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Power and International Law: Towards an Autopoietic Framework

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Abstract: In this paper the traditional debate regarding the relationship between international law and political power is revisited. For over a century the assumption has been made that politics is the sole domain of power, and that international law is either somewhat resistant to or completely subsumed by it. It is argued that by separating power from politics, and recasting it as a seperate analytical category, the traditional dual oppositionality of the debate can be overcome. Through the lense of contemporary constructivism (as found in international relations theory) a well-nuanced framework exists in which this objective can be achieved. It is especialy with reference to the work of Niklas Luhmann that international law and politics can remain sovereign as seperate systems, and power can be more correctly defined as a medium of communication between these to systems. If the political is the excercise of power then international law defines this power. Illustration are given of how international law uses power to shape political behaviour and vice versa. By applying the sophisticated sociological theory of Luhmann, many assumptions made by lawyers regarding power can be overturned.

1 INTRODUCTION

What is the purpose of law? If one had to ask Hobbes, he would have us believe that it is a sacrifice of freedom in order to ensure greater security against the violence of chaos.[1] This theory has also been extended to international law.[2] What, however, does it mean for states, as the primary actor in international law, to sacrifice this freedom?

Freedom can broadly be understood as self-determination, a right that states enjoy as legal principle. This implies the ability to make informed decisions. In other words, it is the ability to make choices. If we are to follow the German legal theorist Niklas Luhmann's treatise on power, we will find that he defines power as the ability to influence and limit the choices of others. It is therefore only logical to understand power as a limitation on the freedom of another.

This brings us back to the statement of Hobbes. If what he claims is correct, it would necessarily mean that law is usurpation of not only freedom but also of power. It is thus not a far stretch of the imagination to claim that law inherently contains a power element. In domestic systems an unequal power relation between the state and private actors exist, but how does this influence the relationships

[1] T Hobbes, Leviathan, or the matter, forme, & power of a common-wealth ecclesiasticall and civill (2010).
[2] J D'Aspremont, 'Reinforcing the (neo-)Hobbesian representations of international law', (2010) Journal of international relations and development Vol. 13(1), at 87.

between sovereign states in international law? The debate as to the relationship between international law and power has been a long one and has gone through many mutations.

For long power has been seen to be the domain of politics.[3] International law, on the other hand, has been the organising force that inhibits the dark passions of the powerful. When it succeeds, international law is hailed as a power-free system. When it fails, international law is dismissed as another instrument of the powerful and the political.[4] The thesis being argued here, coming from an international law position, is that international law is a system distinct from the political. The problem of equating the two has come from the fact that power has been equated with politics. This means that when power is manifested in international law, the assumption is made that it is the triumph of politics over law. It is in this light that it is proposed that not only are international law and politics two distinct systems, but that power is also analytically separate from both of these.

Systems theory based on autopoiesis insists that law and politics are separate systems. In this paper the works of especially Luhmann (who applied his theories to law in general, not international law as such) and D'Amato will be used to define international law as an autopoietic system distinct from politics, which is an autopoietic system on its own. Luhmann's thoughts also extended to the notion of power, which he discussed in very abstract and theoretical terms, rarely applying them to law and never international law, and most certainly not in the context of the debate of power and international law. It is surprising that in light of the growing interest in Luhmann by international lawyers, attempts have not yet been made to apply his thoughts on power in this context.

This paper proposes that his theory of power, when read in conjunction with the recent developments in autopoietic international law, could offer a novel recasting of this old debate. It is suggested that power is not inherent to only politics, but is a force that spans multiple systems, in this case both international law and politics. Power is thus not the threat of politics to international law, but rather a kind of language understood and employed by both systems.

In the next section the historical development of this debate will be discussed. This is done in order to map the contours of the study and provide some historical context to the subject matter. At first the history of the debate around power and international law, and the broad categories or schools of thought that have dominated throughout the last century will be briefly outlined. Classicism, realism and rational-institutionalism are rejected for being too extreme on either side of the debate, and do not allow for the more flexible reading offered here. This leads to the preference of a constructivist understanding, but one that is tempered by

[3] JL Goldsmith and EA Posner, The limits of international law, (2005) at 3.

