

LAW-MAKING THROUGH THE OPERATIONAL ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

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This Article considers the impact of the operational activities of international organizations on the development of international law. Four recent trends in the practices of international organizations illustrate the phenomenon. First, virtually every peace operation established or authorized by the U.N. Security Council since the year 2000 was mandated to protect civilians facing imminent threats of physical violence. Second, after countless election-monitoring missions, the right to political participation is widely thought to require party pluralism, although that is not specified in the relevant provisions of global and regional human rights treaties. Third, Organization for Security and Cooperation in Europe officials engaged in conflict prevention often refer to the rights of ethnic minorities as embodied in *non-legally binding* instruments. Finally, humanitarian organizations are increasingly pressing governments to provide access to internally displaced persons, not out of choice but as a matter of legal obligation. These four trends are connected to the traditional sources of law identified in Article 38 of the Statute of the International Court of Justice—treaties, custom, and general principles. But to the extent that international organizations act autonomously in engaging in these practices, the law-making process is one step removed from state consent.¹

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1. This analysis of the legal import of operational activities is related to the growing interest in global administrative law. See, for example, the Special Issue of the journal *Law and Contemporary Problems*, Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMP. PROBS.* 15, 15-18 (2005); JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 217-56 (2005). The difference is that global administrative law is mainly about standard-setting by international organizations in textual form other than treaties, such as regulations, guidelines and policy direc-

The pattern described above is one in which so-called “soft law” crystallizes into hard law. This evolution proceeds as follows: operational activities occur against the backdrop of widely acknowledged but not well-specified norms; in carrying out those activities, international organizations do not seek to enforce the norms *per se* but typically act in a manner that conforms to them; these activities generate friction, triggering bouts of legal argumentation; the reaction of affected governments—and the discourse that surrounds the action and reaction—can cause the law to harden. As a result, future operational activities meet less resistance, or at least those who would object feel more compelled to use legal language in defending their positions. Compliance with the norm is thus more likely because the demanding discourse associated with hard law increases the pressure on states to act in accordance with it.

This Article examines the development of international law as described above, first by defining the concept of “soft law” and then illustrating how it may “harden.” Part II reviews four areas of law and practice: the protection of civilians by peacekeepers as a manifestation of an inchoate “responsibility to protect”; the role of election-monitoring and electoral assistance by the United Nations in giving content to political participation rights; the impact of the High Commissioner for National Minorities’ conflict prevention strategies on ethnic minority rights; and the effect of humanitarian action and human rights advocacy on the hardening of the Guiding Principles on Internal Displacement. Part III, elaborates on the concept of “legalization” introduced in Part I, applying it to the four fields of practice in order to substantiate the claim that the law can harden in this way. Part IV highlights two theoretical implications of this process: first, that it indicates a more fluid and less state-centric form of law making in which international organizations play an autonomous role; and second, that *argumentation* among international-organization officials, governments, and non-state actors is central to that process. This Article concludes that this is a promising new way to make law in areas where incremental practice driven by international organizations is ahead of broad consensus among states on principle.

tives. This article is about incremental standard-setting through the *practices* of international organizations, and thus is closer to customary law formation than treaty-making or regulation.

I. SOFT LAW AND LEGAL ARGUMENTATION

The term soft law describes norms that are formally non-binding but habitually obeyed.² It falls between recommendations and purely political statements on one hand, and the binding law typically found in treaties and well-established customary law on the other. Soft law comes in various forms as follows: norms expressed in hortatory language in an otherwise binding instrument (like parts of the International Covenant on Economic, Social and Cultural Rights); norms expressed in obligatory language, but contained in a non-binding instrument (like the Helsinki Final Act or resolutions of the U.N. General Assembly); general principles set out in a framework convention without detailed obligations or plans on how to implement the principles (like the Vienna Convention on Ozone Depletion); norms enshrined in a binding treaty but couched in vague or imprecise terms (like some rights in the International Covenant on Civil and Political Rights); or finally, guidelines that supplement hard law instruments (like International Labour Organization recommendations).³

Soft law is a contested concept in legal circles because it implies what a strict legal positivist would deny—that there is a continuum between political and legal commitments, and that the difference between the two is a matter of degree.⁴ In a special issue of the

2. Paul C. Szasz, *General Law-Making Processes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 27, 32 (Christopher C. Joyner ed., 1997). See also Edith Brown Weiss, *Introduction to International Compliance with Nonbinding Accords*, 29 *STUD. TRANSNAT'L LEGAL POL'Y* 1, 3-4 (Edith Brown Weiss ed., 1997). On soft law generally, see *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (Dinah Shelton ed., 2000) [hereinafter *COMMITMENT AND COMPLIANCE*]; Dinah Shelton, *Normative Hierarchy in International Law*, 100 *AM. J. INT'L L.* 291 (2006); ALVAREZ, *supra* note 1, at 217-56, 596-600; Alan Boyle, *Soft Law in International Law-Making*, in *INTERNATIONAL LAW* 141 (Malcolm D. Evans ed., 2006); Jan Klabbers, *The Redundancy of Soft Law*, 65 *NORDIC J. INT'L L.* 167 (1996).

3. See Christine Chinkin, *Normative Development in the International Legal System*, in *COMMITMENT AND COMPLIANCE*, *supra* note 2, at 21, 30; ALVAREZ, *supra* note 1, at 248-49; Szasz, *supra* note 2, at 32-33; Frederic L. Kirgis, *Specialized Law-Making Processes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 65, 82-85 (Christopher C. Joyner ed., 1997); SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 96-107 (2006).

4. One of the earliest and most forceful objections to the notion of 'soft law' is in Prosper Weil, *Towards Relative Normativity in International Law*, 77 *AM. J. INT'L L.* 413, 413-15 (1983). More recently, Jan Klabbers has argued that the concept of soft law is redundant, precisely because law and non-law are on a continuum and there is no need for a middle category. Klabbers, *supra* note 2, at 168. On the debates over the nature and reality of soft law, see generally *COMMITMENT AND COMPLIANCE*, *supra* note 2. See also ALVAREZ, *supra* note 1, at 48; Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 *N.Y.U. J. INT'L L. & POL.* 591, 612 (2000); Michael Riesman, *The Concept and Functions of Soft Law in International Politics*, in *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 135, 136 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

journal *International Organization*, a group of lawyers and political scientists spoke of a spectrum from soft to hard law, claiming that where any given norm falls on the spectrum depends upon three factors: obligation, precision, and delegation.⁵ The hardest law is clearly obligatory, precise, and subject to judicial or some other form of third-party dispute settlement. The softest law is explicitly non-binding, vague, and subject to diplomatic dispute settlement. This typology has been criticized for relying on too narrow a conception of international law.⁶ But as I argue in Part III below, it provides a useful framework for analyzing the move from soft to hard law through operational activities.

The notion of “justificatory discourse” helps illustrate how the process works. As Abram Chayes and Antonia Handler Chayes explain in setting forth their management model of compliance, international relations are conducted in large part through “diplomatic conversation.”⁷ That “conversation” includes explanation and justification, persuasion and dissuasion, as well as approval and condemnation on the basis of law.⁸ Their central proposition is that “the interpretation, elaboration, application, and, ultimately, enforcement of international rules [are] accomplished through a process of (mostly verbal) interchange among the interested parties.”⁹ States feel compelled to justify their conduct; those justifications are reviewed and critiqued in various settings (not only tribunals); and the perceived need to have those justifications

5. See Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 387-88 (2000). The concept of legalization is set out briefly in the introduction to the volume, and then elaborated more fully in Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 401-08 (2000) [hereinafter Abbott et al.] and Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-24 (2000). Georges Abi Saab identified similar criteria: the circumstances of the adoption of the instrument, including the amount of support for it; the concreteness of the language; and the existence of follow-up procedures. Georges Abi-Saab, *Cours Général de Droit International Public*, 207 RECUEIL DES COURS 29, 160-61 (1987).

6. See, e.g., Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”*: *Richer Views of Law and Politics*, 55 INT'L ORG. 743, 743-44 (2001). For the authors' response to the critique, see Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Response to Finnemore and Toope*, 55 INT'L ORG. 759, 759-60 (2001).

7. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 119 (1995).

8. See *id.*

9. *Id.* at 118.

accepted steers and constrains the behavior of states, pushing them in the direction of compliance with international law.¹⁰

Robert Keohane calls this the “normative optic,” which typifies the international lawyers’ perspective on international affairs.¹¹ It is much in line with the concept of “legalization” that Kenneth Abbott and others describe as follows:

[E]stablishing a commitment as a legal rule invokes a particular form of discourse. Although actors may disagree about the interpretation or applicability of a set of rules, discussion of issues purely in terms of interests or power is no longer legitimate. Legalization of rules implies a discourse primarily in terms of the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts. The rhetoric of law is highly developed, and the community of legal experts—whose members normally participate in legal rule-making and dispute settlement—is highly socialized to apply it. Thus the possibilities and limits of this discourse are normally part and parcel of legalized commitments.¹²

The notion that law operates through a process of justificatory discourse is essentially an explanation of compliance.¹³ This Article goes a step further by arguing that not only is compliance affected by the discourse, but so too is the process of making new law. The starting point is the idea that law, at its core, “is an interpretive concept.”¹⁴ Legal interpretation—other than in the form of authoritative decisions rendered by tribunals—is largely a matter of argumentation between interested actors. Arguments come in various forms and are always situated within specific “belief systems,” which are in turn situated within a culture—“the background of shared interpretations (unconsciously held

10. For a fuller development of the argument that justificatory discourse induces law compliance, see generally Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT’L L. 437 (2003).

11. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 491 (1997). In addition to Abraham Chayes & Antonia Handler Chayes’ *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), Keohane identifies Thomas Franck’s *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988) and Ian Johnstone’s *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT’L L. 371 (1991) as typical of the normative optic. *Id.* at 491-94.

