS QVORTRUP, *THE POLITICAL PHILOSOPHY OF JEAN-JACQUES ROUSSEAU: THE IMPOSSIBILITY OF REASON* 74–94 (2003). There is also a view that there are global citizens' preferences about values and norms that influence states' willingness to participate in multilateral treaties. See Takashi Inoguchi & Lien Thi Quynh Le, *Toward Modelling a Global Social Contract: Jean-Jacques Rousseau and John Lock*, 17 JAPANESE J. POL. SCI. 489 (2016).

<sup>24</sup> See generally B. RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

<sup>25</sup> Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996) [hereinafter Koh 1]; Harold H. Koh, *Transnational Legal Process*, in *GENERAL THEORY OF INTERNATIONAL LAW*, *supra* note 6, 237, 241, 260–63 [hereinafter Koh 2].

<sup>26</sup> See Koh 2, *supra* note 25, at 137–143.

<sup>27</sup> See *id.* at 138 (citing U.N. CHARTER, Chap. VII).

however, was built on the unstable foundation of five permanent U.N. Security Council members with unparalleled veto power that no other member could ever access. When the five permanent members were divided during the Cold War, the U.N. lost its regulatory enforcement power. Recent events involving the five permanent members of the U.N. Security Council—Russia’s annexation of Crimea in the Ukraine, conflicts surrounding Syria between Russia and the U.S., economic conflicts between China and the U.S., and South China Sea conflicts between China and the U.S.—demonstrate the current failure of the U.N. as an effective hierarchy.

Many philosophers have highlighted the hierarchical flaws in the international society, including the fact that Grotius’s international legal order based on natural law does not realistically reflect the self-conscious political relations among states.<sup>28</sup> Kantians deny the concept of hierarchy in an international society because there is no hierarchy in rational authority.<sup>29</sup> Hegelians will not adopt the hierarchy in international law because states are assumed to *dialectically* compete and fight against each other.<sup>30</sup> Under Kelsen’s Pure Theory of Law, international legal hierarchy will fail when it loses its effectiveness.<sup>31</sup> Vattel’s positivism and American legal realism may support the legal hierarchy and states’ subordination to international law they agreed to be bound by;<sup>32</sup> however, international law is mostly subordinated to state constitutions under state law superiority. Furthermore, states only submit themselves to treaties once they are ratified, treating international law as non-law normative principles,<sup>33</sup> or experiencing normative conflict causing “fragmentation” of international law.<sup>34</sup> Rejecting monism or legal centralism, legal pluralism does not distinguish international law from state law, and denies its hierarchical superiority.<sup>35</sup> The “archipelagic” nature of international law according to the New Haven School of jurisprudence naturally does not allow a hierarchy in the international law realm, and power is simply a factor in the process of international legal order.<sup>36</sup>

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<sup>28</sup> See ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 2 (2017).

<sup>29</sup> *Id.* at 55.

<sup>30</sup> *Id.* at 116.

<sup>31</sup> *Id.* at 3. Representing the modern positivist school and advocating monism, Kelsen suggests that international law is primitive and resembles a pre-state society. SHAW, *supra* note 17, at 29.

<sup>32</sup> GENERAL THEORY OF INTERNATIONAL LAW, *supra* note 6, at 15.

<sup>33</sup> See von Bogdandy, *supra* note 22; Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. SOC. SCI. 243, 249 (2009).

<sup>34</sup> Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the diversification and Expansion of International Law, A/CN.4/L.682, ¶ 486 (Apr. 13, 2006).

<sup>35</sup> Michaels, *supra* note 33, at 253.

<sup>36</sup> See *id.*

In his transnational legal process theory,<sup>37</sup> Harold H. Koh explains that states obey international law because of interest, identity, interaction, and internalization.<sup>38</sup> States obey it not because they believe that there is a hierarchy in the international society, but because their interests will be harmed and they will be involved in frictions that prevent their ongoing transnational process.<sup>39</sup> Most states' actions seem to be run by game theory<sup>40</sup> and will be predicted to be cooperative based on prisoners' dilemma and non-zero-sum game thinking.<sup>41</sup> In the end, they will internalize international law into their domestic legal system in order to protect their own interests.<sup>42</sup> Because of the normative process in the international society, states do not follow a set international hierarchy. Under this transnational process theory, depending on its interest, identity and interaction, a state will either follow and internalize or deny international law. Recent movements of powerful states such as the U.S., China, and Russia show the latter example based on nationalistic populism, completely ignoring cooperative non-zero sum game theory and threatening globalization and global governance.<sup>43</sup> Since 2017, the U.S. unilaterally imposed tariffs on Chinese imports,<sup>44</sup> ignoring the World Trade Organization (WTO) General Agreement on Tariffs and Trade principles.<sup>45</sup> Moreover, in 2018, the U.S. renegotiated regional free trade agreements threatening its withdrawal between 2017 and 2018,<sup>46</sup> terminating

