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Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention

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Abstract

'Unilateral actions' are taken by an unauthorized participant who contends they are, nonetheless, lawful. The lawfulness of such actions must be examined as a constitutive question before one proceeds to determine whether a particular action fulfilled the substantive criteria of lawfulness. Lawfulness is a function of constitutive structure. In coarchical systems without hierarchical institutions, unilateral action is perforce the mode of decision. In constitutive structures that include generally or intermittently ineffective hierarchical institutions, the lawfulness of unilateral action is more complex and unilateral action becomes normatively ambiguous as a result of the cognitive dissonance caused by the decalage between substantive lawfulness and procedural unlawfulness. In constitutive structures that incorporate effective decision institutions, unilateral action is presumptively unlawful. The normative ambiguity of unilateral actions in contemporary international law arises from the regrettable but acknowledged intermittent ineffectiveness of decision institutions. The appropriate remedy for this problem is to make the institutions effective.

Most decision processes are jolted into operation in response to acts of individual participants; those acts are not 'unilateral actions', as that term is used in international law. A 'unilateral action' is an act by a formally unauthorized participant which effectively preempts the official decision a legally designated official or agency was supposed to take. Yet the unilateral action is accompanied by a claim that it is, nonetheless, lawful because:

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- (i) the pertinent legal system allows such unilateral acts in certain circumstances and on condition that substantive tests of lawfulness are met;
- (ii) the circumstances for the particular unilateral act are claimed to be appropriate; and
- (iii) the act, despite its procedural irregularities, has purportedly complied with the relevant substantive requirements of lawfulness.

The feature that distinguishes a unilateral action, as a term of art, from other acts that are initiated by a single participant is that a unilateral action effectively replaces lawful decision, by obviating it entirely or forcing official processes to endorse it. Other acts that are initiated by a participant do not preempt or replace authoritative decision; they stimulate its operation and are ultimately reviewed by it.

When jurists encounter claims with respect to unilateral actions, then, they necessarily address them at two juridical levels. They must ask whether the constitutive process of the pertinent legal system even allows for the possibility of lawful unilateral action in general or in the matter for which it is claimed; and, if that constitutive question is answered in the affirmative, whether the particular action in question fulfilled whatever substantive criteria of lawfulness are to be applied. If the first or second question is answered in the negative, the action is illegal.

Because unilateral action preempts or replaces an authoritative decision by some formally authorized agency, it is important that we specify the sequential components of a decision. A decision is best understood as encompassing seven different components:

intelligence: the gathering and assembly of intelligence relevant to decision;

promotion: the characterization of certain situations as unacceptable and the agitation for and promotion of a particular new legal policy to remedy them;

prescription: the installation of one such policy as law, whether it is accomplished by formal legislation or by some informal means of prescription;

invocation: the provisional characterization of certain events as incompatible with law and the insistence that the community respond appropriately;

application: the application of law to events and the fashioning of an appropriate remedy;

termination: the abrogation of extant law and the installation of new law; and

appraisal: the assessment of the aggregate performance of the legal system in terms of its fundamental goals.¹

Different legal systems distribute and concentrate the competence to perform these various functions differently, so that what may be characterized as both unilateral and unlawful in one constitutive arrangement may be quite lawful in another. For example, one system may allow virtually unregulated unilateral action with respect to promotion, spawning vast industries of lobbyists, agitators and sundry moral entrepreneurs, while another, which need not be authoritarian, may locate promotion exclusively in a formal governmental process. One system may give great

¹ See H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society* (1992).

play to customary tribal or religious law, while another may jealously guard the sovereign prerogative to make all law for the community.

Many jurists assume that modern, developed legal systems, however much they distribute participation in other decision functions, must guard their monopoly with respect to law-applying, as it is the most manifestly coercive function. But that is not always the case: many systems (indeed, currently the most developed systems) allow considerable privatization of erstwhile state-managed adjudication in the form of arbitration and some permit the establishment, subject to varying degrees of control by some part of the state apparatus, of private police forces and prisons. The actual distribution of participation in different decision functions is important to understanding the lawfulness of unilateral action in a particular system, because broad opportunities for private participation in pre-application functions may, in context, effectively decide the application and thus constitute a disguised but nonetheless effective form of unilateral action.

1 Unilateral Action

For all lawyers — and not simply for the doctors of international law — the entire idea of unilateral action imports a normative ambiguity that provokes a deep professional ambivalence.² The normative ambiguity arises from the fact that the question of the lawfulness of acts or decisions is ordinarily assessed in terms of the conformity to law of their substance as well as the procedures by which they were taken. This dual criterion is used because both substantive and procedural law express important, though quite different community policies. In the unilateral action, substance alone is claimed to be relevant; the failure to comply with the prescribed procedures may well be accompanied by effusive expressions of constraint, reluctance and regret along with emphasis on the overriding and urgent importance of the substantive act; but whatever the rhetoric, the distinguishing feature of the unilateral act is that the prescribed procedure by which it should have been taken has essentially been ignored.