12. Abbott, Keohane, Moravcsik, Slaughter & Snidal, *supra* note 5, at 409-10.

13. For a critique of the Chayes’ management model of compliance, see generally George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT’L ORG. 379 (1996).

14. See RONALD DWORKIN, *LAW’S EMPIRE* 410 (1986). The literature on law as interpretation is voluminous. For a recent review of the debates, see generally ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (2005).

intersubjective beliefs) and practices” that allow meaningful discourse and debate to occur.¹⁵ Some forms of discourse are more specialized than others, especially in professional settings. Legal discourse is highly structured; certain types of argument and styles of reasoning are acceptable while others are, in effect, out of bounds.¹⁶ Claims, justifications, and interpretations that range beyond the acceptable parameters of the legal discipline tend to be unpersuasive in settings where legal argumentation counts, and are therefore not often heard because they will be immediately dismissed. Moreover, good arguments—as opposed to merely plausible ones—are those that cohere best with the broader normative context in which the discourse occurs.¹⁷

The staunchest proponents of soft law claim that compliance does not depend on where a norm falls on the spectrum; soft law may receive as high a level of compliance as hard law.¹⁸ Yet that fails to account for the power of argumentation; the harder the law, the more demanding the discourse about compliance. Hard law compels states to explain and justify their behavior on the basis of the text, context, underlying purpose, negotiating history, precedent, and subsequent practice—standard techniques of legal interpretation and argumentation. This method of argumentation in turn has an impact on state behavior, largely because it affects reputation for instrumental or constructivist reasons; states calculate that it is in their longer-term interest to preserve a reputation for good-faith compliance with legal norms, even if doing so may entail some short-term costs, and membership in the international

15. NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION 59 (2002). This is how Neta Crawford describes Jürgen Habermas’ “common lifeworld.” See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1999).

16. Cf. Friederich V. Kratochwil, *How do Norms Matter?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 35, 52-53 (Michael Byers ed., 2000). On legal argumentation generally, see FRIEDERICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1991).

17. Crawford talks about coherence as an element of the persuasiveness of any argument. See CRAWFORD, *supra* note 15, at 79. Thomas Franck says coherence is one of four features that gives legal norms their compliance pull. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990). Other theories of legal interpretation built on the notion of coherence are DWORKIN, *supra* note 14, at 407; STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 25-33 (1989); and STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 356-71 (1980).

18. See Kirgis, *supra* note 3, at 91-92. For a multi-author study of the impact of “hardness” on compliance, see generally COMMITMENT AND COMPLIANCE, *supra* note 2.

system generates a felt sense of obligation to comply with its rules, whether or not compliance brings immediate instrumental benefits.¹⁹

What triggers this argumentation? Although it is typically state conduct, increasingly, the practices of international organizations have triggered it. The operational activities of international organizations, such as peacekeeping and election-monitoring, can generate friction. Such friction triggers argumentation; those engaged in the activity may make their case in terms of relevant norms, and those on the receiving end react. If the ensuing back-and-forth results in an agreed-upon solution, that serves as an implicit interpretation of the law. Oscar Schachter states the following:

U.N. interpretation does not usually have an adjudicative character. The task faced by most U.N. bodies is practical and instrumental—that is, to prepare a plan of action or to . . . achieve a goal . . . Problems are analyzed, proposed solutions negotiated, decisions reached. Interpretation is implicit in the measures adopted . . .²⁰

Moreover, this interpretative process is creative; not a straightforward application of rules whose meaning is self-evident, but rather giving content to inchoate norms. In the words of Paul Szasz as follows:

[A]ctivities by international entities may, just like the activities of states, create international law if carried out—as is usual for organizations created by international law and subject to the scrutiny of many states—in a regular manner and in the conviction that even if not responding to positive requirements of international law they are at least authorized by and in conformity with such law.²¹

Thus activity, combined with a sense of legal conviction demonstrated in the discourse surrounding the activity, causes the norm to harden. Before elaborating on the implications of that proposition, the next Part discusses four areas of practice in which such “hardening” seems to be underway.

19. Preserving a reputation as a good faith participant in the international legal system by successfully justifying one’s actions in legal terms is important from both perspectives. Ian Johnstone, *The Power of Interpretive Communities*, in *POWER IN GLOBAL GOVERNANCE* 185, 187-88 (Michael Barnett and Raymond Duvall eds., 2005). See also Keohane, *supra* note 11, at 496-98 (acknowledging that reputation concerns may weigh in favor of observing law, but also discussing problems with reputation as a guarantor of compliance).

20. Oscar Schachter, *The UN Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 9 (Christopher C. Joyner ed., 1997).

21. Szasz, *supra* note 2, at 43.

II. OPERATIONAL ACTIVITIES: THE PRACTICES OF INTERNATIONAL ORGANIZATIONS

The term “operational activities” describes the programmatic work of international organizations carried out as part of their overall mission or in fulfillment of a specific mandate. These are distinguished from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies. The operational activities may be authorized by intergovernmental bodies, but the functions performed often go beyond what is explicitly mandated.

A. *Responsibility to Protect*

The “responsibility to protect” norm has its origins in the controversial doctrine of humanitarian intervention.²² Employing a gradually expanding definition of what constitutes a threat to international peace and security, the U.N. Security Council authorized a number of interventions in the 1990s for what were—in part—humanitarian or human rights purposes. The first case was in northern Iraq in 1991, where the Security Council declared Iraqi oppression of the Kurd and Shi’ite populations to be a threat to the peace, though it did not explicitly do so under Chapter VII.²³ This ambivalent authorization of humanitarian intervention—Operation Provide Comfort conducted by the United States, United Kingdom, and France—was followed by more explicit mandates in Bosnia, Somalia, Rwanda (though too late to stop the genocide), Haiti, and Sierra Leone. Although no single decision represented a radical departure from existing international law, they collectively amounted to a significant evolution in the applicable norms over the years.

When the Kosovo crisis erupted in late 1998 and early 1999, the North Atlantic Treaty Organization (NATO) was unable to get Russian support for a U.N. Security Council resolution authorizing military action. It nevertheless launched an eleven-week bombing campaign in late March 1999. The weight of both scholarly and

22. Recent book-length treatments of humanitarian intervention include, SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION AND CIVIL SOCIETY* (2000); *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J.L. Holzgrefe & Robert O. Keohane eds., 2003); MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2003).

23. S.C. Res. 688, pmb., U.N. Doc. S/RES/688 (Apr. 5, 1991).

official opinion at the time, and presently, is that the action was illegal, though perhaps legitimate.²⁴ A more accurate legal characterization of what transpired is that the intervention was excused on the grounds of humanitarian necessity.²⁵ In other words, a “blind eye” was turned to the violation given the extreme circumstances, and those responsible (NATO countries) were, in effect, pardoned.

The unauthorized action in Kosovo and tragic failure to stop the genocide in Rwanda in 1994 prompted the U.N. Secretary-General to make the following statement in his famous “humanitarian intervention” speech in September 1999: “[T]he core challenge to the Security Council and to the United Nations as a whole in the next century [is] to forge unity behind the principle that massive and systematic violations of human rights . . . should not be allowed to stand.”²⁶ The International Commission on Intervention and State Sovereignty, picking up on this challenge, coined the term “responsibility to protect” two years later.²⁷ The concept was affirmed by the High Level Panel on Threats, Challenges and Change,²⁸ reaffirmed by the Secretary-General in his report prepared for the World Summit of September 2005,²⁹ and then endorsed at the Summit, though only after a rancorous and inconclusive debate about the scope of the responsibility and upon precisely whom it fell. The outcome document from the Summit stipulates first that “[e]ach . . . State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” and second, that the international

24. This was the position taken by the INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000). For a review of the official and scholarly debates on the legality of the Kosovo intervention, see Johnstone, *supra* note 10, at 464-66.

25. For an extensive analysis of the concept of necessity, see Ian Johnstone, *The Plea of ‘Necessity’ in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT’L L. 337, 337-388 (2005).

26. Kofi Annan, Presentation of the Secretary-General’s Report to the U.N. General Assembly, (Sept. 20, 1999), *reprinted* in Press Release, Secretary-General, Secretary-General Presents his Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA 9596 (Sept. 20, 1999). The co-chairmen of the International Commission on Intervention and State Sovereignty said in launching the report that it was a response to the Secretary-General’s challenge. See Gareth Evans & Mohamed Sahnoun, *Intervention and State Sovereignty: Breaking New Ground*, 7 GLOBAL GOVERNANCE 119, 119-20, 124 (2001).

27. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 11 (2001), *available at* <http://www.iciss.ca/pdf/Commission-Report.pdf>.

28. See U.N. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 199-203, U.N. Doc. A/59/565 (Dec. 2, 2004).

29. See The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 132-35, U.N. Doc. A/59/2005/Add.3 (Mar. 21, 2005).

community is “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the [U.N.] Charter, including Chapter VII, on a case-by-case basis”³⁰ Although not as demanding as the most enthusiastic proponents of the “responsibility to protect” would have liked, this was the first time the concept was endorsed in a universal meeting, which gave it the character of international soft law.³¹ A harder statement of the norm is contained in the Constitutive Act of the African Union, in force since May 2001, which grants “the right . . . to intervene . . . in respect of . . . war crimes, genocide and crimes against humanity”³²

In a parallel development, the U.N. Secretary-General issued a series of reports on protection of civilians that addressed the operational responsibilities of peacekeepers, humanitarian actors, and human-rights workers. The protection of civilians concept was introduced in an influential report on Africa in 1998, where protecting civilians was described as a “humanitarian imperative.”³³ That was followed by a number of other Secretary-General reports and U.N. Security Council resolutions, one of which refers to the World Summit’s endorsement of the responsibility to protect.³⁴ The combined effect of these instruments is to set out standards of behavior expected of governments, parties to a conflict, other states, and international organizations and their organs, including for example the U.N. Security Council itself when it adopts peacekeeping mandates.

30. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 20, 2005). For an analysis of the debates leading to the World Summit outcome, see Ian Johnstone, *The Secretary-General as Norm Entrepreneur*, in *SECRETARY OR GENERAL? THE UN SECRETARY-GENERAL IN WORLD POLITICS* 123, 132-133 (Simon Chesterman ed., 2007) and Carsten Stahn, Note, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *AM. J. INT’L L.* 99, 108-110 (2007).

31. Cf. Stahn, *supra* note 30, at 118. Stahn reviews the four main texts in which the ‘responsibility to protect’ concept has been articulated: the International Commission on Intervention and State Sovereignty report, the High Level Panel on Threats, Challenges and Change report, the Secretary-General’s *In Larger Freedom*, and the World Summit Outcome document. *Id.* at 102-110, 118. He concludes that “the concept currently encompasses a spectrum of different normative propositions that vary considerably in their status and degree of legal support.” *Id.* at 102. For other analyses of these four texts, see Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 *ETHICS & INT’L AFF.* 143, 151-57, 164-67 (2006) and Geliijn Molier, *Humanitarian Intervention and the Responsibility to Protect After 9/11*, 53 *NETH. INT’L L. REV.* 37, 47-52 (2006).

32. Constitutive Act of the African Union, art. 4.

33. The Secretary-General, *Report of the Secretary-General on the Causes of Conflict and Promotion of Durable Peace and Sustainable Development in Africa*, ¶¶ 49-57, U.N. Doc. S/1998/318, A/52/871 (Apr. 13, 1998).

34. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

These instruments also led to a number of institutional innovations: better integration of human-rights and humanitarian concerns in peace operations;³⁵ assignment of the job of developing policy for the protection of civilians to the U.N. Office for the Coordination of Humanitarian Affairs; creation of an *aide-memoire* adopted by the U.N. Security Council as a tool for improving analysis and diagnosing protection issues during deliberations on peacekeeping mandates;³⁶ development of a ten-point plan of action on protection of civilians presented to the U.N. Security Council;³⁷ and an appeal by the Secretary-General for a more “systematic partnership with regional and other intergovernmental organizations in the field of protection of civilians in armed conflict.”³⁸

By the end of 2005, the protection of civilians had become a standard mandate for peacekeeping missions and institutional changes had been made at U.N. headquarters to help actualize the function. Since 1999, eight U.N. missions have been authorized under Chapter VII of the U.N. Charter “to protect civilians under imminent threat of physical violence,” but the mandates are often qualified by the words, “within the mission’s capabilities and areas of deployment.”³⁹ Among non-U.N. missions, France’s Operation

35. See, e.g., President of the Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/1999/6 (Feb. 12, 1999); The Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, ¶¶ 57-59, U.N. Doc. S/1999/957 (Sept. 8, 1999); The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 31, U.N. Doc. S/2005/740 (Nov. 28, 2005); The Secretary General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2007/643 (Oct. 28, 2007).

36. President of the Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/41 (Dec. 20, 2002). The *aide-memoire* was adopted in March 2002, Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/6 (Mar. 15, 2002), updated in December 2003, Statement by the President of the Security Council, U.N. Doc. S/PRST/2003/27 (Dec. 15, 2003), and updated again in January 2009, Statement by the President of the Security Council, U.N. Doc. S/PRST/2009/1 (Jan. 14, 2009).

37. The Secretary-General, *Report of the Secretary-General to the Security Council on Protection of Civilians in Armed Conflict*, ¶ 6, U.N. Doc. S/2004/431 (May 28, 2004).

38. *Id.* ¶ 41.

39. See S.C. Res. 1270, ¶ 14, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (Sierra Leone); S.C. Res. 1291, ¶ 8, U.N. Doc. S/RES/1291 (Feb. 24, 2000) (DRC); S.C. Res. 1509, ¶ 3(j), U.N. Doc. S/RES/1509 (Sept. 19, 2003) (Liberia); S.C. Res. 1528, ¶ 6(i), U.N. Doc. S/RES/1528 (Feb. 27, 2004) (Côte d’Ivoire); S.C. Res. 1542, ¶ 7(I)(f), U.N. Doc. S/RES/1542 (Apr. 30, 2004) (Haiti); S.C. Res. 1545, ¶ 5, U.N. Doc. S/RES/1545 (May 21, 2004) (Burundi); S.C. Res. 1590, ¶ 16, U.N. Doc. S/RES/1590 (Mar. 24, 2005) (Sudan); S.C. Res. 1769, ¶ 15(a)(ii), U.N. Doc. S/RES/1769 (July 31, 2007) (Darfur). Three non-U.N. operations have been given similar mandates. See S.C. Res. 1464, ¶ 9, U.N. Doc. S/RES/1464 (Feb. 4, 2003) (French-led Operation Licorne and ECOWAS in Cote d’Ivoire); S.C. Res.

Licorne in Côte d'Ivoire has the mandate, as did the African Union (A.U.) mission in Darfur.⁴⁰ And while the term "protection of civilians" was not used for several other operations, the mandate is implicit.⁴¹ The hybrid A.U.-U.N. mission for Darfur has the mandate,⁴² as will the U.N. operation in Chad when it is established.⁴³ The responsibility to protect has also found expression in the non-military functions of peace operations. Security sector reform, for example, may be seen as an application of the responsibility in post-conflict societies.⁴⁴ While the responsibility to protect is a

1564, ¶ 1, U.N. Doc. S/RES/1564 (Sept. 18, 2004) (African Union in Darfur). A compilation of the precise language in these resolutions can be found in VICTORIA K. HOLT & TOBIAS C. BERKMAN, *THE IMPOSSIBLE MANDATE? MILITARY PREPAREDNESS, THE RESPONSIBILITY TO PROTECT AND MODERN PEACE OPERATIONS*, Annex 1 (2006).

40. S.C. Res. 1464, U.N. Doc. S/RES/1464 (Feb. 4, 2003); Communiqué, Peace and Security Council, African Union [A.U.], A.U. Doc. PSC/PR/Comm. (XVII) (Oct. 20, 2004), available at http://www.africa-union.org/News_Events/Communiqués/Communiqué%20_Eng%2020%20oct%202004.pdf.

41. *E.g.*, S.C. Res. 1031, ¶ 7, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (IFOR in Bosnia); S.C. Res. 1088, ¶ 10, U.N. Doc. S/RES/1088 (Dec. 12, 1996) (SFOR in Bosnia); S.C. Res. 1244, ¶ 9(d), U.N. Doc. S/RES/1244 (June 10, 1999) (KFOR in Kosovo); S.C. Res. 1264, ¶ 2, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (INTERFET in East Timor); S.C. Res. 1272, ¶ 2, 10, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (UNTAET in East Timor); S.C. Res. 1744, ¶ 11, U.N. Doc. S/RES/1744 (Feb. 21, 2007) (AMISOM in Somalia). The Brahimi Report goes as far as to state that U.N. "peacekeepers . . . who witness violence against civilians should be *presumed* to be authorized to stop it, within their means, in support of basic [U.N.] principles." *Report of the Panel on United Nations Peace Operations*, ¶ 62, U.N. Doc. A/55/305, S/2000/809 (Aug. 21, 2000) (emphasis added). In other words, the mandate should be presumed even if it is not written into the resolution. Concerns about the broad implications of the concept have generated doubts about the presumption, but few question that in principle all peace operations ought to be able to deal with spoilers who threaten civilians.

42. United Nations, Letter from the Secretary-General to the President of the Security Council, ¶ 53-54, U.N. Doc. S/2007/307/Rev. 1 (June 5, 2007) (transmitting the Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur).

43. The Secretary-General, *Report of the Secretary-General on Chad and the Central African Republic*, ¶ 47, 91, U.N. Doc. S/2007/97 (Feb. 23, 2007).

44. See Willy Nindorera & Kristiana Powell, *Delivering on the Responsibility to Protect: Reforming the Security Sector to Protect the Most Vulnerable in Burundi*, at 2 (Institute for Security Studies, Policy Paper, 2006). The International Commission on Intervention and State Sovereignty identified the "responsibility to rebuild" as an element of the responsibility to protect. See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 27, at 39-45. Multinational institutions, including the Organisation for Economic Co-operation and Development, European Union and United Nations, have begun to develop principles for security sector reform. See generally Organisation for Economic Co-operation and Development, DAC Guidelines and Reference Series: Security System Reform and Governance (2005); Secretariat, EU Concept for ESDP Support to Security Sector Reform (SSR), Council Doc. 12566/4/05 (Oct. 13, 2005); U.N. Dep't of Peacekeeping Operations, Draft *DPKO Policy: Support for the Reform, Restructuring and Rebuilding of Law Enforcement Agencies*, U.N. Doc. DPKO/PD/2006/0070 (Aug. 24, 2006) (copy on file with author); U.N. Development Programme, *Security Sector Reform and Transitional Justice: A Crisis Post-Conflict Pragmatic*

broader concept than the protection of civilians, the operational activities of peacekeepers and peace builders serve as an implicit interpretation of the norm, giving it concrete meaning.

Considerable discretion on how to protect civilians is necessarily delegated to the peace operations. While the U.N. Security Council and other authorizing bodies like the A.U. Peace and Security Council grant the broader mandate, day-to-day management falls to the secretariat of the peacekeeping organizations and to the mission leadership in the field. Thus, for example, the U.N. peace operation in the Democratic Republic of the Congo has taken robust action in the east of the country, based largely on an expansive reading of its authority to protect civilians, including pre-emptive action when necessary.⁴⁵ The A.U. African Mission In Sudan had the mandate, but lacked the capacity to do more than serve as an observer in trying to fulfill it.⁴⁶ This raises one of the dilemmas associated with the protection of civilians: without adequately accounting for capacity, the mandate can generate expectations that will remain unfulfilled, despite the qualifying words “within the limits of the mission’s capabilities.” But if peacekeepers are going to be held responsible for every death they fail to prevent, the number of countries willing to contribute troops or police may decline dramatically.⁴⁷

That this and other dilemmas have prompted concern about the “protection of civilians” mandate as well as mixed success in carrying it out does not necessarily undermine the broader responsibility to protect. If anything, it will help the norm develop in a viable way. Adopting expansive versions of a norm in intergovernmental conferences will not lead to behavior changes if it is impossible to implement. But incremental application by peacekeepers is a way of rendering the abstract concept *operational*.