[4] Ibid 9.

poststructuralist criticism. The aim is to suggest the frailty of understanding international law and power as structurally separated.

Once the debate has been contextualised, the third section will introduce international law as an autopoietic system. Autopoietic systems theory is employed since it is believed that offers a logical and coherent argument for separating politics and law, and for redefining the classical debate by separating power into a distinct category. Luhmann's theory of power as a generalised medium of communication will be investigated, and an attempt will be made to harmonise it with the theorist's persuasive description of (international) law as an autopoietic system.

In the final section the previously presented model will be critically analysed, and an attempt will be made to place it within contemporary thought.

2 HISTORICAL OVERVIEW

The purpose of this section is to provide some historical context in order to map the study through a brief overview of the four main schools of thinking regarding international law and power. A view of constructivism as deconstructed by poststructuralism will be suggested, in order to open this relationship for new spaces of critique. The destabilization of this relationship as understood by constructivism will allow us to make room for new ideas to manifest. A preference for constructivism is presented since it is most capable of recasting the traditional oppositions between international law and politics, and can reimagine power as a separate analytical entity that spans both systems.

2.1 A short history of power and international law

It is generally believed that the power of states is an asset that informs and shapes their behaviour in the field of politics, diplomacy and international relations.[5] Whilst an unequal power-relationship is inherent in municipal legal orders, the international legal landscape has a horizontal nature in which state actors are, in the eyes of the law, theoretically and in principle equal.[6]

International legal norms are normative structures that regulate what is called "power" in international relations. Studying power touches on both disciplines.[7] In international law the study of where power lies has been important for a long time. While at first it was (perhaps somewhat naïvely) hoped that law could remove the factor of power on the international landscape, the manner in which this relationship has been regarded has shifted over the last 100 years or so.[8] Steinberg and Zasloff

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[5] MD Evans (ed.), *International law* (2010), at 204; J Dugard, *International law: A South African perspective* (2012), at 3.
[6] Ibid.
[7] M Byers, *Custom, power and the power of rules: international relations and customary international law* (1999), at 4.
[8] N Krisch, 'International law in times of hegemony: unequal power and the shaping of the international legal order' (2005) 16 EJIL 3, at 370.

identify four general schools of thought regarding the understanding of the role of power in international law in that have developed in the last century.[9] These four schools have been labelled as the classical view, realism, rational-institutionalism and finally constructivism. Each will now be dealt with in turn.

2.2 The classical view

The classical view was the dominant paradigm for understanding power in international law at the beginning of the 20th century. It holds the optimistic belief that international law could usher in a new era of international cooperation that did not rely on power, and instead created the distinction of law as separate from politics, the domain of power. Instead international law was viewed to be built on foundations of custom and consensus; in other words, norms.[10] This was an ideological project that distanced international law from power, but also equated power with politics. All nations are seen to be equal in the eyes of the law, and have a common interest in world harmony and cooperation. Conflicts and misunderstanding are thus not seen as the power-play of distinct interest, but instead arise due to different interpretations of law in the attempt to achieve and maintain global harmony. Conflicts were thus believed to be more apparent that actual. These conflicts would also diminish as international law evolves and develops, and law has become more sophisticated in order to deal with such conflicts. Just as municipal law enjoys a degree of legitimacy making people are willing to obey it from some notion of the common good, states would also obey international law.[11]

Whilst the view that power and international law can operate independently has been refuted, some of its ideals have remained. Many still subscribe to the idea that international law can be employed for the greater good of all people where common goals are followed instead of individual ones, and that greater interdependence has benefitted the international system.[12] An important legacy of this movement is that international law is separated from politics (and politics in turn are equated to power) and that the two systems are in conflict. This meant that when one expands, the other necessarily has to withdraw.