² Part of the controversy about the lawfulness of unilateral action does not concern unilateral action at all but is simply the result of using different observational and role standpoints without appreciating that each looks at decision-making and the use of rules in quite different ways. For example, the bureaucrat inhabits a limited number of relatively routinized situations within a universe of rules and authorized procedures through which he or she navigates and in terms of compliance with which his or her performance is evaluated. Positivist jurisprudence, which lends itself to decision-making by many of the levels of a bureaucracy, identifies lawfulness in terms of compliance with rules. The decision-maker at the pinnacle, in contrast, does not think in terms of compliance with rules, but in terms of making decisions that optimize the many policies that may be expressed in rules, but which are presented for decision in situations that are anything but routine; if they were routine, they would have been adequately dealt with by the bureaucrats at lower levels of behemoth. From the perspective of the jurist who is deploying a positivist jurisprudential frame, the decision-maker is acting unilaterally and unlawfully. Using a different and quite possibly more appropriate jurisprudential lens could lead to the opposite conclusion. See generally Reisman & Schreiber, *Jurisprudence: Understanding and Shaping Law* (1987).

The professional ambivalence toward unilateral actions arises from the fact that jurists, above all, appreciate that at the heart of procedural law is the notion that orderly decision, preceded by due deliberation and followed by authorized and inclusive application, is vital to minimum order and human dignity. Lawyers know that, however noble the impulse, action that purports to be in the common interest, but that is taken without formal authority, may have incalculable public and private costs. Actions inconsistent with the procedures prescribed for them may erode the authority of the law and increase the probability of abuse. Hence the law's ceaseless quest for organization and institutionalization and its discomfort with and inherent resistance to legally unauthorized actions, no matter how urgent the circumstances or morally imperative the impulse. Law's insistence on orderly decision is not a professional pathology or a sub-cultural quirk, but is central to the legal enterprise.

Contemporary international lawyers, who often seem obsessed with unilateral action and assume that it is a unique feature or failing of international law, might console themselves with the fact that the problem of the lawfulness of formally unauthorized unilateral action in international law is generic to law. Pareto observed the correlation between the ineffectiveness of a political system and the resort to and toleration of unilateral action: the less effective the system, the more the impulse for and use of unilateral action and vice versa.³ His observation, which may apply to even more phenomena than he addressed, has been confirmed by countless anthropologists.

But who is authorized to determine that a system is generally ineffective or incapable of responding to one particular problem? One of the reasons unilateral action is so divisive is that the assessments of ineffectiveness of the legal system that might justify recourse to unilateral actions will, in many political configurations, vary, depending on whose ox is being gored. There may be profound disagreements among participants in a partially effective political system or sub-system as to whether the system in question is, indeed, ineffective in responding to a particular matter or class of events. Such disagreements may rest on conflicting values and interests as much as on factual perceptions, since, in any instance, the unilateral action will, by its nature, indulge some and deprive others, not the least those who have a place or an interest in the decision process that is being circumvented or usurped.

The latter point is frequently the nub of the international legal issue when unilateral military action, that is plausibly based on humanitarian concerns, is still strongly criticized by elites of smaller states. The reason for the criticism is not necessarily a lack of feeling for human rights so much as the fear that any erosion of the principle of sovereignty can only increase the vulnerability of weaker states to more powerful states. Even when it is generally accepted that a system is failing to respond to a violation whose remedy has been assigned exclusively to a formal decision-maker or that the human consequences of the failure are especially grave, some participants — international lawyers in particular — may still insist that, good intentions notwithstanding, greater systemic injury will be caused by the prospective

³ See V. Pareto, *The Mind and Society*, (1935) vol. 4, §2180.

unilateral action than by the failure of the designated decision-maker to respond adequately. Nor is this always, as exponents of unilateral action contend, a dreamy retreat from a nastily imperfect reality. It may be an indispensable ingredient in the recipe for changing reality. As the poet, Charles Stephenson, has written ‘The facts of the future/are built on dreams. Dreams permit change/to happen.’⁴

2 Constitutive Processes

Much as every sound is meaningful only if it takes place in a language system, the question of the extent of the lawfulness of unilateral action — in general and in particular — derives its meaning from the political and legal system in which it takes place and especially the system’s constitutive process. Every legal system, from the most evanescent encounter of two persons⁵ to the most comprehensive international one, includes a constitutive process, which establishes and maintains the institutions and procedures by which decisions are to be taken. Constitutive process must be distinguished from the flow of specific decisions about the mundane ‘who gets what’ that the established institutions and procedures take. Some legal systems purport to describe their constitutive process in a document, called a constitution. The document may, at the moment of its inception, have been an accurate picture of the constitutive process. But the dynamic process itself is always changing and quickly begins to drift from, edit and elaborate the snapshot taken at the moment of drafting.