Indeed, the responsibility to protect seems to have reached a tipping point. Even if the norm does not stimulate coercive humanitarian intervention in a place like Darfur, it has “hardened” into an

Approach (2003); U. N. Disarmament, Demobilization and Reintegration, *Integrated Disarmament, Demobilization and Reintegration Standards* (2006), available at http://www.unddr.org/iddrs/download/full_iddrs.pdf.

45. Center on International Cooperation, *Mission Review: Democratic Republic of the Congo* (MONUC), in *ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS* 73, 75, 78-79 (Ian Johnstone ed., 2006).

46. Alhaji M. S. Bah & Ian Johnstone, *Sudan: Faltering Protection and Fragile Peace*, in *ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS* 29, 34 (I. Johnstone ed., 2007).

47. For a fuller discussion of the dilemmas, see Ian Johnstone, *Dilemmas of Robust Peace Operations*, in *ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS* 2, 5-8 (Ian Johnstone ed., 2006).

expectation that peacekeepers will protect civilians when and where they can. After Rwanda and Srebrenica, peacekeepers cannot simply stand by as civilians are massacred, claiming that protection is not in the mandate. The African Union's inability to prevent such atrocities in Darfur was not because the norm was irrelevant, but rather because the capacity of African Mission In Sudan was so limited. In fact, widespread appeals and determined diplomatic efforts to send a more robust force to compensate for the weakness of African Mission In Sudan prove that the norm has some traction.

B. *The Right to Political Participation*

Gregory Fox makes a strong case that the right to political participation as enshrined in the International Covenant on Civil and Political Rights has been refined, elaborated, and given content through election monitoring and other forms of electoral assistance by international organizations.⁴⁸ His thesis has been reinforced by recent developments in multidimensional peace operations, which almost invariably include an electoral process, as well as the good governance agenda of development organizations like the World Bank and U.N. Development Program.

Article 25 of the International Covenant on Civil and Political Rights reads in relevant part as follows:

- Every citizen shall have the right and the opportunity . . .
- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors⁴⁹

This language leaves open some important interpretative questions, the most important of which is whether "genuine" periodic elections require party pluralism. This was a point of contention between West and East when the International Covenant on Civil and Political Rights was drafted, where neither the text nor *travaux préparatoires* provide a definitive answer. Similar ambiguity appears in Article 3 of the First Protocol to the European Convention on

48. Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 48, 70 (Gregory H. Fox & Brad R. Roth eds., 2000).

49. International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171.

Human Rights, and Article 23 of the Inter-American Convention on Human Rights.

These provisions have been interpreted in various judicial and quasi-judicial bodies, all pointing in the direction of requiring party pluralism, though only the European Court of Human Rights has issued an authoritative ruling to that effect.⁵⁰ The Human Rights Committee, the body set up by the International Covenant on Civil and Political Rights to oversee implementation of that treaty, expressed skepticism that one-party elections would be “genuine,” stating in 1996 that the right to form and join political parties “is an essential adjunct to the rights protected by Article 25.”⁵¹

Article 23 of the Inter-American Convention on Human Rights is phrased in an almost identical fashion as Article 25, and the Inter-American Commission—another expert body that lacks binding powers—has determined that one-party elections are not “authentic” within the meaning of the article. The Helsinki Final Act and other Conference on Security and Cooperation in Europe (CSCE)/Organization for Security and Cooperation in Europe (OSCE) documents, none of which are legally binding, include language that could be read as endorsing multiparty democracy.⁵² Thus, these bodies have consistently held that participatory rights require party pluralism, but in equivocal and generally non-binding terms.

The soft law on party pluralism, according to Fox, has been reinforced by years of electoral assistance from international organizations. He examines two forms of U.N. practice in this area: (1) General Assembly resolutions on the standards to be followed in the decolonization process (culminating in the election that led to Namibia’s independence in 1989); and (2) monitoring and verification missions in the post-colonial period, which consistently insisted on certain common features before declaring an election “free and fair.” For some monitoring missions—but not all—the

50. Article 3 of the First Protocol to the European Convention on Human Rights uses language that is even narrower than Article 25, but has been interpreted broadly by the European Court of Human Rights to prohibit the banning of political parties. Fox, *supra* note 48, at 59.

51. The Human Rights Committee is a quasi-judicial body composed of eighteen independent experts with the authority to issue non-binding General Comments on how to interpret and implement specific articles in the International Covenant on Civil and Political Rights. The Committee relies on persuasion and dialogue rather than coercion to induce compliance, sometimes through tough questioning on the periodic reports that parties to the International Covenant on Civil and Political Rights are obliged to submit.

52. See, e.g., Conference on Security and Cooperation in Europe (Helsinki) Final Act, Aug. 1, 1975, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

General Assembly outlined specific standards. In other cases, the standards were determined by agreement among several states, for example, with respect to Namibia (the five western members of the Contact Group and the government of South Africa) and in the case of Nicaragua (the Esquipula II agreement among the five Central American presidents). In Haiti, neither the General Assembly nor a peace agreement provided clear terms of reference, but the monitoring mission insisted upon virtually the same participatory rights—including party pluralism. By the mid-1990s, Fox argues, “burgeoning international standards had been repeated so frequently that the particulars of any given election monitoring mission had become essentially uncontroversial.”⁵³ The criteria for “free and fair” elections had been reduced to boilerplate. No state ever complained that by insisting on these standards, the United Nations was interfering in internal affairs.

In addition to these stand-alone monitoring missions, elections and democratic institution-building are now staples of multidimensional peace operations. A stated goal of peace building is “participatory governance,” based upon the theory that conflict needs to be channeled from violent to non-violent forms of dispute resolution.⁵⁴ Accordingly, the post-conflict peace-building work of the United Nations and regional organizations includes a range of measures to cultivate democratic governance, including the conversion of rebel groups into political parties, as well as multiparty elections. The organizations have conducted, certified, or helped with numerous elections in peace processes. The forms of assistance they offer range from organizing the entire election (as the United Nations did in Cambodia, Eastern Slavonia, and East Timor, and as the Organization for Security and Cooperation in Europe has done in Bosnia and Kosovo), supervising and verifying (as the United Nations did in Namibia, El Salvador, and Liberia, and as the Organization of American States did in Haiti), coordinating and supporting international and national observers, and providing technical assistance by reviewing electoral laws and train-

53. Fox, *supra* note 48, at 81.

54. The Secretary-General, *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, 2, 4, U.N. Doc. S/2001/394 (Apr. 20, 2001). The transition period in a peace process is an opportunity to design institutions that foster non-violent, political and legal contestation, holding the promise of what Michael Doyle and Nicholas Sambanis call “participatory peace.” Michael W. Doyle & Nicholas Sambanis, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* 18-19 (2006). See also Terrence Lyons, *Transforming the Institutions of War: Postconflict Elections and the Reconstruction of Failed States*, in *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* 269, 269 (Robert I. Rotberg ed., 2003).

ing electoral officials. Party pluralism has been a feature of every case; indeed, it is hard to imagine any international organization being associated with an electoral process that did not include party pluralism, let alone certifying such an election as “free and fair.”

Democratization is also part of the broader “good governance” agenda of the U.N. Development Program, World Bank, European Union and other development agencies and donor governments. The U.N. Development Program’s 2002 Human Development Report calls for “deepening democracy” by building governance institutions (including political parties), an independent electoral system, and a vibrant civil society. Many of these activities are undertaken in the context of post-conflict peace building, but democratic governance has become a guiding principle for a broad range of programs of the U.N. Development Program.⁵⁵ Interestingly, the U.N. Development Program has gone beyond the World Bank’s concept of good governance—whose roots were in economic liberalization and public sector management—to emphasize the political and civic dimensions of governance.⁵⁶

These two parallel processes—the interpretation of relevant treaty provisions by judicial and quasi-judicial bodies on one hand, and operational activities in the form of election monitoring, peace building, and development assistance, on the other—have converged upon a position that strongly supports the notion that participatory rights require multi-party elections. While not directly linked (the operational activities are not engaged to enforce treaty rights, nor are the treaty bodies purporting to set standards for the monitoring, peace-building, or development projects), there is a substantial amount of cross-pollination. The net result is the emergence of an “international law of participatory

55. The bulk of the U.N. Development Program’s resources support democratic governance in some way. UNITED NATIONS DEVELOPMENT PROGRAMME, ANNUAL REPORT 10 (2002).

56. On the good governance agenda of the World Bank, see generally the WORLD BANK, WORLD DEVELOPMENT REPORT: THE STATE IN A CHANGING WORLD (1997). For a good comparison of the U.N. Development Program and World Bank approaches to good governance, see Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 *THIRD WORLD Q.* 795, 804 (2000). For a recent statement of the U.N. Development Program’s work in this field, see Mark Malloch Brown, *Democratic Governance: Towards a Framework for Sustainable Peace*, 9 *GLOBAL GOVERNANCE* 141, 142 (2003).

rights," founded in human rights treaties, but with more precision and determinacy.⁵⁷

To recap, a vague principle was set out in binding legal instruments (the International Covenant on Civil and Political Rights and regional human rights treaties). The principle was interpreted in non-judicial bodies, which operate on the basis of dialogue and persuasion. Meanwhile, election monitoring and related operational activities by international organizations converged on a set of standards for what constitutes a "free and fair election" and, implicitly, what the right to political participation requires. An increasing number of states request this assistance, anxious for the legitimacy it can bestow. No governments have complained that the criteria constitute interference in internal affairs. Many other states have tacitly endorsed them by authorizing the operational activities, or not objecting when the activities are undertaken. States are involved in the process, but international organizations play an autonomous role as operational actors who initiate the activities and insist on the electoral standards in carrying them out.