2.3 Realism

The romantic and optimistic classical view was however, shattered with the rise of Fascism during the 1930s, giving way to realism. This represents the opposite of the classical view, in that international law is merely that which politics "leave over" for it, and international law is thus at the mercy of power. Scholars became sceptical about the nature of international law in light of the disregard of peace treaties and the system as a whole by states such as Germany. According to Morgenthau, these

[9] RH Steinberg and JM Zasloff, 'Power and international law', (2006) 100 AJIL 1, at 64.
[10] Ibid.
[11] See Byers, *supra* note 5, at 131.
[12] See Steinberg and Zasloff, *supra* note 7, at 86.

states were able to do so because of their material power.[13] The realist theory contended that international law was little more than political power with a different mask. The question of enforcement of international norms rested with states themselves, in their capacity as the fundamental actors of international law.[14] Traditional realism held that international law relied on the power of dominant states to maintain order.[15] This view held for much of the post-war era, where global politics stayed in fairly static power blocs for decades. Up until the 1990s structural realism contended that since states rarely actually shared norms, norms could not be the source of international law. Instead of norms, the power and interests of dominant states were seen as the source. Such states were considered to have a fair amount of freedom in their actions, and that international law merely explained the process of their actions, but did not substantially regulate the outcomes of their assets and interests. Other realist scholars, such as Gruber and Steinberg, conceded however that international law could facilitate cooperation and thus had some value in bringing about certain consequences.[16] Positive-sum outcomes could be achieved. Yet whilst international law could establish legitimate juridical processes that could influence the outcomes of state actions, these outcomes are not free from reflecting some degree of state power.[17]

This approach still exists and is even becoming more popular in the United States. Authors such as Franck have contended as recently as 2006 that for many in the US government and academia, international law is a disposable tool of diplomacy, merely one consideration among many when determining strategies for the fulfilment of national interest.[18] Some even go so far as to suggest that the legitimacy of international law is a myth propagated by smaller states to exert influence on dominant states.[19] If this point of view is gaining ground in the United States, it could spell danger for international law. For any legal system it is important to legitimise its norms, and the times when it works should not be considered as mere "temporary coincidences of self-interest".[20] The latter would mean that law has no independent privilege or value for dominant states to subscribe to. Even if international legal norms are followed, the legitimacy of these norms are in danger even simply when the mere belief in them is diminishing. It would create a case of perception eventually dictating reality. Therefore simple compliance is not enough, but instead predictable State action has to be ensured.

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[13] Ibid 47.
[14] This is not the commonly held viewpoint any longer. Whilst states still remain the most obvious and important actors in international law, the system has in recent decades opened up for other actors including international organisations, non-governmental organisations, multinational corporations and even individuals to be regarded as subjects of the international legal system.
[15] See Steinberg Zasloff, *supra* note 7, at 48.
[16] RH Steinberg 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', (2002) 56 INT'L ORG. at 339.
[17] Ibid.
[18] TM Franck 'Power of legitimacy and the legitimacy of power: international law in an age of power disequilibrium', (2006) 100 AJIL 88, at 77.
[19] Ibid 78.
[20] Ibid 79.

An example was the behaviour of the United States in the *Nicaragua* case. The State of Nicaragua brought the US to the International Court of Justice on the basis that the US was supplying rebel groups within the country with military aid and that this constituted an unlawful use of force.[21] The US countered that it was justified in its actions out of self-defence, but the court dismissed this claim and held that the US actions did constitute a breach in the principles of non-intervention and the prohibition on the use of force.[22] It is also apparent from the US military action in the Middle East. It seems that many states practice a realist approach through an attitude of acting the way they want first, and only afterwards testing it through law.

Realist conceptions of international law pose a great threat to lawyers, since it diminishes the importance of international law. Apart from still equating power with politics, it represents the ultimate withdrawal of international law. Autopoietic theory presents a challenge to this in that it offers a conceptual model of international law and politics that simply cannot amalgamate, but retain their individual integrity and function. This problem can be addressed in part when power can be separated from politics, as will be attempted in the next chapter.