For some purposes, constitutive processes can be described in great detail, in terms of the full range of those who participate in them; their background conceptions and explicit and latent objectives; the arenas in which the process takes place and the characteristics of those arenas; the bases of power that participants deploy and the ways they deploy them; and the aggregate of outcomes of the process. In our inquiry, that level of detail is impossible. Instead, the drastic abbreviations available in an adaptation of Max Weber’s conceptual tool of ‘ideal types’⁶ may be helpful in considering the range of constitutive structures relevant to our inquiry.

When a unilateral action occurs, its legal appraisal varies as a function of the constitutive configuration in which it occurs. Four constitutive configurations are relevant: first, constitutive processes without hierarchical institutions of decision; second, constitutive processes in which there are hierarchical institutions which are manifestly ineffective; third, constitutive processes in which the hierarchical institutions are generally effective, but prove to be ineffective for the application of particular norms; and fourth, constitutive processes in which hierarchical institutions are highly effective and in which unilateral actions will simply be characterized as ‘taking the law into one’s own hands’, and hence delictual, no matter what the

⁴ C.W.T. Stephenson, *Dream Cantos*, (1999) vol. II, 1–1.

⁵ See W.M. Reisman, *Law in Brief Encounters* (1999).

⁶ See generally M. Weber, *The Theory of Social and Economic Organization* (trans. A.M. Henderson and T. Parsons, 1947).

explanations and how passionate the justifications proffered. Let us consider each of these types.

A *Unorganized and Non-Hierarchical Constitutive Structures*

In legal systems whose constitutive processes do not have or do not operate through hierarchical institutions for making and applying law, unilateral action is performed the method for making decisions; the unilaterality of the action, of itself, is not a relevant consideration in the assessment of its lawfulness. Participants within the legal system may decry the absence of organized decision-making arrangements that would obviate the need for justification of unilateral action and some may even struggle to create them, but until effective institutions are brought into operation, unilateral action is performed the lawful mode of decision. In micro-legal arrangements in the private sphere of liberal systems, coarchical decision by unilateral action is the normal mode of decision, but the stakes are usually much lower and the consequences apparently evanescent.⁷

Wholly aside from the question of efficiency, the first type of constitutive structure raises serious political philosophical problems. Where there are clear norms, unorganized modes for appraisal of the lawfulness of the unilateral action may be quite efficient, but, by their nature, unorganized and non-hierarchical systems tend to mirror the power process, in which the quintessential *grundnorm* is Thucydides' 'The strong do what they will and the weak suffer what they must.'⁸

B *Ineffective Constitutive Structures*

In the panorama of domestic political and legal systems, many are essentially semantic: they are furnished with sometimes grandiloquent paper constitutions, along with corresponding paper institutions with elaborate legal procedures, which together purport to be their legal and political systems. Yet they have no power. Actual decisions are made by a shadow process, which may converge with the formal 'legal' system, but which operates on an entirely different value calculus. In some circumstances, the formal system will issue the actual decisions and outsiders may attribute them to the legal process. But insiders — operators who understand the 'operational code'⁹ — know that it is fruitless to seek decisions from the formal process if they have not first been certified by the actual power process.

Unfortunately, ineffective political and legal systems abound. The earliest known example is the Code of Hammurabi, an elaborate codex that was not applied. Numerous similarly ineffective systems have existed since. Rogelio Perez Perdomo has produced an indispensable study of this type of system in nineteenth century Latin America *caudillajes*.¹⁰ Ernst Fraenkel analyzed it in his classic study of the *Doppel-*

⁷ See generally Reisman, *supra* note 5.

⁸ *The Complete Writings of Thucydides: The Peloponnesian War* (Modern Library College ed. 1951) 331.

⁹ See W.M. Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (1979).

¹⁰ R.P. Perdomo, *El Formalismo Jurídico y sus Funciones Sociales en el Siglo XIX Venezolano* (1978).

staat.¹¹ In my experience as a member of a regional human rights oversight body, I found this to be a situation so common that, for all of its frustrating ineffectiveness, one hesitates to call it ‘abnormal’. I believe that, at some level of consciousness, all of us entertain the possibility that the legal system in a particular situation may be only semantic, for example, when we visit a new town and ask, ‘who’s the mayor?’, and then, ‘who’s the boss?’