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<sup>37</sup> Koh 1, *supra* note 25, at 183. The transnational legal process theory was initiated by Phillip Jessup, Abram Chayes, Tom Ehrlich, Andreas Lowenfeld, Myres McDougal, Harold Lasswell, and Michael Reisman.

<sup>38</sup> *Id.* at 199.

<sup>39</sup> *See id.*

<sup>40</sup> *See generally* Duncan Snidal, *The Game Theory of International Politics*, in *WORLD POLITICS* 25 (1985).

<sup>41</sup> Koh 1, *supra* note 25, at 257.

<sup>42</sup> *Id.* at 261.

<sup>43</sup> *See* Janne E. Nijman & Wouter G. Werner, *Populism and International Law: What Backlash and Which Rubicon?*, 49 *NETH. Y.B INT'L L.* 3, 5–10 (2019).

<sup>44</sup> *See Chain Brings U.S. Tariff Dispute to WTO, Berates Washington for Blocking Judges*, REUTERS (Jan. 28, 2019), <https://www.reuters.com/article/us-usa-trade-china-wto/china-brings-u-s-tariff-dispute-to-wto-berates-washington-for-blocking-judges-idUSKCN1PM1YJ>; Pablo Garrido Estevez, *Circumventing the WTO: Impermissibility of Tariffs Imposed by the U.S. and China under WTO Law*, 40 *MICH. J. INT'L. L. ONLINE* (Nov. 27, 2018).

<sup>45</sup> U.S. allegedly violated the Most Favored Nation treatment under Article I of 1947 GATT and National Treatment under Article II of 1947 GATT. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; *See also* WORLD TRADE ORGANIZATION, *Principles of the Trading System*, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm).

<sup>46</sup> *See e.g.*, Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES, (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

treaties such as the Paris Agreement on Climate Change in 2019,<sup>47</sup> and withdrawing from the U.N. Human Rights Council in 2018.<sup>48</sup> China, violating international principles codified in the U.N. Law of the Sea convention, extended its regional power in the South China Sea by claiming historic and sovereign rights relating to artificial islands and features in the Spratly Islands, Scarborough Shoal, and Paracel Islands. In so doing, China created conflicts with regional states.<sup>49</sup> Lastly, in 2014, Russia illegally annexed Crimea against Ukrainian sovereignty<sup>50</sup> and interfered and supported wars in the Middle East.<sup>51</sup>

State-centric nationalism that places its interests above global values are natural results of the Westphalian system. Just as no country can subject another country to its own law that reflects its own values, so does international law traditionally assume equality of states. Thus, states are not bound by international law and inter-state governments unless they agree; this was prevalent among dualists during the nineteenth century, who emphasized the consent element based on positivism.<sup>52</sup> The Westphalian system, establishing the principle of state sovereignty, did not allow a hierarchy among its subjects.<sup>53</sup>

It was not until after World War I that inter-governmental organizations began to appear, but their authority and function have been limited. These organizations, supposedly at the pinnacle of the international hierarchy, cannot pierce state sovereignty and enforce their decisions directly. Furthermore, international organizations do not effectively control behaviors of states. Moreover, the permanent members of the U.N Security Council are

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<sup>47</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016); Depository Notification, Paris Agreement, United States of America: Withdrawal, C.N.575.2019.TREATIES-XXVII.7.d (Nov. 4, 2019) (declaring U.S. withdrawal from Paris Agreement).

<sup>48</sup> Susan H. Allen & Martin S. Edwards, *The U.S. Withdrew from the U.N. Human Rights Council. That's Not How the Council Was Supposed to Work*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/26/the-u-s-withdrew-from-the-u-n-human-rights-council-thats-not-how-the-council-was-supposed-to-work/>.