2.4 Rational-Institutionalism

After the end of the Cold War, international law began integrating theories from the social sciences in what Steinberg calls the rationalist-institutionalist era, heavily influenced by the New Haven school.[23] The school holds that international law is a theory about making social choices with the aim of creating a global community with shared values.[24] In this vein of thought, international law is seen as part of a network of different systems, a variable among many others that influences and facilitates outcomes that would otherwise not have been foreseen. Thus international law has influence on how states pursue their interests. It provides, unlike classicism, a logical model for how international law affected dominant states into compliance.[25] The law can reflect common interests of all states, and thus compliance from individual states can be emphasised over their power. In this manner world order can be achieved and shape behaviour. The introduction of ideas from the social sciences and rationalist logic departed from previous pure theories of law, and whilst agreeing with classic theories in principle, these theories could now be proved through explicit logic.[26] Legal processes are, however, still seen to be shaped by the goals of those who frame them. Despite this (and in contrast to realism), it was held that rules and norms "still matter".[27] Whilst dominating states could influence the conditions under which international organisations came into

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[21] FL Morrison 'Legal issues in the Nicaragua opinion', (1987) 81 AJIL 162; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, Judgment of 26 November 1984.
[22] Ibid.
[23] See Steinber and Zasloff, *supra* note 7, at 77.
[24] M Reisman, 'The View from the New Haven School of International Law', *International Law in Contemporary Perspective*, (1992).
[25] Ibid 50.
[26] Ibid 76.
[27] See Byers, *supra* note 5, at 132.

being, the continued existence of the organisations could be doubtful if global power shifted. This is in part because state interests are not divorced from the liberal influence of individual interest. The global actors were still members of domestic society, and governments still represent certain demographics, reflecting their preferences.[28] States participate in international organisation because they rationally calculated that it would be beneficial, and not necessarily because of a spirit of cooperation or global community.

This is an important shift for understanding international law. Rational-institutionalism is open to ideas of the social sciences, and systems theory as a sociological theory of law can thus be studied by lawyers and helps understand international law "from the outside". It is also relevant in that it places international law as relative to other systems, for example politics, and doesn't deny that these systems work together in shaping outcomes. It does, however, differ from systems theory in one important way, in that the New Haven school did carry a normative agenda, which has never been the goal of systems theorists.

2.5 Contemporary constructivism

Another contemporary paradigm, and one that seems even more suitable for a Luhmannian theory of international law and power (although by no means a perfect fit), is that of constructivism.[29] State interests are seen as material considerations, and power is based on material assets. These material assets must belong to someone or some specific group. Thus the very possession of these assets of power creates interest groups around them, and these groups gain certain socially constructed identities. The constructivist nature of international law lies in the fact that it not only reflects such identities and interests, but also informs and reinforces them. In other words, law is not a mask for politics: without legal definition, the very notion of statehood, of sovereignty or consent would not exist.[30] In this kind of "hard" constructivism the realist's table has been turned: law itself constructs social categories which patterns the behaviour of power. It is through international law that states can make sense of themselves. Thus international law does not regulate power, but defines it. In contrast, "soft" constructivist theories contend that states exist through material characteristics such as language, culture, history and resources, before the legal definition of it.[31]

Krisch identifies a paradox in that although states usually abide by international law, the system would not work without a degree of power to enforce it.[32] Thus dominant states have to maintain the world order, whilst at the same time being reluctant to cede power to it. Thus to dominant states international law is an instrument as well as an obstacle to power, or in the terminology of Koskenniemi an apologia and

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[28] Ibid.
[29] See Steinberg and Zasloff, *supra* note 7, 52.
[30] Ibid 82.
[31] Ibid 83.
[32] See Krisch, *supra* note 6, at 373.

utopia.[33] Krisch continues to describe that at the opposite poles of international law, states are simultaneously expanding it whilst also withdrawing from it. The majority of international legal activity however takes place between these two extremes.