Yet for those who have been acculturated to and work in effective legal systems, each confrontation with semantic systems, even when recognized as such, still generates a type of what Festinger called ‘cognitive dissonance’.¹² We have been conditioned to respond affirmatively to the symbols of the law so that even if they are only symbols, with no effective legal system behind them, their presence still makes any action — whether taken by others or ourselves — that has not been pre-authorized by its paper institutions seem somehow unlawful and further corrosive of the law itself.

C *Effective but Limited Constitutive Structures*

There are legal systems that are only partially effective. In some circumstances, this occurs over extended periods because of a lack of coordination of political power and political authority. In other circumstances, it occurs because, as McDougal put it, ‘authoritative reach exceeds controlling grasp’. The phenomenon of legal over-reaching is more common than may be generally appreciated,¹³ for ineffective law is often not a failure of legal drafting or a lapse of legislative continence, but rather a conscious technique for mediating between the incompatible aspirations of different classes and interest groups by means of the device of recognizing legislatively the validity of claims while ensuring that the legal promise will neither be enforced nor otherwise fulfilled.¹⁴ In other circumstances, it occurs, not because of an intentionally designed incapacity, but because of a particular, unanticipated stress on the system.

Many legal systems have contingent *exceptios* for unilateral action to fill the gap for important matters for which there are clear substantive standards and prescribed procedures, but, whether generally or sporadically, insufficient power to make them effective. In modern international law, the prime example of the *exceptio* is the so-called right of self-defence.¹⁵ This power, which the UN Charter authorizes to its state-parties, is not, it should be emphasized, a survival from an earlier period of law as the rather archaic naturalist language that was used to frame it in the Charter would suggest. It is an intentional *exceptio*, for there was no ‘right’ of self-defence prior to the Charter’s installation of a prohibition on the use of force. Until that time, states, as a manifestation of their sovereignty, were entitled to wage war, whether to defend

¹¹ E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, (trans. E.A. Schils et al. 1941).

¹² See L. Festinger, *A Theory of Cognitive Dissonance* (1957).

¹³ See Reisman, *Folded Lies*, *supra* note 9.

¹⁴ See T.W. Arnold, *The Folklore of Capitalism* (1937); see also T.W. Arnold, *The Symbols of Government* (1935).

¹⁵ See UN Charter, Art. 51.

existing rights or to change them, so a ‘right’ of self-defence¹⁶ was redundant. Despite the word ‘inherent’ in the English version or ‘droit naturel’ in the corresponding French version of Charter Article 51, the provision was designed to function as an *exceptio* to the general assignment of the right to use force that had been made to the Security Council.

D Effective Constitutive Structures

When a constitutive process has hierarchical institutions that are effective and can meet the authorized demands of those who participate in it, there is no justification for unilateral action. Hence virtually all unilateral action in this constitutive setting is presumptively delictual. The sanctioning agents may sometimes appreciate that a particular unilateral action is different from ordinary delicts that are occasioned by negligence or presumably animated by an intention to self-enrich. Moreover, those applying the sanctions may be conscious of the moral arguments that can be marshalled to justify the particular unilateral action. Nevertheless, the action will still be condemned and sanctioned, lest the constitutive process cease to be effective and degrade to the third type. In the constitutive process that has established and maintained effective structures, we encounter unique oxymorons such as ‘civil disobedience’ and complex multi-referential terms such as ‘vigilantism’. A term such as civil disobedience is invoked by the unilateral actor, who acknowledges the authority and effectiveness of the decision process he or she is disobeying and in some theories the propriety of punishment for the ‘civil disobedience’.¹⁷ Vigilantism is a complex term of decision-makers which at once condemns the unilateral and, as a result, more arbitrary action taken and insists that sanctions be applied, yet, in not using the term ‘criminal’, implies some understanding of the reasons for the action, usually the inability or refusal of the political and legal system to address, through timely law-making or effective application, the issue which has excited the action of the vigilante.

Each of these four types of constitutive configurations views the category of events that we call unilateral action differently. Only in the last three systemic arrangements is unilateral action a legal problem; in the second and third, the uncertainty with regard to the lawfulness of unilateral action or its normative ambiguity arises from the cognitive dissonance caused by the realization that the constitutive process to which the prerogative of action has been assigned is either generally or momentarily unable to implement rights it has guaranteed, while in the fourth, the primary problem is one of control, as the constitutive process is effective, so unilateral actions are unnecessary to vindicate rights and hence are presumptively unlawful. Yet even in the latter type of

¹⁶ On the early efforts to transform this form of unilateral action into a ‘right’, henceforth subject to legal regulation, see Jennings, ‘The Caroline and McLeod Cases’, 32 *AJIL* 82 (1938).

¹⁷ See W.M. Reisman, ‘The Tormented Conscience: Applying and Appraising Unauthorized Coercion’, 32 *Emory Law Journal* (1983) 499.

constitutive structure, particular unilateral acts and unilateral action in general may be viewed as unlawful only by some participants.¹⁸

3 The Succession of Processes

Let us review the succession of constitutive processes in international law, with the same drastic abbreviation we used for description of the four types of constitutive structure.