<sup>49</sup> See *In re Arbitration Between the Republic of the Philippines and the People's Republic of China*, PCA Case No. 2013-19, Award (July 12, 2016), <https://www.pccases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

<sup>50</sup> See Anton Bebler, *The Russian-Ukrainian Conflict over Crimea*, 15 ROMANIAN J. EUR. AFF. 35, 44-46 (2015).

<sup>51</sup> See Angela Stent, *Putin's Power Play in Syria: How to Respond to Russia's Intervention*, FOREIGN AFF. (Jan./Feb. 2016), <https://www.foreignaffairs.com/articles/united-states/2015-12-14/putins-power-play-syria>.

<sup>52</sup> SHAW, *supra* note 17, at 29. (stating that the view of a higher will of the state above any individual was first analyzed by Hegel).

<sup>53</sup> See Mark Weston Janis, *Religion and International Law*, AM. SOC'Y INT'L L. (Nov. 17, 2002), <https://www.asil.org/insights/volume/7/issue/13/religion-and-international-law>.

never subject to sanctions for violations of international law thanks to their veto powers. When permanent members of the U.N. Security Council disregard their leadership role by acting upon national interests,—U.S. withdrawals from environmental and human rights treaties, Brexit, Russia’s annexation of Crimea, South China Sea conflicts—intended peace based on international hierarchy becomes useless. Regardless of the efforts of international organizations to establish peace, many armed conflicts followed World War II.<sup>54</sup> Thus, rather than being a peacemaking hierarchical body of law, international law is, in effect, a law of powerful states that fluctuates in terms of its effectiveness when states rise and fall.<sup>55</sup>

### B. *International Institutions and Hierarchy*

Hierarchical international institutions have been adopted by states on an *ad hoc* basis until the early 20th century.<sup>56</sup> In the Western Christian world before the Westphalian international system, the hierarchy was established by the Pope and the Holy Roman Empire through religious law and policies.<sup>57</sup> States were subordinate to the Roman Catholic Church and its political and tax power. This governance, however, was contrary to the Bible, which taught the paradox of hierarchy and importance of humility.<sup>58</sup> According to Jesus’s teachings, the more people that subordinate themselves at the bottom of the hierarchy by throwing away money, reputation, and power, the greater the change of entering the narrow door of heaven.<sup>59</sup> Catholic religious laws in the medieval era went against the Lord’s teachings,

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<sup>54</sup> Examples include Israel’s ethnic cleansing, the Kashmir dispute, violence in Cambodia, civil war in Somali, the Rwandan civil war, the Srebrenica Massacre, the Darfur conflict in Sudan, the invasion of Iraq, the Syrian civil war, violence in South Sudan, civil war in Yemen, and the Rohingya crisis. See *Twelve Times the UN Has Failed the World*, TRTWORLD (Nov. 28, 2018), <https://www.trtworld.com/americas/twelve-times-the-un-has-failed-the-world-21666> [hereinafter *Twelve Times the UN Has Failed the World*].

<sup>55</sup> See Michael Byers, *Symposium: The Steadfastness of International Law*, OPINIOJURIS (Nov. 19, 2018), <http://opiniojuris.org/2018/11/19/34288/> (“[T]he international legal system has always responded to major shifts in the identity, character, and priorities of powerful states. The German diplomat-scholar Wilhelm Grewe divided the history of international law into periods of hegemonic dominance, from Holland in the 17<sup>th</sup> century to the United States after the Cold War. Grewe’s analysis was Eurocentric, statist, and materialist in its understanding of power, but seen from the vantage point of 2018, his thesis—that the international legal system evolves with the rise and fall of powerful states—is almost indisputable.”).

<sup>56</sup> Reisman, *supra* note 11, at 127.

<sup>57</sup> SHAW, *supra* note 17.

<sup>58</sup> *Proverbs* 22:2; *Psalms* 67:4; *Leviticus* 19:33–34; *Colossians* 3:10–11.