Constructivism seems to offer the most possibilities for an autopoietic international law and Luhmann's theory on power. Firstly it recognises that power is some kind of independent category separate from international law and politics. International law and politics is still, however, informed, reinforced and employed by power. As international law helps in defining power, international law is able to influence behaviour. It is also honest about the role of power in international law, admitting that international law also relies on the usage of power without this meaning a withdrawal away from politics. It is also sensitive to Luhmann's idea that as power is sacrificed when it becomes institutionalised, but that it also allows power to be exerted in new ways. It seems that constructivism, as informed by the rational-institutionalist school, already has the foundations for the model that will be discussed in the next chapter.

3 POWER IN AN AUTOPOIETIC INTERNATIONAL LEGAL SYSTEM

3.1 Introduction

In the previous section the most important historical views on the relationship between international law and power were discussed. It is however submitted that most these theories have been predicated on a theoretically impoverished and underdeveloped notion of what power is. It has been taken at face value that power is military or economic strength, which enables one state to make another act according to its will. Such a definition triggers a knee-jerk reaction for lawyers: law is supposed to bring order and justice in a chaotic Hobbesian world and should act as an antidote to the adage of "might makes right". If, however, a more sophisticated theoretical understanding of power can be reached, international law can have a more constructive relationship with power.

Critical legal scholarship aims to expose the myths of objectivity, determinism, value-freedom and alleged political neutrality of law.[34] It posits that international law exists among many ideological tensions such as between the individual and the community, or between positivism and natural law.[35] According to Koskeniemmi shared values and political convictions have a greater influence on certain areas of international law than the strict legal process has.[36] Critical theorists such as Koskeniemmi, Klein and Weber, together with feminists and postcolonial critics have

[33] M Koskenniemi, *From apology to utopia* (2005).
[34] See Byers, supra note 5, at 45.
[35] Ibid.
[36] Ibid 46; See Koskeniemmi, supra note 31.

exposed the role of power in international law. Few however have attempted to posit a theory of this relationship.[37]

It is in this light that the theory of power as suggested by Niklas Luhmann should come under closer inspection by lawyers. It could present a model under which politics and law can be understood to have complementary spheres, instead of the simplistic oppositional theories of total separation or complete equation that have historically been in vogue, as discussed in the previous section. Luhmann suggests that political power becomes coded into the legal system too. Although international law and politics are structurally coupled, power is also double-coded into both law and politics. Law legitimises political violence, but remains legal in nature because it is dependent on a disappointment of normative expectation.[38] In other words violence is sanctioned by law but is seen as legitimate exactly because it has been legitimately connected to the non-fulfilment of a legal rule. The violence is not seen as accidental. In this way power is dispersed over the legal and political systems which, as shall be explained, are structurally coupled.

Through systems theory international law and politics can be understood as separate social systems. To international law this is good, as it means politics is less of a threat to its independence. Also, power can be defined as an analytically separate concept from politics, and can thus interact with international law without these interactions being labelled as the withdrawal of international law in the face of politics. Instead power is something that relies on international law as well as politics, and these systems rely on power too. Power becomes a concept that spans both these separate systems and allow them to communicate with each other in a certain way.

3.2 International law and autopoietic systems theory

"Autopoiesis" is derived from Greek, meaning the activity of self-creating. In order to deal with certain social problems, certain social systems have developed. International law as well as politics are two of this kind of systems. The basis of an autopoietic system is that it is self-defining, and uses its own internal logic in order to recreate itself, hence the name *auto*poiesis. It decides which actions or communications it accepts as relevant, and then processes it according to its own binary code of acceptance or rejection. In the case of international law, this code is one of legal or illegal.[39] This self-definition also carries with it the concept of boundary drawing – that which is part of what the system defines as itself and that which falls beyond this ambit. Everything external of this boundary is called the system's environment.[40] In the case of international law, its environment would include politics but also economics and media, which are of limited relevance to international law. To put it in the words of D'Amato, a system such as international

[37] Ibid; RBJ Walker, 'Inside/Outside: international relations as political theory (1993). BS Klein, 'Strategic studies and world order: the global politics of deterrence' (1994).
[38] A Philippopoulos-Mihalopoulos, *Niklas Luhmann: law, justice, society* (2010), at 130.
[39] N Luhmann, *Law as a social system* (2004), at 55.
[40] Ibid.

law only "sees" what it wants in its environment.[41] Politics and economics are their own separate systems the communications of which can only be understood by law after law has translated it into legal information. This section will show how these intersystemic communications change in character with the addition of power, and creates the possibility for greater influence between these usually rather isolated systems. Power becomes a universal language that is able to somewhat resist the translation process between these different systems.