Until the early twentieth century, international law approximated the first constitutive structure: there were no hierarchical institutions and decisions were perforce taken unilaterally, unless governments found it in their interest to participate in an *ad hoc* multilateral decision. Law making was accomplished by custom, which allows for unilateral acts that make new law by violating previous law, so that, in an ironic inversion of the Roman maxim, the maxim of international law was indeed *ex delicto oritur jus*. As for law application, the usual method was unilateral act: a state that felt it was entitled to certain rights perforce secured them itself by what was inelegantly but accurately called 'self-help'. If a particular state lacked the power to self-help, there was no institution to which it could turn; in consequence, it was simply unable to vindicate its rights. A discussion of the lawfulness of unilateral action would have been meaningless in this constitutive structure. Many efforts after 1899 sought to change the constitutive process by establishing hierarchical institutions to which states were supposed to assign decision competence and surrender rights of unilateral action they would otherwise have enjoyed. But these were clearly perceived as exercises *de lege ferenda*.

The creation of the League of Nations in 1920 brought into being a constitutive structure of the second type.¹⁹ An apparently hierarchical structure had been established, but if one read the fine print, it was clear that its functioning depended upon the voluntary actions of the many states that were party to the Covenant; if those actions were not forthcoming, there was no effective sanction and one would have expected a regression to the first constitutive structure. But with the conflation of two constitutive processes, one allowing unilateral action, the other purporting to have institutions of decision that would obviate unilateral action, the lawfulness of unilateral action became more ambiguous and began to generate the cognitive and moral dissonance that now seems indissolubly associated with the concept.²⁰

¹⁸ National foreign policy specialists, whether lawyers or not, operate simultaneously in a national constitutive process that is often the fourth type and the international constitutive process that is the second or third. At some level of consciousness, they may transpose the expectations that are accurate and cogent in the national constitutive process to the international one.

¹⁹ See Covenant of the League of Nations, Part I of the Treaty of Peace signed at Versailles, 28 June 1919.

²⁰ Nonetheless, as European jurists began seriously to study non-European systems in the nineteenth century, they were obliged to reassess their assumption that a legal system necessarily imported a centralization of power and monopolization of the use of force, for many intergenerationally stable systems they encountered had neither, but perforce assessed lawfulness by reference to the conformity of outcomes to substantive principles rather than to the propriety of the procedures by which those outcomes were achieved. Some international lawyers, such as Georges Scelle, used the insight available

The creation of the United Nations in 1945 was the culmination of efforts to establish a constitutive process approximating the fourth ideal type. The government representatives who designed the organization wanted a constitutive structure that would address their basic security needs. Accordingly, a general prohibition on the threat or use of force was installed and other than a short-term right of self-defence pending the response of the Security Council, the Council was assigned the exclusive right to use force to respond to 'threats to the peace', 'breaches of the peace', and 'acts of aggression'.²¹

For all its ambition, this was a realistic formula, because the five permanent members of the Security Council, on whose agreement its operation depended, concurred that overt uses of the military instrument against the political independence or territorial integrity of states were the most significant threats to international order. Henceforth, violations of these widely accepted norms were not to be resisted or remedied unilaterally, but only by the collective action of the United Nations. Other matters, on whose normative character the permanent members would likely have disagreed, were deemed to fall within a sphere of 'domestic jurisdiction' that was insulated from international concern. In this period, then, unilateral action would have been deemed unlawful.

With the advent of the Cold War, the constitutive structure created by the Charter remained in place but, in practice, it quickly degraded from what had been intended to be the fourth type of constitutive arrangement to the third. The veto effectively paralyzed the Council in virtually all circumstances in which the Charter regime would have expected it to operate. Alternative, essentially unilateral techniques for addressing the security concerns of the governments that had established the system developed, but efforts were still made to maintain and to shelter such practices under the authority of the UN Charter. Expansive and at times patently forced interpretations of Article 51's right of self-defence were invented. A new term, 'counter-measures', was minted²² in order to fill a vacuum created by the broadly formulated prohibition of the threat or use of force and the intervening ineffectiveness of the constitutive structure that had been assigned the exclusive competence to use force in support of public order. Even the International Court of Justice, while condemning unilateral uses of force,²³ still allowed the state resorting to them to enjoy some of their fruits. Yet, the Court itself inched cautiously toward a possible *exceptio* for the unilateral termination of treaties in urgent environmental matters.²⁴

from comparative studies to coin the term 'dédoublement fonctionnel' as a way of describing a system essentially characterized by the unilateral actions of its members. The term was especially useful for comprehending the actual operation of a legal system when there were few, even weak, hierarchical institutions. Scelle, 'Le Phénomène juridique de dédoublement fonctionnel', in Schätzel and Schlochauer, *Rechtsfragen de Internatiolen Organisation* (1956) 324.