<sup>59</sup> *James* 2:1–4; *Galatians* 3:26–29; *Mark* 12:33; *Matthew* 19:24.

and instead set a hierarchical order upon which the Church governed the western world.<sup>60</sup>

Contrary to its efforts to keep this hierarchical order, the Holy Roman Empire started crumbling after the Peace of Westphalia in 1648, when sovereign states began to mutually recognize each other either through treaties or custom.<sup>61</sup> After the establishment of the Westphalian system, states began to build an international legal hierarchy, by which they voluntarily promised to be bound. They willingly submitted themselves to this hierarchy to gain stability and peace, admitting that the hierarchy does not perforce guarantee the stability and security due to its lack of enforceability.<sup>62</sup> International law relating to war, commerce, and territorial boundaries was formed.<sup>63</sup> The League of Nations after World War I created by the 1919 Peace Treaty could be considered the culmination of international hierarchical development since the Peace of Westphalia because it hierarchically managed the world order, a new political development since the fall of the Holy Roman Empire. That being said, it did not effectively prevent the occurrence of World War II.

A stronger intergovernmental entity, the U.N., to which states gave more power than the League of Nations, was created after World War II. Just like the Westphalian system, however, the U.N. did not effectively pierce state sovereignty to bind states, with the exception of the U.N. Security Council decisions in the matters of international peace and security.<sup>64</sup> Most economic, social and cultural matters have still remained in the domestic realm. While the U.N. was given privileges, and U.N. officials enjoy immunities within states, this does not mean the U.N. is higher hierarchically than the state. Rather, the U.N. is mutually respected by a state who grants privileges and immunities. The only decisions that bind a state are those made by the UN Security Council,<sup>65</sup> but those can only be limitedly issued in relation to international peace and security. While under Article 25 of the U.N. Charter,<sup>66</sup> members accept and carry out the decision of the U.N.

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<sup>60</sup> "[T]he hierarchical nature of Catholicism sets it apart from other Christian churches. It is a pyramid with the Pope at the top, followed by cardinals (who have the right to elect a new pope on the death of the current incumbent), archbishops, bishops, priests, deacons and laity." Peter Stanford, *Roman Catholic Church*, BBC (June 29, 2011), [http://www.bbc.co.uk/religion/religions/christianity/catholic/catholic\\_1.shtml](http://www.bbc.co.uk/religion/religions/christianity/catholic/catholic_1.shtml).

<sup>61</sup> See CARTY, *supra* note 28, at 7.

<sup>62</sup> See *id.*

<sup>63</sup> SHAW, *supra* note 17, at 19–30.

<sup>64</sup> Enforceability of security council decisions is another matter.

<sup>65</sup> U.N. CHARTER art. 25.

<sup>66</sup> *Id.*

Security Council, its bindingness is contentious.<sup>67</sup> Even if it is binding, its effectiveness is questionable. Furthermore, it is not binding on the non-U.N. member countries. It is difficult to justify fifteen U.N. security council members making a decision that binds all 193 countries. There is no reason that countries who are not members of the U.N. Security Council would willingly follow its decision when they think it does not represent their ideas. To make matters worse, decisions are sometimes vetoed by the permanent five members if the decision conflicts with their own interests. Thus, this politically biased decision-making entity cannot effectively bind and further enforce its decision on the other member countries.

Regional developments may be the only exception to hierarchical failures. Regionally, the European Coal and Steel Community, Euratom, and European Economic Community (“EEC”) created a new hierarchical order in Europe in the 1950s. The so-called supranational organizations were born in Europe, expecting to be further developed in the international arena. The EEC was developed into the current European Union (“EU”) in 1993 in Maastricht, the Netherlands, and started expanding its area of cooperation into climate, environment, health, external relations, security, justice, and immigration.<sup>68</sup> The EU can make its own laws, so-called secondary legislation, through its institutions—the European Parliament, the European Council and the European Commission. One of its secondary legislation tools, EU regulation, pierces state sovereignty and is directly enforceable to the citizens of 28 member countries.<sup>69</sup> This supranational hierarchy was in part possible due to the shared values among member states. These values include attaining peace and security and encouraging economic prosperity.

While the EU is a success story in many ways, it also has its hierarchical failures, exemplified by its inability to effectively deal with recent migration turmoil, and also Brexit.<sup>70</sup> As of 2019, the dream of adding more EU members to eventually cover the world seems impossible as seen by Turkey’s stalled access to the EU since 2016.<sup>71</sup> Revising the U.N. Charter or adopting a new treaty to create a supra-national organization seems

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<sup>67</sup> See Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are binding under Article 25 of the Charter?*, 21 INT’L & COMP. L. Q. 270 (1972); Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUR. J. INT’L L. 89 (1994).