C. *Ethnic Minority Rights*

The impact of the conflict prevention role of the OSCE High Commissioner for National Minorities on ethnic minority rights is another example of this law-hardening process, though focused on one region and less advanced than the right to political participation. The position of High Commissioner was created in 1992 with a mandate to investigate problems relating to national minorities before they reach crisis proportions, precipitated by the outbreak of hostilities in Yugoslavia. The title—High Commissioner *on* rather than *for* minorities—indicates that the job is not to serve as an advocate but rather as a mediator in ethnic disputes.⁵⁸ First occupied by Max van de Stoel, then Rolf Ekeus, and now Knut Vollebach, the position of High Commissioner promotes conflict prevention, using norms as an integral part of his strategy to resolve incipient conflicts.⁵⁹

57. See Fox, *supra* note 48, at 48-90. The standard, it should be stressed, applies only to parties to the International Covenant on Civil and Political Rights and regional treaties with similar language. (Few would argue that multiparty democracy is required by international customary law, even if a more general right to political participation may be.)

58. Erika B. Schlager, *A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE*, in COMMITMENT AND COMPLIANCE, *supra* note 2, at 346, 363.

59. Ratner, *supra* note 4, at 621. John Packer states "The [High Commissioner for National Minorities]'s reference to standards is not expressly foreseen in the mandate, and the extent to which he uses the standards is for the sole purpose of conflict prevention."

The CSCE began with the Helsinki Final Act of 1975, which created three “baskets” of activity. Basket three dealt with “the human dimension,” which included human rights, the rule of law and democracy, as well as cooperation in the humanitarian field. The human rights provisions in the Helsinki Final Act became a yardstick by which non-governmental organizations could measure government performance, while CSCE meetings became venues for public diplomacy and “shaming.”⁶⁰ The impact was hard to discern in the 1970s and 1980s, but some have credited the Helsinki process with helping to bring an end to the Cold War by contributing to the emergence of a civil society in Eastern Europe while playing a catalytic role in de-legitimizing Soviet hegemony.

As the Cold War ended and the Soviet Union split, the CSCE adopted a number of documents that pertain to minorities: the Vienna Concluding Document of 1989, the Copenhagen Document of 1990, the Charter of Paris later that year, and the Moscow Document of 1991. The Copenhagen Document listed detailed protections for minorities, reinforced by formal mechanisms for implementation set out in the other three documents. The norms embodied in the OSCE instruments are at the “soft” end of the “legalization” spectrum.⁶¹ The documents are “*politically*” rather than legally binding—an uncertain distinction, but one which at its minimum means there are no automatic legal consequences for violation of their provisions.⁶² Some of the language is precise, but much is open-textured. The instruments do not include binding dispute settlement provisions, and, while they do include some formal government-to-government review mechanisms, these mechanisms have not been used often.⁶³

Other international law pertaining to minorities is also quite soft. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

John Packer, *Making International Law Matter in Preventing Ethnic Conflict: A Practitioner's Perspective*, 32 N.Y.U. J. INT'L L. & POL. 715, 716 (2000).

60. Schlager, *supra* note 58, at 355-56.

61. This is the terminology of Goldstein et al., *supra* note 5, at 388.

62. See Pieter van Dijk, *The Implementation of the Final Act of Helsinki: The Creation of New Structures or the Involvement of Existing Ones?*, 10 MICH. J. INT'L L. 110, 114 (1989). The distinction is artificial because no obvious legal consequences flow from non-compliance with any human rights instrument. Most human rights treaties are not enforced coercively; the sole sanction is publicity (naming and shaming), the impact of which is political.

63. With the end of the Cold War, states became less willing to use the CSCE/OSCE as a forum for ‘naming and shaming’ in respect of human rights commitments. Ratner, *supra* note 4, at 605-06 (maintaining that states have not invoked the mechanisms since the Cold War).

Rights both contain protections for minorities, but the focus is on non-discrimination against individuals rather than the preservation of minority groups or identity.⁶⁴ The U.N. General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992, but it is formally non-binding, and the language itself is less demanding than the OSCE documents. The Council of Europe's 1995 Framework Convention for the Protection of National Minorities is a binding treaty, but the provisions on implementation are weak, for example requiring states to "endeavor to ensure" certain rights "as far as possible."⁶⁵ Both the International Covenant on Civil and Political Rights and European Convention on Human Rights have received some elaboration in the Human Rights Committee and European Court of Human Rights respectively, but many aspects of minority rights remain unaddressed by either.⁶⁶

This is the context in which the High Commissioner for National Minorities operates. His conflict prevention mandate includes the power to collect information, visit countries (with their consent), promote dialogue between government and minority groups, warn of impending conflict and find solutions through "early action."⁶⁷ In carrying out his functions, he meets with government leaders, representatives of minorities, others involved in the particular issue (e.g. education leaders), representatives of the kin state of the relevant minority, and other OSCE states whose influence may be needed to help resolve the problem.⁶⁸ He works within a well-developed institutional framework and is ultimately accountable to OSCE member states, but remains in many ways a free agent.⁶⁹

The High Commissioner uses norms consciously and actively in his conflict prevention strategy. Steven Ratner explains as follows:

The norms of the OCSE, the Council of Europe, and the United Nations have provided both a starting point for many of his interventions and a continued reference point during the discussions. He has invoked and interpreted them constantly, especially if one party is seeking to ignore or mischaracterize them. He has proposed solutions in which states specifically acknowledge duties to undertake behavior required or at least

64. *See id.* at 600.

65. *Id.* at 610-11 (citing arts. 10 and 14 of the Framework Convention).

66. *Id.* at 623.

67. High Commissioner on National Minorities, The Organization for Security and Co-operation in Europe, Overview, <http://www.osce.org/hcnm/13019.html> (last visited Jan. 19, 2008).

68. Ratner, *supra* note 4, at 619.

69. *Id.* at 620.

encouraged by the norms. And he has used a variety of strategies to support outcomes consistent with norms and to oppose policies inconsistent with them. In short, he uses norms to achieve solutions, and seeks solutions consistent with norms [T]he High Commissioner has made norm compliance a necessary (though not sufficient) element of his problem-solving approach.⁷⁰

The High Commissioner uses norms to affect behavior in a number of ways. One is “translation” of the norms, which entails explaining to the disputing parties what the norms require and offering concrete proposals to accommodate the concerns of both sides in a manner consistent with the standards.⁷¹ These functions—clarification and policy recommendation—translate vague norms into practical guidance, making them “meaningful and relevant to domestic actors.”⁷²

Ratner does not consider whether soft law can harden through this process, but the two functions together illustrate how this may occur. To begin with, there is necessarily an element of interpretation in the first function. For example, in a Macedonian dispute about the education opportunities for ethnic Albanians, the High Commissioner explained both privately and publicly that international norms ensured the right of minorities to establish educational institutions in their own language, but did not require public funding for those institutions.⁷³ In other words, he elaborated on the meaning of a vague principle by applying it to the particular circumstances of the case at hand. The second function—offering concrete proposals consistent with the standards—contributes to the law’s hardening to the extent that acceptance of the policy proposals by all concerned signifies acquiescence to the norms.

Another causal pathway Ratner identifies is the development of new international norms based on general principles, or legal concepts common to different legal systems. For example, in Latvia, the High Commissioner pressured the government to employ language and residency requirements for citizenship based on standard practices of other CSCE states. He took a “soft” general principle and sought to apply it throughout the region, which, if accepted, would have the effect of hardening the norm.

70. *Id.* at 621-22.

71. *Id.* at 627-29.

72. *Id.* at 694.

73. *Id.* at 627.

Thus in various ways, the High Commissioner's actions produce authoritative interpretations of existing OSCE law, and demonstrate how new law can be created through operational activities. As John Packer states:

[The High Commissioner] has become a source of "soft jurisprudence," drawing upon textual instruments, doctrine, and state practice in the composition of his own argumentation to arrive at a specific recommendation. While his status is important in bringing the [High Commissioner] into a situation, it is ultimately his power of argumentation that moves a state to alter policy or law bearing upon the situation of minorities.⁷⁴

The High Commissioner's mediation is largely an exercise in argumentation and persuasion. Through that argumentation, not only are solutions to particular problems found, but the norms that were invoked in finding those solutions actually sharpen.

D. *The Rights of Internally Displaced Persons*

The "hardening" of the Guiding Principles on Internal Displacement is an especially interesting case because those most directly involved have been acutely conscious of the unusual normative process in which they are engaged. The Guiding Principles were drafted by a group of independent experts under the direction of the Representative of the Secretary-General on Human Rights for Internally Displaced Persons, a post created by the U.N. Commission on Human Rights. They are explicitly non-binding, but reflect and are consistent with international human rights and humanitarian law. According to the first Representative of the Secretary-General on Human Rights for Internally Displaced Persons, the Guiding Principles restate relevant legal principles applicable to the internally displaced, clarify grey areas, and address gaps that may exist.⁷⁵ Determined to counter accusations of making new law "through the back door," the current Representative insists that the Guiding Principles simply "identify those guarantees and con-

74. Packer, *supra* note 59, at 717.

75. See U.N. Econ. & Soc. Council [ECOSOC], *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39, Addendum, Guiding Principles on Internal Displacement*, ¶¶ 9-10, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998); CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 58-60 (2004); INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND CONSEQUENCES 108 (Thomas G. Weiss & David A. Korn eds., 2006). See also Walter Kälin, *The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool*, 24 REFUGEE SURVEY Q. 27, 28-30 (2005); Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 459-65 (2004).

cepts implicit in the rich body of existing international law that respond to the special needs of [internally displaced persons], and to make this protection explicit.”⁷⁶

The Guiding Principles originated in an NGO campaign pressuring the U.N. Commission on Human Rights to appoint a special representative whose mandate would be promoting an institutional and normative framework for the protection of internally displaced persons. The first Representative of the Secretary-General on Human Rights for Internally Displaced Persons, Francis Deng, was appointed in 1993. Between then and 1995, he worked with a team of legal experts to produce a compilation and analysis of the applicable legal norms. This group included academics and non-governmental activists, mainly from the United States and Europe, as well as representatives from U.N. human rights and humanitarian organizations. They found that existing law provided many protections to internally displaced persons, but it was still necessary to “restate general principles of protection in more specific detail” and address gaps “in a future international instrument”⁷⁷ Rather than trying to enshrine the norms in a treaty (for which there was little political will and which would take too long), the team decided that a set of guiding principles should be formulated instead.