²¹ UN Charter, ch. VII.

²² See case concerning the Air Services Agreement of 27 March 1946 (*Fr. v. U.S.*), 18 RIAA 417 (1978).

²³ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*) Merits, ICJ Reports (1986) 14 (27 June).

²⁴ See case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports (1997) 76.

In the course of this period, participation in the constitutive process expanded and the relative effectiveness of the various categories of participants began to shift in ways quite different from the conceptions of classical international law. While states had long been deemed the only 'subjects' of international law, non-state participants in international legal processes were hardly an innovation. For centuries, wealth elites had operated effectively through charter companies and directly on the governments of states. Long after it had ceased to have a territorial base, the Holy See was acknowledged as one of a very few *sui generis* participants in the international legal process by even the most positivist of the doctrinalists. Now, thanks to developments in communications, many new non-governmental entities have begun to operate efficiently in the international legal process, while more and more private individuals are able to play increasingly effective roles in decision functions such as promoting, law-making or prescribing, invoking and law-applying. Not the least of the innovations is the growing power of the electronic mass media, a development whose full effect has been felt only in the last decade of this century.

Thus, in a relatively short period of time, an international decision process essentially comprised of representatives of states operating severally and later collectively in the United Nations and other informal arenas and largely restricted to state representatives has been incorporated into a contemporary international decision process, which includes not only officials of states, but the aggregate *actual* decision process, comprised, as it is, of governments, inter-governmental organizations, non-governmental organizations and, in no small measure, the media. All the actors, who assess, retrospectively or prospectively, the lawfulness of international actions and whose consequent reactions shape the flow of events, now constitute, in sum, the international legal decision process. The transformation of a system that was largely managed by state elites into the contemporary international legal process has coincided with the virtual enfranchisement of a new international 'Fourth Estate', the transnational electronic mass media, as an independent force whose professional elite are largely animated by the values of the western liberal tradition. Currently, the media appear able to play a preponderant role in invoking international decision by presentation of graphic images of human rights violations and insistence that a remedy be provided.

Power is often a zero-sum exchange, so increases in non-state actors' influence have correlatively reduced the influence of many of the more traditional state-based actors and the organizations they established. The political objectives of the host of new non-governmental participants are far from homogenous, but they are essentially different from those of the elites managing the affairs of nation-states. To be sure, state representatives still control formal access to many of the inherited organized arenas of international law, but the international decision process can now initiate and participate in them, as the *Legality of Nuclear Weapons* opinions showed,²⁵ or coopt, incorporate or circumvent them. Many students of international law resist the notion that this phenomenon is a legal process, let alone *the* legal process that now

²⁵ ICJ Reports (1996) 226 — and see especially Opinion of Judge Oda *ibid.* at 330.

decisively shapes expectations of authority about international behavior. However, heads of even the most powerful states, delegates to inter-governmental organizations, members of international secretariats, legal advisers, corporate elites, indeed, even mid-level officers planning targeting for military campaigns, have learned that they ignore the operation of this phenomenon, whatever they call it, at their peril.

4 Installation and Establishment

The installation of the international human rights code as part of modern international law and the establishment of oversight institutions that purport to regulate the techniques by which governments control their populations, are largely results of the agitation and growing influence of non-governmental participants in the expanded international decision process. After all, state elites are hardly likely to initiate an external process that effectively limits their freedom to choose and use the ruthless, though time-tested, methods of control and management of the people in their territory, the *sine qua non* of their base of power. But thanks to the ability of state elites to protect their interests, the human rights norms that had been prescribed in formal documents remained, for the most part, aspirational rather than effective, on the order of a 'standard of achievement',²⁶ the Universal Declaration's functional equivalent of the US Supreme Court's 'all deliberate speed' formula.²⁷ Moreover, such institutions as were established at the universal level were either firmly controlled by governments and subject to their political interests, for example, the Human Rights Commission, or, sad to acknowledge, generally ineffective even when composed of independent experts.

The end of the Cold War and the disintegration of the Soviet Union signalled the apparent restoration of the consensus among the five permanent members of the Security Council. As this had been the precondition for the operation of the Charter system, for a short time, it appeared that the world community had returned to the fourth type of constitutive structure. This impression was reinforced by the response of the Security Council to Iraq's invasion of Kuwait.²⁸ But the impression of effectiveness was only partially accurate, for the consensus had never gone beyond a manifest violation of an international boundary and seizure of the territory of another member of the United Nations. It had never extended to human rights, i.e. the authoritative international scrutiny of the essential techniques by which state elites control their populations. One of the five permanent and veto-franchised members was an unrepentant dictatorship that could not comply meaningfully with the international human rights standard without weakening or transforming itself, while another was in a process of transition whose ultimate outcome could not be predicted with any confidence.