<sup>68</sup> See PHILIP RAWORTH, EUROPEAN UNION LAW GUIDE § 1:3–§ 1:8 (2019).

<sup>69</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 288, June 7, 2016, 2016 O.J. (C 202) 47.

<sup>70</sup> See Agust Arnorsson & Gylfi Zoega, *On the Causes of Brexit*, 55 EUR. J. POL. ECON. 301 (2018).

<sup>71</sup> Turkey’s access to EU was stalled mainly because of EU countries’ blame on human rights violations and lack of rule of law. See Ece Toksabay & Tuvan Gumrukcu, *Erdogan Warns Europeans ‘Will Not Walk Safely’ if Attitude Persists, as Row Carries On*, REUTERS, (Mar. 22, 2017), <https://www.reuters.com/article/us-turkey-referendum-europe-idUSKBN16T13E>.

impossible in the current world pluralistically fragmented by geography, levels of development, economy, politics, security, territory, culture, intellectual property, human rights, etc. Indeed, consensus seems unattainable in a world where actors include various intergovernmental organizations, non-governmental organizations, the BRICS, the G20, the Global South, the EU, the Council of Europe, the Organization of American States, NATO, the Arab League, the ASEAN, the African Union, etc. In this multi-dimensionally divided world, internationally-shared values are hard to find and define. Thus, it is not possible or efficient to build a hierarchy based on global values; it is rather more effective to rely on global governance based on dynamic transnational process.

### III. DEVELOPMENT, HUMAN RIGHTS AND HIERARCHY

In this part, I would like to analyze and discuss various aspects of hierarchy existing in human rights law. As applied to human rights law, both structural hierarchy to enforce human rights values and value-focused normative hierarchy do not work effectively.

#### *A. Human Rights Principles and Hierarchy*

Human rights are built on the equality of all human beings. Dividing humans into different ranks based on race, sex, religion, nationality, and membership in a collective group is discriminatory and violates these rights. After the establishment of the U.N., the universality of human rights successfully pierced into sovereign states, establishing a hierarchical order. Reflected in the U.N. Charter,<sup>72</sup> and various human rights instruments including the international bill of rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights,<sup>73</sup> the U.N. established human rights as internationally-shared values, uniting the world in a hierarchically globalized society.

The U.N. General Assembly and its subsidiary organs, the implementing hierarchical system for human rights, is challenged due to the fundamental normative limits of the General Assembly; resolutions and decisions of the General Assembly lack binding and enforceable authority. Treaty-based bodies created by many human rights treaties diversify this effort and reduce the efficiency of the U.N.-based hierarchy. Furthermore,

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<sup>72</sup> Stating the importance of the “the dignity and worth of the human person.” U.N. CHARTER, Preamble.

<sup>73</sup> See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1057; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

the political division between North and South shakes the basis of the hierarchy, rendering it ineffective. The degree to which human rights definitions and scopes of protection against violations vary among states also decreases hierarchical efficiency.

The hierarchical failure to implement and enforce human rights principles was followed by prevalent ethnic cleansing and crimes against humanity on massive scales in various regions, including in Asia, Africa, and Eastern Europe.<sup>74</sup> This led the U.N. Security Council and member-states to apply humanitarian law to human rights law<sup>75</sup> and to consider the responsibility of the international community to protect via intervention, ultimately leading to the development of the Responsibility to Protect doctrine in 2005.<sup>76</sup> Nevertheless, exemplified by events in Darfur, this effort failed due to a lack of support from the international community and the fear of unilateral military intervention.<sup>77</sup>

Hierarchical protection of human rights does not work effectively by merely creating value-focused normative hierarchy. The paramouncy of human rights does not mean that there should be a value hierarchy of rights among human rights. Distinguishing between universally applied human rights among states and human rights respected only within a country is meaningless. While the implementation of a certain right may be realized at the expense of another, it simply means there is a priority among human rights.<sup>78</sup> For example, consider an indigenous group that seeks the human rights of dignity, life, food, water, land, and cultural and religious identities. Promoting the human rights of a certain indigenous group may be realized

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<sup>74</sup> See *Twelve Times the UN Has Failed the World*, *supra* note 54 (providing examples such as Israel's ethnic cleansing, the dispute in Kashmir, violence in Cambodia, Somali's civil war, Rwanda's civil war, the Srebrenica massacre, the Sudanese conflict in Darfur, the U.S. invasion of Iraq, Syria's civil war, South Sudan's civil war, Yemen's civil war, and the Rohingya crisis).