In 1996, the U.N. Commission on Human Rights called on the Representative to proceed with developing the Guiding Principles. The drafting process involved a progressively expanding group of non-governmental experts, humanitarian agencies, and representatives of international and regional organizations.⁷⁸ The draft Guiding Principles were then presented to the Inter-Agency Standing Committee, a body comprised of most of the major humanitarian agencies within and outside the U.N. system. The Inter-Agency Standing Committee then adopted a decision welcoming the Guiding Principles and encouraging its members to apply them, after which the principles were submitted to the U.N. Commission on Human Rights in 1998. Mexico expressed some reservations about “standard setting by the back door,” but a consensus resolution was

76. Kálin, *supra* note 75, at 28.

77. *Report of the Representative of the Secretary-General, Mr. Francis Deng, Submitted Pursuant to Commission on Human Rights Resolution 1995/57: Compilation and Analysis of Legal Norms*, ¶ 413, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995) [hereinafter *Compilation and Analysis*]. For a comprehensive review of the process by which the Guiding Principles were formulated, see SIMON BAGSHAW, *DEVELOPING A NORMATIVE FRAMEWORK FOR THE PROTECTION OF INTERNALLY DISPLACED PERSONS* 71-97 (2005).

78. BAGSHAW, *supra* note 77, at 93.

adopted by the Commission “tak[ing] note” of the Guiding Principles.⁷⁹

While some of the Guiding Principles are embodied in hard law instruments, those that clarify grey areas or fill gaps are still soft law at best.⁸⁰ It is possible to cite legal provisions that underpin most of them, but some are novel.⁸¹ Principle 25, for example, stipulates that states shall not arbitrarily withhold consent to offers of assistance from international humanitarian organizations or obstruct access to internally displaced persons by those organizations.⁸² The 1995 compilation states that international law did not explicitly recognize those duties, but they can be read as flowing from various instruments.⁸³ For example, Article 1(3) of the U.N. Charter requires states to cooperate in “solving international problems of an economic, social, cultural or humanitarian character and in promoting respect for human rights and fundamental freedoms for all.”⁸⁴ The “right to life,” guaranteed by global and regional human rights treaties is another example, as is Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which obliges states to “take steps, individually and through international assistance and cooperation . . . to the maximum of its available resources, with a view to achieving the full realization of the rights recognized” in the Covenant.⁸⁵ Finally, the compilation

79. *Id.* at 134-35.

80. *Id.* at 103. Walter Kälin says they are not even typical soft law because they were not drafted by states and therefore did not rest on state consensus when they were formulated. Kälin, *supra* note 75, at 29.

81. Kälin, *supra* note 75, at 29. Similarly, the ICRC concluded that *most* of the Guiding Principles restate customary law. Jean-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: Volume 1: Rules 457-74 (2005).

82. U.N. Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, Principle 25, http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (last visited Apr. 13, 2008) [hereinafter Guiding Principles]. I am grateful to Simon Bagshaw, Senior Humanitarian Affairs Officer in the Office for the Coordination of Humanitarian Affairs, Geneva, for providing this example of a guiding principle that may be hardening. Interview with Simon Bagshaw, Senior Humanitarian Affairs Officer, U.N. Office for the Coordination of Humanitarian Affairs, in Geneva, Switzerland (Nov. 16, 2006).

83. *Compilation and Analysis*, *supra* note 77, ¶¶ 13-46.

84. BAGSHAW, *supra* note 77, at 78. General Assembly resolutions invite states to work with humanitarian organizations, but the right to provide assistance was based on the consent of the state concerned. Cohen, *supra* note 75, at 467. This issue was actively debated when resolution 46/182 was adopted in 1992, which created the post of Emergency Relief Coordinator. *See generally* G.A. Res. 46/182, ¶¶ 3, 34, U.N. Doc. A/RES/46/182 (Dec. 19, 1991) (showing final result). *See also* Resolutions 43/131 and 45/100 for the same issue. *See* G.A. Res. 43/131, pmb., ¶ 2, U.N. Doc. A/RES/43/131 (Dec. 8, 1988); G.A. Res. 45/100, pmb., ¶ 2, U.N. Doc. A/RES/45/100 (Dec. 14, 1990).

85. BAGSHAW, *supra* note 77, at 110.

of principles reflected the fact that Security Council resolutions on Northern Iraq, Bosnia, and elsewhere had obliged the authorities to permit U.N. agencies and NGOs access to civilians in need.⁸⁶ Thus Principle 25 did not have an explicit basis in international law when the Guiding Principles were formulated, but it was not simply pulled out of thin air.⁸⁷

The stated objective of the Guiding Principles is to provide guidance to the Representative of the Secretary-General on Human Rights for Internally Displaced Persons in implementing his mandate, to states when confronted with situations of displacement, to all other authorities and groups in their relations with internally displaced persons, and to intergovernmental and non-governmental organizations in carrying out their work.⁸⁸ Those purposes are being achieved; increasingly, the Guiding Principles are cited and used by U.N. agencies, regional organizations, NGOs, and governments.⁸⁹ They have been disseminated to U.N. agencies' field staff, through which non-governmental and governmental partners receive them. The Inter-Agency Standing Committee has prepared a training package for all its members based on the Guiding Principles. The U.N. High Commissioner for Human Rights, human rights rapporteurs, and non-governmental organizations like Amnesty International and Human Rights Watch use them in their advocacy work. The Inter-American Commission on Human Rights also applies them as a benchmark for evaluating conditions in member states. U.N. agencies have drawn on the Guiding Principles in designing programs for internally displaced persons in Sri Lanka, Angola, and Burundi. In addition, the Norwegian Refugee Council has convened workshops on the Guiding Principles in the Philippines, Thailand, Angola, Georgia, Sierra Leone, and Colombia. And national NGOs in those and other countries have begun using them as advocacy tools, both with respect to their own governments and U.N. agencies.⁹⁰

86. *Id.* at 111.

87. A similar Principle is 15(2), which concerns protection against forcible return of internally displaced persons to places of danger, which can be inferred from the more general norm prohibiting cruel and inhuman treatment. Principles that have an even less firm basis, i.e., those designed to fill clear gaps in the law, include enforced disappearances (Principle 10), property restitution (Principle 29), and detention in closed camps (Principle 12). Guiding Principles, *supra* note 82.

88. Guiding Principles, *supra* note 82, at Introduction: Scope and Purpose ¶ 3.

89. Cohen, *supra* note 75, at 467. For discussion of such uses of the Principles, see BAGSHAW, *supra* note 77, at 140-66 and Cohen, *supra* note 75, at 469-71.

90. See Cohen, *supra* note 75, at 471. See also BAGSHAW, *supra* note 77 at 165.

These operational activities took place against the backdrop of debates in intergovernmental bodies, typically culminating in expressions of support for the Guiding Principles with varying degrees of enthusiasm. After “taking note” in 1998, the U.N. Commission on Human Rights recognized the value of the Guiding Principles in 1999 and welcomed their widespread use by the operational agencies. In 2003, it declared that the Guiding Principles had become a “standard” in international efforts to protect internally displaced persons.⁹¹ Similarly, beginning in 1999, the U.N. General Assembly adopted progressively more effusive resolutions, culminating in the claim at the 2005 World Summit that the Guiding Principles provided “an important international framework for the protection of internally displaced persons.”⁹² The U.N. Security Council also began referring to the Guiding Principles in its debates on the protection of civilians, and formally acknowledged their utility in a Statement of the President of the Council.⁹³

Debates about the Guiding Principles were sharpest in the year 2000, with Egypt, Sudan, and India questioning the process by which they were made and casting doubt on their normative status (Mexico, under newly-elected President Vicente Fox, had become a supporter at that time).⁹⁴ India and Egypt in particular were reluctant to see internally displaced persons as a special category that needed protection beyond the provisions in existing human rights law. Both countries underscored that the Guiding Principles were not legally binding.⁹⁵ In the 2000 session of the U.N. Economic and Social Council, India and Egypt deleted any reference to them in the “agreed conclusions.” Their opposition was even more public in the General Assembly, which held a vote on the operative paragraph of a resolution on the Office of the U.N. High Commissioner for Refugees that referred to the “continuing relevance of the Guiding Principles.” The result in the Third Committee of the General Assembly was 118 for, 0 against, with 31 abstentions; in the General Assembly plenary, it was 139 for, 0 against, with 31 abstentions.