²⁶ Universal Declaration of Human Rights, GA Res. 217A, UN GAOR, 3d Sess., pmb. (1948).

²⁷ *Brown v. Board of Education*, 347 US 294, 301 (1954).

²⁸ See, e.g. SC Res. 678, UN SCOR, 45th Sess., 2693d mtg., UN Doc. 5/RES/678 (1990) (implicitly authorizing use of force against Iraq).

The introduction of human rights into international law and the opening of an international decision process to broad and effective non-governmental participation has had a significant — and surprising — effect on the legal status of unilateral action. Recall that the absence of consensus on human rights was of little consequence for the operation of the Security Council as long as those rights were considered to be matters of domestic jurisdiction that were neither deemed to be the active responsibility of the United Nations nor within the assignment of the Security Council. Now, however, the new and expanded international decision process has taken a hitherto normatively uncertain human rights ‘standard of achievement’, refashioned it into the international protection of human rights’, and elevated it to an imperative level of international law. Indeed, it is increasingly characterized as a *jus cogens*, a term currently used in ways quite different from its denotation in the Vienna Convention on the Law of Treaties.²⁹ But real law, which requires coercive enforcement is assigned to the Security Council. Yet the task of human rights enforcement cannot be discharged, for the members of the Council do not share a consensus on human rights norms. In a decision process in which law-makers and law-appliers are identical, non-enforcement of norms would, over time, render them caducous, but as the norms in question — international human rights norms — derive from a broader decision process than the body assigned to enforce the norms, the broader decision process sustains the norms and seeks alternative modes of enforcement.

In the fourth type of constitutive structure, the use of force — the *ultima ratio* of law — is taken from the individual state and henceforth to be effected by the Security Council. As remedies for grave human rights violations may involve the use of major coercion against a government, they, too, fall within the competence of the Security Council. But the absence of consensus on human rights means that their remedial action, requiring, as it does, agreement of all the permanent members of the Council, is unlikely. Yet the international legal process’s demand for a remedy for grave violations of human rights has become so powerful and urgent that democratic governments that are susceptible to non-governmental influence and that have the wherewithal to effect a remedy are under great pressure to act unilaterally. Hence, for purposes of the enforcement of human rights, a constitutive process of the fourth type now reverts to the third type: enforcement through the Security Council, if it can be achieved, but enforcement unilaterally if it cannot.

Thus, we encounter an anomalous, constitutive regime, which begins to reserve different legal treatment for different types of unilateral actions, based principally on the purpose or objective of the actions concerned. Since many participants assume

²⁹ Article 53, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). In the Convention, a *jus cogens* deprives of putative legal effect other, inconsistent treaty obligations. In human rights discourse, *jus cogens* has acquired a much more radical meaning, evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity. This new understanding of *jus cogens* renders national law that is inconsistent with it devoid of international and national legal effect, such that national officials who purport to act on the putative authority of that national law may now incur direct international responsibility.

that an ineluctable feature of law is generality of application, this constitutive regime engenders more normative ambiguity and cognitive dissonance.

5 The Importance of International Legal Process

One of the functions of organized and institutionalized decision-making is to ensure that due deliberation precede action thereby minimizing the inevitable tendencies to impulsiveness and arbitrariness, to which decisions are always prone but which increase when choices must be made in crisis. In the civil rights and human rights context, the demand for orderly decision — often under the rubric of ‘due process’ — is deemed so important that, in many systems, a denial of due process requires setting aside a decision that may otherwise have been substantively correct. Hence the demand among international lawyers for institutionalized decision is particularly intense with respect to unilateral actions that purport to remedy grave human rights violations, both as a value in itself as well as lest even more human rights be grievously violated in an effort that is supposed to protect human rights from grievous violation. Due process demands exacerbate the cognitive dissonance associated with that species of unilateral action called humanitarian intervention.

But the primary juridical objection to unilateral action for humanitarian purposes, is that, without formal institutional determinations of whether the circumstances really warrant unilateral action, the action is likely to be taken, rhetoric aside, in the self-interest of the intervener. There are, alas, ample examples of past abuse to justify this concern. The inherited ‘doctrine’ of humanitarian intervention usually involved a strong state, invoking humanitarian concerns and intervening in a weaker state to remedy alleged grave human rights violations. As such, it was essentially a rhetorical device, for one state did not need a human rights justification for intervening in or seizing the territory of another. The establishment of the League of Nations and the installation of the second type of constitutive structure created a need for a doctrine justifying any unilateral action which the constitutive process prohibited. Since the time of the League, as the world constitutive process has oscillated among the second, third and fourth constitutive structural types, the doctrine has, understandably, continued to be controversial. The states that purported to be acting on the basis of humanitarian intervention were acting quite selectively and usually in circumstances in which national interests unrelated to humanitarian concerns played no small part in the motive for the action. Moreover, the interveners, classically oblivious to the beam in their own eyes, were often guilty of human rights violations in areas subject to their own jurisdiction and control.