<sup>75</sup> See CHANDRA LEKHA SRIRAM ET AL., *WAR, CONFLICT AND HUMAN RIGHTS: THEORY AND PRACTICE* 54 (3d ed., 2018).

<sup>76</sup> See generally DORIS KÖNIG ET AL., *INT'L LAW TODAY: NEW CHALLENGES AND THE NEED FOR REFORM?* (Doris König et al. eds., 2d ed., 2008); INSTITUTE FOR ETHICS, GOVERNANCE & LAW, *RESPONSIBILITY TO PROTECT AND SOVEREIGNTY* (Charles Sampford & Ramesh Thakur eds., 2013); JULIA HOFFMANN ET AL., *RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE* (Julia Hoffman & Andre Nollkaemper eds., 2012); SRIRAM, *supra* note 75, at 54–70; PETER HILPOLD ET AL., *THE RESPONSIBILITY TO PROTECT (R2P): A NEW PARADIGM OF INTERNATIONAL LAW?* (Peter Hilpold ed., 2015); SERENA K. SHARMA ET AL., *THE RESPONSIBILITY TO PREVENT* (Serena K. Sharma & Jennifer M. Welsh eds., 2015).

<sup>77</sup> See Alex De Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFF. 1039 (2007); Nick Grono, *Briefing—Darfur: The International Community's Failure to Protect*, 105 AFR. AFF. 621 (2006); Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFF. 615 (2008).

<sup>78</sup> Kate Halvorsen, *Notes on the Realization of the Human Right to Education*, 12 HUM. RTS. Q. 341, 347 (1990).

by loosening environmental regulations and creating exceptions to other areas of law. This is not because there is a hierarchy of rights between human rights and environmental rights, but because certain human rights should be prioritized depending on the circumstances.

Arguably, enforcement of human rights may be more effective if there were a clear hierarchy among human rights because domestic law enforcement would have clearer application standards.<sup>79</sup> If a state's government, either the legislative or judicial branch, believes that civil and political rights are more important than economic, social, and cultural rights, or clearly distinguish between core rights and rights that they can progressively achieve, the state could adopt the more important rights first as their domestic law.<sup>80</sup> In this case, more positive social and economic rights could be progressively achieved. It is true that realizing rights one by one and little by little can be less burdensome than trying to reach all rights simultaneously. This approach, however, is dangerous because defining and distinguishing core rights is a daunting task that is wrought with subjectivity. While equally treating human rights is impossible due to the conflicting natures of rights and duties among rights holders, human rights must be realized in a timely order based on the paramountcy of human rights and practical reality rather than subjective hierarchical ranks.

### *B. Human Rights Cities and Hierarchy.*

Following natural law, most countries cannot place their political and governmental interests over fundamental human values by simply setting up a hierarchy among groups. Theoretically, governments could be structurally organized to enforce human rights norms in hierarchical orders, such as international and regional, national and federal, state and local government. Laws can also be hierarchically organized into international law, regional law, state constitutions, federal law, state law, and local law. However, that is not necessarily how it happens in reality. Depending on each state, international law can be ranked in terms of preemptive power above, below or on par with a state's constitution. Human rights principles are usually adopted as a hard law of treaty or international custom. Because of the unclear status of international law, however, human rights principles are not necessarily self-executing. Most international lawyers are skeptical on the

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<sup>79</sup> International enforcement may be problematic because there is no such body except very limited application of the United Nations peacekeeping force.

<sup>80</sup> More leftist stakeholders would try to adopt and implement more economic, social and cultural rights and rights that can be achieved progressively, burdening government budgets.

status of international law in a domestic legal system,<sup>81</sup> domestic law professionals lower its status as a scholarly discipline, and many see it as a meaningless gesture that states use for cooperation and negotiation strategies.<sup>82</sup>

Due to the dubious nature of the hierarchy of international law and among subjects of international law, unilateral local movements have recently formed to adopt human rights principles as local ordinances or municipal codes, contrary to state governments that have failed to adopt the principles nationally. Those cities that have adopted the principles locally are called human rights cities.<sup>83</sup> Boston, U.S., and Gwangju, South Korea are such cities. While these movements have been threatened to be preempted by state governments,<sup>84</sup> they are good examples of flipping state and international hierarchies on their heads, making them useless and paradoxical.