D'Amato claims that the functioning of international law is best described as "an autopoietic system of norm generation and norm-recognition".[42] This description is important for the reason that it shows that systems theory assumes that all systems have a built-in drive toward self-preservation and self-perpetuation.[43] This means that international law does regard itself as distinct from politics or international relations, and allows us to keep the field or systems analytically distinct.

The role of systems is to create abstract and symbolic "languages" that can reduce the infinite complexity of their environments in order to communicate relevant and specific information about our lives. Despite what realists would like to believe, it is held here that international law and politics are indeed separate systems, each dealing with different aspects of our lives, and using different criteria for reducing complexity and the kind of impact it communicates back to us. There is however, some symbolism that spans across both systems and that is the symbolism of power.[44]

3.3 Power in autopoietic theory

If communication between international law with politics, economics or international relations could occur only in a way that is understandable by law, these communications would carry little influence. By communication it is meant the intake of information relevant to a system from its environment, which is then expressed in its particular binary code in which all systems communicate a code of acceptance or rejection. If international law only sees in politics what it is programmed to see, the communication would have little effect on law. However, it is submitted that when combined with power, international law has less autonomy to choose what to accept. So how does power influence intersystemic communication?

It is important to understand what power means in Luhmann's theory, especially since he never applied it directly to law, much less international law and politics. Whereas traditional definitions of power have emphasised the ability to *force* specific actions in light of resistance, Luhmann prefers to define power as the ability to *cause* wanted outcomes despite resistance, or despite being causally unfavourable.

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[41] D'Amato, 'International law as an autopoietic system', *draft paper read at the Max Planck Institute for Comparative Law,* 15 November 2003, at 23.
[42] Ibid 4.
[43] Ibid 7.
[44] Luhmann *Trust and power* (1979) 108.

Thus power is not an act, but a mechanism situated in causality.[45] In simpler terms, the kind of power Luhmann talks about is to bring others to act in a way that you want, but they would have been unlikely to were it not for your power. In other words the more unlikely they act because of your presence, the more power you have.

Using this model, we can keep international law, politics and economics apart, whilst still identifying that certain communications between them are similar to one another. When a system such as international law rejects a communication, the rejection is expressed in a way particular to that system. In the case of law this would be coded as "illegal" (in contrast to acceptance being "legal"). When international law rejects a communication as illegal conflict arises.[46] When a communication is legal, it passes through international law unhampered. An assumption about these communications do exist, namely that when they are "sent out", they carry the expectation to be accepted. Put another way, when politics communicates with international law in the language of power, it is motivated to do so because it hopes to be accepted by law, and that this will carry certain consequences and fulfil certain expectations, namely that its proposed project or exertion of power will be deemed "legal".[47] It will use its influence to make the receiving system make the selection that it prefers. Examples of this could be when a state wishes to receive the international community's approval when going to war, or when it attempts to organise a boycott against another state and expects its actions to be regarded as legal under international law. It thus stands to logic that the more freedom the receiver has to make different choices, but chooses the communicator's preferred selection, it reflects more power of the communicator.[48] This is a radical notion, since it removes power from the idea of coercion, but instead makes freedom a precondition for power. This theoretical insight of Luhmann has profound implications for international law: power is not the "might makes right" mantra of chaotic, uninhibited politics. Instead the kind of freedom that international law has formalised becomes a precondition for power. According to Luhmann coercive violence is not power. This is because the other is not acting according to your will, but instead you have substituted his action with your own. In other words coercion is the very lack of power. Instead power is the ability to carry out a greater variety of decisions, and have others go along with your decision.[49]