In the contemporary constitutive process, the potential for abuse in humanitarian interventions is considerably reduced because the species of unilateral action for humanitarian purposes that has emerged in the contemporary constitutive process is different, both in stimulation and application, from its traditional counterpart. In terms of the sequential decision functions,³⁰ it is clear that recent humanitarian

³⁰ See Lasswell and McDougal, *supra* note 1.

actions have not been initiated by states. Quite the contrary. It is the international legal process that is the force that now invokes, compels and appraises the lawfulness of unilateral acts purporting to be based on humanitarian concerns. The 1999 intervention in Kosovo was not secretly prepared in the US Department of Defense in order to achieve some important, recondite objective, unrelated to the human crisis there, and then skilfully translated into a moral and legal package and promoted by public relations personnel. To the contrary. Most foreign policy and security specialists appear to have opposed the action as did many civilian political and military elites. The international legal process compelled the action. Similarly, in East Timor, the foreign policy and security specialist class assembled manifold reasons to prove that this situation was different from Kosovo and, as such, did not warrant international action or American participation. Again, however, the action, though different from Kosovo, was compelled by the larger decision process and when it became inevitable, the members of the Security Council and the government of Indonesia acquiesced. While this latter endorsement nominally transformed the action into one authorized by the Security Council and gives the impression that it transpired within the fourth type of constitutive structure, the actual decision was taken in a less organized arena and, if necessary, might well have been effected unilaterally.

Hence the fears of the gross kinds of abuses, associated with humanitarian interventions in the first type of constitutive structure, are considerably reduced. Concerns about the quality of due process available in this kind of an unorganized decision process are not.

6 Conclusion

The constitutive regime that currently obtains is thus capable of responding collectively, through the Security Council, to many of the grave violations of international law enumerated in Article 39 of the United Nations Charter. For such violations, there is neither need nor justification for unilateral action. But this constitutive process will find it more difficult to respond collectively to those grave human rights violations that contemporary international law has raised to the class of calamities requiring effective international response. So this latter category will sometimes be addressed by forms of unilateral action that the international legal process may, in context, deem lawful, but that manifestly fail a test of formal legality under the UN Charter.

In some ways, this situation represents important advances toward the achievement of certain key policy goals. Some satisfaction may be taken from the fact that the Security Council is more able than in the past to respond to the sorts of threats to and breaches of the peace and acts of aggression that the Charter assigned to it. Similarly, the emergence of the international legal process, as described above, is, in itself, a triumph of enhanced participation, enfranchising, as it does, many heretofore ineffective international actors with a corresponding reduction in the power of many

state elites. The fact that this international legal process is more able than constitutive structures of the past to compel the provision of remedies for some grave human rights violations is a cause for satisfaction. But these gains notwithstanding, the current constellation of the constitutive process is far from satisfactory.

1. The electronic mass media, which play a central role in the new international legal process, are profit-maximizing entities and not international civil servants. In the competitive market environment in which they operate, they must vie for the attention of audiences. At the moment, graphic images of disaster 'sell' but that may change as audiences grow weary of this entertainment and seek something new or retreat into private realities. When this happens, one may expect the media to turn their attention elsewhere. Thus, the media are not a reliable long-term substitute for an institutionalized international decision process, specialized in the types of problems that give rise to the need for international humanitarian action.
2. The criteria by which the media select particular human rights violations for massive coverage are inconsistent and unpredictable. For example, Bosnia-Herzegovina and Kosovo get attention; the greater carnage in Chechnya and the massive famine in North Korea do not.
3. Deliberation and advanced planning with respect to the use of force is sacrificed in a system that responds spasmodically and emotionally rather than rationally and deliberately.
4. The demand for rapid results may skew sound strategic planning and make campaigns more costly or produce illusory or 'pretend' results.
5. The normative ambiguity and cognitive dissonance caused by the conflation of the third and fourth types of constitutive process may tend to undermine generally the authority of law.
6. The safeguards that are part of an organized and institutionalized decision process are not available in the constitutive constellation that currently obtains.

Hence the challenge for international lawyers remains: to improve the world constitutive process so that it can address humanitarian and other issues and thus obviate unilateral action.³¹

³¹ See McDougal et al., 'The World Constitutive Process of Authoritative Decision', 91 *Journal of Legal Education* 253 (1969).