### C. *Indigenous World, Education, and Hierarchy*

The indigenous world is a good example of paradoxically contradicting hierarchical theories of international law. The indigenous world is self-sufficient and sustainable without being interrupted by domestic and international legal systems. The modern concept of a state based on Rousseau's social contract<sup>85</sup> theory fails to consider certain minority races and the indigenous world. Family-based tribes have elders and leaders who provide wisdom and social leadership. While they were secluded from the international world on the Asian, American, and African continents, they have successfully survived thousands of years, harmonizing with nature and living sustainably: hunting and fishing, farming, gathering, and raising domestic animals. Having lived peacefully and sustainably for such a long time, does the indigenous world need to be governed by a positivist foreign state, or an international legal order? No, the indigenous world does not need to give up their power, territory, population and political autonomy for the better good as defined by the Western world. Subjecting them to the existing hierarchy that does not reflect their culture, society and political structure,

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<sup>81</sup> See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 503 (2000).

<sup>82</sup> Many states agree to bind themselves to treaties, but do not implement or even violate them.

<sup>83</sup> See GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES (Barbara Oomen et al. eds., 2016). There are also fake human rights cities that call themselves as such, but in reality, they do not adopt law relating to human rights principles.

<sup>84</sup> See Martha F. Davis, *Design Challenges for Human Rights Cities*, 49 COLUM. HUM. RTS. L. REV. 27, 29 (2017).

<sup>85</sup> See MADS QVORTRUP, *THE POLITICAL PHILOSOPHY OF JEAN-JACQUES ROUSSEAU: THE IMPOSSIBILITY OF REASON* 74–94 (2003).

harms their self-sufficient sustainable world. Western religion, technology, processed food, manufactured clothing, and artificial materials do not necessarily help indigenous cultures but rather make them dependent upon the foreign state. While Socratic positivist law of a Western state seemingly guarantees peace and security in a society, the indigenous world has existed independently, keeping its own natural law that can provide peace to the world. The law of a Western state does not reflect the fundamental values indigenous people have kept for thousands of years. Furthermore, the meanings of moral values, needs, and peace are different from tribe to tribe.<sup>86</sup>

If hierarchy does not work well in the indigenous world, teaching indigenous people they should follow a the new hierarchy a state orders them to follow is useless. Will education help protect existing indigenous people from any legal system based on modern international hierarchy? A Neo-Weberian would say that any education for this indigenous group will permanently change their status from peripheral to integrated in the main society.<sup>87</sup> A Neo-Marxist will say this will increase inequality between the main society and the indigenous society.<sup>88</sup> The main society's values and cultures will be infused into the indigenous society, and will force younger generations to throw away traditional religious beliefs and cultural values. New capitalistic ideas will make them compete with each other for money, breaking traditional harmony within the indigenous society. Without hierarchy, traditional indigenous history and values can be transnationally diffused into the main society and reflected in policy and law.

#### D. Local public policy, values, and theories

Whether following positivism or naturalistic monism, international law cannot completely pierce state sovereignty to nullify local custom, and normative policies reflecting local moral values. This also applies to private international law where relations between private entities are the center of normative development. New *lex mercatoria*, seeking the harmonization of private international law through international conventions, respects local normative policies and moral values while treating as obstacles any national law that increases transactional costs.<sup>89</sup> New *lex mercatoria*, seeking

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<sup>86</sup> For example, the differences between the Hutu and Tutsi led to the killing of about 800,000 people. *Rwanda*, COUNTRIES AND THEIR CULTURES, <https://www.everyculture.com/No-Sa/Rwanda.html> (last viewed Dec. 30, 2019); *Rwanda Genocide: 100 Days of Slaughter*, BBC (Apr. 4, 2019), <https://www.bbc.com/news/world-africa-26875506>.

<sup>87</sup> See e.g., POWER AND IDEOLOGY IN EDUCATION (J. Jarabel and A.H. Halsey eds., 1979); Halvorsen, *supra* note 78, at 341–364.