In the course of those debates, it became apparent that concern about the Guiding Principles had more to do with the broader

91. See Cohen, *supra* note 75, at 469.

92. G.A. Res. 60/1, ¶ 132, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

93. See Statement by the President of the Security Council, U.N. Doc. S/PRST/2000/1 (Jan. 13, 2000).

94. Cohen, *supra* note 75, at 473.

95. Cohen, *supra* note 75, at 472. See also BAGSHAW, *supra* note 77, at 145.

debate on humanitarian intervention (triggered by Kosovo) than strong opposition to the Guiding Principles themselves.⁹⁶

While Egypt and India were fighting this relatively lonely battle in the United Nations, the Organization of African Unity (with Egyptian support), the East African Intergovernmental Authority on Development (following a conference on internally displaced persons hosted by Sudan), the Economic Community of West African States, Organization of American States, the Organization for Security and Cooperation in Europe, and the Council of Europe all formally acknowledged the Guiding Principles and expressed support for their usefulness as a tool for humanitarian action and advocacy.⁹⁷ In fact, a substantial number of states with internally-displaced-person problems have adopted legislation or policies based upon them; these states include Afghanistan, Angola, Burundi, Colombia, Georgia, Peru, the Philippines, Sri Lanka, and Uganda.⁹⁸ Of particular interest are a number of judgments from the Constitutional Court of Colombia that cite the Guiding Principles in claims by internally displaced persons, ruling that the Guiding Principles should be used “as parameters for the creation of rules and for the interpretation of the national law on forced displacement.”⁹⁹

It would therefore seem that the debates triggered by the dissidents who questioned the legal status of the Guiding Principles actually helped solidify them. The resolutions coming out of those many meetings do not themselves convert the Guiding Principles into hard law,¹⁰⁰ but rather—along with the surrounding argumentation—provide grounds for claiming that a sense of legal obligation is emerging alongside the consistent practice of international organizations. Widely used and commented upon, the Guiding Principles are becoming the normative framework for protection

96. See Cohen *supra* note 75, at 472.

97. See *id.* at 469-70; BAGSHAW, *supra* note 77, at 154-57; Kālin, *supra* note 75, at 27. SAARC and ASEAN bucked the trend.

98. Cohen, *supra* note 75, at 470; Kālin, *supra* note 75, at 33.

99. BAGSHAW, *supra* note 77, at 159-60.

100. On the legal status of U.N. General Assembly resolutions and similar instruments, see generally ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); JORGE CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (Alba Amoia trans., 1969); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301 (1979); Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, in *INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM* 21 (1987); ALVAREZ, *supra* note 1, at 259-60.

and assistance activities on behalf of the internally displaced, leading to a gradual hardening of the Guiding Principles.¹⁰¹

III. THE HARDENING OF SOFT LAW

The operational activities described above are loosely regulated by soft law. Like much of international-organization practice, they occur against the backdrop of widely-acknowledged but not well-specified norms. The international organizations are not trying to enforce the norms, but carry out their mandated activities in a manner that coincides with them. The purpose is to achieve programmatic goals; the effect may be to harden international law. The extent to which that has happened in the areas surveyed in this Article varies, but they all offer at least suggestive evidence that the law *can* harden in this way.

The concept of “legalization” referred to in Part I turns on three characteristics—obligation, precision, and delegation—which Abbott et al. define as follows:

Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.¹⁰²

Martha Finnemore and Stephen Toope claim this is too narrow a conception of international law.¹⁰³ They argue that it relies too heavily on one branch of legal theory (the positivism of H.L.A. Hart) and one branch of international-relations theory (neo-liberal institutionalism), ignoring broader understandings of law as a “social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies.”¹⁰⁴ For the purposes of this Article, it is not necessary to take sides in that debate. Some of the criticisms of Finnemore and

101. BAGSHAW, *supra* note 77, at 173-74. See also Patrick L. Schmidt, *The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment*, 35 GEO. J. INT'L L. 483, 517-18 (2004).

102. Abbott et al., *supra* note 5, at 401. For different but related indicators of “hardness,” see Abi-Saab, *supra* note 5, at 160-161 and Chinkin *supra* note 3, at 37-41.

103. Finnemore and Toope, *supra* note 6, at 743.

104. *Id.*

Toope however can usefully be incorporated in the three characteristics identified by Abbot et al. to provide a richer understanding of the spectrum from soft to hard law.

The sharpest critique made by Finnemore and Toope is that “obligation” is defined in a circular manner without providing any theory of how it may be generated or become internalized.¹⁰⁵ Drawing upon the work of Thomas Franck and others, they argue that “legitimacy” is an important source of obligation, as well as an explanation for the “compliance pull” of law. Finnemore and Toope also contend that law is as much about *process* as it is about *product*; “[m]uch of what legitimates law and distinguishes it from other forms of normativity are the processes by which it is created and applied”¹⁰⁶ They do not cite Harold Koh’s transnational legal process to make their point, but his explanation of the various ways in which international law becomes internalized is illuminating:

Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm, and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.¹⁰⁷

Thus if the “obligation” criterion is reframed to mean a felt sense of obligation that derives from the perceived legitimacy of the rule and is embedded domestically in one or all of the above forms, then it can serve as a measure of “hardness” that reflects the richer view of international law proposed by Finnemore and Toope.

Another critique of the Abbott et al. concept of legalization is that it is too closely tied to formal international institutions—that it seems to involve only the “structural manifestations of law in public bureaucracies.”¹⁰⁸ Whether this criticism is valid as a general matter, it does not detract from the usefulness of the three criteria in analyzing how law hardens through operational activities because those activities are engaged in by “public bureaucracies.” Indeed

105. *Id.* at 748.

106. *Id.* at 750.

107. Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2656-57 (1997). *See also* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Back Home*, 35 *HOUS. L. REV.* 623, 642 (1998).

108. *See* Finnemore and Toope, *supra* note 6, at 744.

“delegation” (as that term is used by Abbott) is about the authority granted to international institutions to interpret and oversee implementation of a norm, “and (possibly) to make new rules.” Consistent with that understanding, this Article treats the operational activities of international organizations as *implicit* manifestations of the authority to interpret, implement, and make law.

Even a brief application of the “legalization” criteria to the four areas of practice substantiates the claim that the law can harden in this way. For example, the normative expectation that peacekeepers have a responsibility to protect civilians facing imminent threat has become “internalized” in the U.N. Security Council to the point at which it would be difficult for any member of the Council to argue *against* that responsibility when new mandates are being drafted. Indeed, failing to grant the mandate (and to give peacekeepers the capacity to fulfill it) in a place like Darfur would undermine the legitimacy of the Council. Moreover, while the broad “responsibility to protect” norm has remained undefined or imprecisely defined in intergovernmental fora, one can reasonably claim at least one of its meanings is that peacekeepers—as implementing agents—cannot stand idly by while civilians are killed.

The right to political participation has certainly become more precise as a result of election-monitoring and other operational activities. Multiparty elections are increasingly seen as “obligatory” in the sense that governments are anxious to claim the legitimacy that the “free and fair” election certification bestows—so much so, that the demand for election-monitoring vastly outstrips what international organizations are willing and able to provide—and that certification will only be forthcoming if political parties are allowed to form. Ethnic minority rights, as Ratner has argued, are being “translated” (or given more precise meaning) by the High Commissioner for National Minorities. And while the sense of “obligation” to comply with this field of soft law domestically is not embedded in all OSCE states, the High Commissioner has, in effect, become the implementing agent of those norms, serving as an intermediary who not only conveys the meaning of minority rights to the parties to a conflict, but also puts pressure on them to resolve their differences in a manner consistent with the norms.

Also, at least some of the Guiding Principles on Internal Displacement—already a relatively precise set of standards—are coming closer to being seen as obligations, like Principle 25 on

humanitarian access.¹⁰⁹ And to the extent that international humanitarian organizations invoke the Guiding Principles in their day-to-day work, some responsibility for implementing them has implicitly been “delegated” to those organizations.

Finally, although the above cases all showed progress from soft to harder law, it is important to stress that movement along the “legalization” spectrum is not entirely one way. Just as the law can harden through operational activities, it can soften as well.¹¹⁰ Thus, if peacekeepers were to fail systematically to protect civilians, and mandating bodies seemed to be indifferent to that failure, the responsibility to protect norm would be undermined. Similarly, if humanitarian organizations ceased to insist on humanitarian access to internally displaced persons, Principle 25 would lose its normative bite.

IV. THEORETICAL IMPLICATIONS

Two important theoretical implications follow from the above analysis. First, it suggests a more nuanced and pluralistic, though less predictable, form of law-making. In 1963, Rosalyn Higgins pointed out that resolutions of the political organs of the United Nations do not fit neatly into any of the primary sources of law enumerated in Article 38(1) of the Statute of the International Court of Justice.¹¹¹ This is even truer of the operational activities of international organizations.¹¹² Analogies can be drawn to customary law formation (for example, Principle 25), treaty interpretation (the right to political participation), and the identification

109. The latest evidence of this is a Press Statement delivered by the President of the Security Council on behalf of the Council, following an open debate on the protection of civilians, which included the following paragraph: “Members of the Security Council recalled the obligations of international humanitarian law regarding the protection of civilians. They urged all concerned parties to allow full, safe and unimpeded access by humanitarian personnel to civilians in need of assistance in situations of armed conflict.” Press Release, Security Council, Security Council Press Statement on Protection of Civilians in Armed Conflict, U.N. Doc. SC/9058 (June 22, 2007). Although the Council only “urged” unimpeded humanitarian access, the placement of that sentence in the statement suggests the principle is close to being a legal obligation if not quite there yet.

110. Michael Glennon makes a powerful argument that just as customary law can develop through state practice, both it and treaty law can fall into desuetude as a result of systematic non-compliance. Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 939-41 (2005).

111. See HIGGINS, *supra* note 100, at 1, 4-5.

112. See Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 323, 339 (Guy S. Goodwin-Gilland & Stefan Talmon eds., 1999) [hereinafter Kingsbury, *Operational Policies*].

of general principles of law (OSCE member state citizenship requirements), but the practices of international organizations are not simply a variation on these traditional sources. Although the resolutions of intergovernmental organs and rulings of quasi-judicial bodies are relevant, international bureaucracies are the driving force. That this has occurred across a range of areas signifies a trend away from traditional lawmaking to less state-centric and more innovative approaches.¹¹³

International organizations are not mere instruments of states in this process. International officials act autonomously, one step removed from state consent.¹¹⁴ They often initiate the activity and interpret their mandates creatively in carrying them out. The Secretary-General and his peacekeeping representatives, for example, translate the broad “responsibility to protect” and narrower protection of civilian mandates into operational rules. U.N. election-monitoring missions often set their own terms of reference. Within broad parameters set by OSCE member states, the High Commissioner for National Minorities is a free agent, able to engage with all who may have a stake in the outcome of an ethnic conflict.¹¹⁵ The U.N. High Commissioner for Refugees and other humanitarian organizations do not look to their executive bodies for explicit guidance on how to assist internally displaced persons.