<sup>88</sup> Halvorsen, *supra* note 78, at 341–364.

<sup>89</sup> Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 627 (2006).

transnational governance, focuses on the importance of local moral values and normative policies, denying the common absolute values upon which the hierarchical structure of public international law is based.

As such, identifying the common absolute values upon which the hierarchical structure or global governance of international law is based is idealistic. Western theories such as American realism cannot directly apply to Asian societies. Even inside the Asian area, the legal reasoning that led to the arbitral decision of the South China Sea disputes in the Permanent Court of Arbitration cannot resolve the matters relating to the Dokdo Island issue between Korea and Japan because both countries attribute different historical values to the island as well as different emotional attachment.<sup>90</sup> It is believed that China will observe international law to the extent that it conforms to its policies and interests.<sup>91</sup> A few other examples of the difficulty in discerning common world values are public policy exceptions to the recognition and enforcement of international arbitral decisions under the New York Convention;<sup>92</sup> local policy considerations in regional free trade agreements and bilateral investment treaties;<sup>93</sup> Asian, African and Latin theories and practice of international law;<sup>94</sup> claims to historic and sovereign rights to specific features in the South China Sea;<sup>95</sup> and fraud exceptions to the independence principle of the Uniform Customs and Practice 600.<sup>96</sup>

#### IV. CONCLUSION

International hierarchy that does not common historical and societal values cannot be enforced in countries that have different social and historical cultures and norms reflecting diverse values. Not only has international hierarchy failed to effectively implement and enforce international norms as seen in the human rights field, but it is also difficult to clearly define and establish. The Westphalian state-based system acts as

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<sup>90</sup> See DOKDO: HISTORICAL APPRAISAL AND INTERNATIONAL JUSTICE 2 (Seokwoo Lee & Hee Eun Lee eds., 2011).

<sup>91</sup> SHAW, *supra* note 17, at 38.

<sup>92</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(2)(b), June 10, 1958, 330 U.N.T.S. 3 (1958).

<sup>93</sup> Enforcement can be rejected by a country if it believes that enforcement is contrary to public policy. See Scott Barrett, *Introduction to the Special Issue-Trade and Environment: Local Versus Multilateral Reforms*, 5 ENV'T AND DEV. ECON. 349, 351, 354, 356 (2000).

<sup>94</sup> See e.g., NORTHEAST ASIAN PERSPECTIVES ON INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES (Seokwoo Lee & Hee Eun Lee eds., 2013).

<sup>95</sup> This is an example of claiming an exception to the general law of sea principles. See *In the Matter of the South China Sea Arbitration*, PCA Case No. 2013-19, Award (July 6, 2015), <https://www.pccases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

<sup>96</sup> Uniform Customs and Practice for Documentary Credits: UCP 600, Arts 4 and 5. UCP 600 is silent on the issue of fraud, leaving its regulation to local law such as UCC § 5-109.

an obstacle to reaching a globalized society, especially when states are driven by populism as recently seen in the U.S., China, Russia, U.K., Brazil, etc. The international society is losing its leaders, the great powers, that would be willing to give up national interests and resources to support and maintain a globalized society.

It is a long shot to resolve the many international issues, such as migration and climate change, through a hierarchical system such as the U.N. But this article does not attempt to claim that anarchistic unorganized and non-hierarchical constitutive structures are superior to organized and hierarchical constitutive structure. The absence of hierarchy may mean chaos where “[t]he strong do what they will and the weak suffer what they must.”<sup>97</sup> However, even in unorganized and non-hierarchical constitutive structure, the world, through global governance, may be able to keep peace and restrain any unilateral delictual action through transnational process. As Reisman suggests, many other non-state actors in addition to states appear, and they are participating in the constitutive process, acting as restraints;<sup>98</sup> the non-governmental actors such as NGOs and the media play more active roles in the human rights area.<sup>99</sup> State elites, in protecting their interests, are more restrained in human rights.<sup>100</sup> Thus, effective but non-hierarchical structures working within a transnational world, if unhindered by nationalism and populism, are achievable and desirable.

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<sup>97</sup> Reisman, *supra* note 11, at 133 (citing HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992)).

<sup>98</sup> Reisman, *supra* note 11, at 141–43.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 141.