Moreover, non-governmental actors are more directly involved than in normal international legal processes. To begin with, many of the operational activities are targeted primarily at non-state actors, not states.¹¹⁶ The civilians who are being protected and political parties championed as well as the minority groups on the verge of conflict and internally displaced persons in need are receiving assistance directly from the international organizations, *not* through their governments. In addition, NGOs play a greater

113. BAGSHAW, *supra* note 77, at 1.

114. On the autonomy of international organizations, see generally MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 5 (2004). They tie the autonomy of international organizations to their authority, by which they mean “the ability . . . to use institutional and discursive resources to induce deference from others.” *Id.* at 5. They identify four categories of authority that undergird international organizations: rational-legal, delegation, morality and expertise. *Id.* at 22.

115. As Erika Schlager notes, the success of the High Commissioner for National Minorities in the Baltic States turned in part on the desire of Estonia and Latvia to “prove” themselves to the international community, and in part on the willingness of other OSCE states to invest time and energy in monitoring the situation and to leverage political pressure in support of the High Commissioner’s ‘non-binding’ recommendations. Schlager, *supra* note 58, at 364.

116. ALVAREZ, *supra* note 1, at 245. *See also* Chinkin, *supra* note 3, at 35-37.

role in making the law, as the formation and implementation of the Guiding Principles illustrates. The impetus behind the international recognition of internal displacement came from NGOs, not states or intergovernmental actors.¹¹⁷ Non-governmental experts produced the compilation of relevant international law and were the core team that drafted the Guiding Principles. NGO representatives were also involved in the Inter-Agency Standing Committee deliberations, made statements in support of the Guiding Principles in the Commission on Human Rights, worked actively to disseminate them, and now use the Guiding Principles in their operational activities. The Representative of the Secretary-General on Human Rights for Internally Displaced Persons mobilized these NGOs to gain support for the Guiding Principles, pushing them into wider acceptance by states.

The second theoretical implication concerns the impact of argumentation (legal and otherwise) on the conduct of international affairs.¹¹⁸ There are two dimensions to this: the hardening results from argumentation about the status of the norm, and the harder the norm, the more demanding the discourse (argumentation) about compliance. Combined, these two elements show the dynamic nature of law-making and law compliance. Legal discourse promotes compliance with soft norms and, in the process, the norm hardens, making it more difficult to counter demands for compliance when the law is invoked.

But international organization practice alone is not enough for the law to harden. There must also be something analogous to *opinio juris*—a sense that the practice is generally accepted and treated as law. The only way of ascertaining that sense of legal obligation is through the discourse that surrounds the practice. The argumentation occurs directly (amongst the international organization, target state, and affected people) as well as diffusely (in deliberative forums where the norms are being debated). There are several examples of this: while peacekeepers were trying to protect civilians based on U.N. Security Council mandates, the World Summit was debating the scope of the “responsibility to protect”; as U.N. electoral assistance missions were insisting on the right to form political parties as a condition of free and fair elections, the Human Rights Committee was expounding the view that party pluralism is an element of the right to political participation; and while the Office for the Coordination of Humanitarian Affairs and

117. See BAGSHAW, *supra* note 77, at 63.

118. On argumentation and world politics, see generally CRAWFORD, *supra* note 15.

other humanitarian actors were insisting on access to internally displaced persons, debates were underway in intergovernmental bodies about whether states could arbitrarily withhold consent to offers of humanitarian assistance. Interpretation of the norm is implicit in the action taken; it becomes more explicit in the discourse and deliberation surrounding the practice.

The discourse also involves a wide range of states and other actors, with international organizations serving as both agents that engage in argumentation and venues for argumentation among states. Moreover the discourse occurs within shared background assumptions and understandings that underpin the organization, setting the boundaries of reasoned exchange about the meaning and status of norms.¹¹⁹ Although the extent to which these shared understandings exist varies from organization to organization, the specialized discourse of international law provides an additional layer of cohesiveness, regardless of the setting, through the operation of what may be called the “interpretive community”—an amorphous collection of officials, experts, and attentive citizens who in effect distinguish good legal arguments from bad.¹²⁰

Whether the arguments are sincere or strategic, they can have an impact on the hardening of law. Sincere argumentation is at the core of Jurgen Habermas’ ideal of communicative action, which requires speakers to engage in a genuine search for agreement or inter-subjective understanding.¹²¹ In strategic argumentation, speakers use arguments instrumentally, without being open to persuasion or even necessarily believing in the validity of their own positions. However, even this kind of argumentation can affect behavior through both what Jon Elster calls the “civilizing force of hypocrisy”¹²² and what Thomas Risse describes as “argumentative self-entrapment.”¹²³ Having made rhetorical commitments, speak-

119. In terms of Jurgen Habermas’s theory of communicative action, international organizations provide the “common lifeworld” that makes rational discourse possible. See Johnstone, *supra* note 10, at 455-60. See also Ian Johnstone, *The Power of Interpretive Communities*, in *POWER IN GLOBAL GOVERNANCE* 186, 195 (Michael Barnett and Raymond Duvall eds., 2005) [hereinafter *Interpretive Communities*]; Thomas Risse, *Let’s Argue: Communicative Action in World Politics*, 54 *INT’L ORG.* 1, 10-11 (2000). As Corneliu Bjola puts it, international organizations provide the “institutional lifeworld” that makes communicative action possible. Corneliu Bjola, *Legitimizing the Use of Force in International Politics: A Communicative Action Perspective*, 11 *EUR. J. INT’L REL.* 266, 279 (2005).

120. See *Interpretive Communities*, *supra* note 119, at 189-91. See also Johnstone, *supra* note 10, at 455-60.

121. HABERMAS, *supra* note 15, at 17-18, 323-25, 360-61.

122. See Jon Elster, *Strategic Uses of Argument*, in *BARRIERS TO CONFLICT RESOLUTION* 250 (Kenneth Arrow et al. eds., 1995).

123. See Risse, *supra* note 119, at 32.

ers feel some pressure to match their words with deeds. Otherwise, they would be branded as blatantly hypocritical, which would defeat the purpose of making the argument in the first place.

Moreover, argumentation that starts out as strategic can *become* sincere. As Jennifer Mitzen claims, speakers in public forums get habituated to practices of “reason giving” on the basis of general, impartial, publicly-accepted criteria.¹²⁴ These practices become expected, and over time the norms they articulate become internalized and taken for granted as accepted standards of behavior, which is one of the defining elements of “legalization.”

Once the law hardens, compliance may not be automatic, but the burden of persuasion shifts to those who would act contrary to it. Those who seek to defy conventional understandings of the law find it more difficult to justify their conduct to the interpretive community. Reverting to the three “legalization” criteria set out above, it becomes harder to argue that compliance with the norm is optional, rather than *obligatory*. Arguments based on policy, power, and self-interest are no longer fully responsive; to be persuasive, legal counter-arguments must be advanced. Moreover, to the extent that the law-hardening process is seen as legitimate, a sense of obligation does not depend entirely on the *content* of the law—the compliance pull exists simply because it *is* law.¹²⁵ Second, if the law is more *precise*, it is increasingly difficult to avoid compliance based on conflicting interpretations. And third, if the hardening process results in international-organization officials tacitly being *delegated* the task of following up on the norm, then the opinion of those officials as to what the law means and what implementation entails will tend to be treated as more authoritative.

V. CONCLUSION

The operational activities of international organizations occur in the context of a diffuse normative process where claims and arguments are made, challenged, defended, and elaborated in the course of interactions among international organizations, governments, and affected peoples.¹²⁶ The process however does not

124. Jennifer Mitzen, *Reading Habermas in Anarchy: Multilateral Diplomacy and Global Public Spheres*, 99 AM. POL. SCI. REV. 401, 411 (2005).

125. As Allen Buchanan and Robert Keohane explain, by way of analogy to a club: “I have a content-independent reason to comply with the rules of the club to which I belong if I have agreed to follow them and this reason is independent of whether I judge any particular rule to be a good or useful one.” Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 411 (2006).

126. Kingsbury, *Operational Policies*, *supra* note 112, at 340.

entirely bypass state consent because the member states of the organization give a broad mandate to engage in the activity. Those same members can put a stop to it if they so choose, and if governments respond positively or do not object, that signifies state acquiescence. But the process is not entirely or even primarily driven by states in the manner of traditional law-making. Rather it is more pluralistic and fluid, involving international and NGO officials, as well as representatives of governments. While less certain and predictable, it offers a promising new channel for the development of international law in areas where incremental agreement on practice is ahead of state consensus on principle.

International officials often lead this practice, and the extent to which they succeed in achieving programmatic goals serves as a measure of the power they wield. Their control over material resources may be limited, and they depend almost entirely on the resources member states are willing to provide, whether in the form of peacekeepers, funding for humanitarian aid, or logistic support to electoral processes. But the discursive power the officials wield is substantial. In acting operationally, they are often required to engage states and others in dialogue about norms of appropriate behavior; for example, about what constitutes free and fair elections or how to treat ethnic minorities.

From the perspective of international organization officials, the harder the norms they can invoke, the better; because international law by definition embodies shared understandings, hard law gives them a more solid starting point from which to push for changes in state behavior. When norms however are "soft," a byproduct of this interactive, dialogic process is a hardening of the law. Thus the discursive power of international organization officials serves not only to persuade states to behave in accordance with accepted norms, but also to sharpen those norms and thereby shape the climate within which future behavior will occur.