If however power is to be understood at such an abstract level, it is difficult to make quick comparisons of power in order for states to make decisions. This is why concrete symbols have been created to represent power. The first of these substitutes are hierarchy, which might be established by a history of confrontations that have laid down certain expectations as to who is more powerful. A second substitute used especially by international law is how it manifests power in the form

[45] Ibid 107.
[46] Ibid 110.
[47] Ibid 111.
[48] Ibid 112.
[49] Ibid 113.

of expectations. When countries enter into a treaty with one another they create normative legal expectations, and thus form a kind of power-relationship with one another. International law thus becomes a repository for power that functions as a mutually understood symbol that commit the states normatively and can by referenced. Thus the collective power of international law takes the place of the power of an individual State party.[50]

Both symbols and communication systems serve to reduce complexity. A system reduces complexity by making a selection, communicating it to another system, which in turn only has certain possible selections it can make in relations to it, hence the reduced complexity.[51] Just as it is not replacing the other's actions with one's own through coercion, it is also not about concretely determining the selection the other makes. Instead it is about reducing the other's range of selections, or more simply leaving them less rational or attractive options to act in ways that are unfavourable to you.[52] In the light of power, the other sees that it is senseless to form contrary decisions, and by itself initiates the causal chain of events that the powerful State expected. It does not break the will of the other State, but negates it.[53] This can be distinguished from a narrow range of possible actions by the other by determining whether the presence or actions of the power-holding State would have reduced the options available to the other State.

Instead of being completely separate from law, or it being the same as law, power is in fact a useful tool in analysing legal events. Law has only developed semantics that can translate concrete actions into legal terms. Outside of criminal law, law usually has difficulties understanding motivation, especially when speaking of an abstract entity such as a State. Power provides the explanation for the motivations behind legal actions. Power implies a reason for action instead of letting events happen without interference. Thus when a State acts and exerts power, it is not simply the manifestation of its will, but it is also true that its power has contributed in generating this very will.[54] This does not mean that no power is the only factor constitutive of will, or that without power, will cannot be formed. Rather, in the presence of the options granted by power, will is influenced. By the very fact that states possess power they are presented with motivations and courses of action that it would not necessarily otherwise have.

If a state has preferred outcomes that imply that it can imagine alternative options by the other State that it wishes to avoid.[55] In order to prevent the fruition of these undesirable outcomes, states link them to sanctions, often illustrated as a "stick" in the classical "carrot/stick" metaphor of international relations. The threat of sanction is thus important to power, in that it influences the other State to make the desired

[50] Ibid.
[51] Ibid.
[52] Ibid 114.
[53] Ibid.
[54] Ibid 120.
[55] Ibid 121.

selections.[56] If, however, the undesired selection is made and sanctions have to be imposed, it reflects a loss of power since it had not been able to secure the outcome it had expected. Power functions as a potential, a possibility or an opportunity and not in the actualisation of events.[57]

As has been discussed earlier, states give up a degree of their power when they participate in international law. This however does not mean that power or power considerations are removed from international law. Instead international law is better understood as the formalisation of power, and through formalising power as law it becomes challengeable.[58] Thus, since it would be illegal, a state sacrifices some of the possibilities in which its power can be expressed, it does not mean that power is fundamentally removed from the equation.[59] As Luhmann puts it, whilst legal communication takes place, there is a parallel meta-dialogue of power that is also taking place. Power might be explicitly stated, or might just appear in the form of unspoken agreements, expectations or even threats.[60] Without ever threatening with the use of force, states can make references to certain legal norms (such as self-defence) which would invoke images of sanctions or the use of force in the imagination of the other state.[61] Power is thus a code that states use in conjunction with law that allows them to converse on the level of expectation rather than explicit statement, in cases where explicit language would be undesirable (as in the case of open threats).[62] For the powerful, even his silent wishes are obeyed without him having to state them.[63]

International law interacts with power by trying to find resolutions to its struggles, to turn a factual power position into a juridical position.[64] This is in line with its ultimate goal of self-preservation, because the antithesis of this goal is chaos, and chaos needs to be controlled by the law.[65] This is not the same as excluding or even tempering power: the fact is that power is defined by law as described by constructivism. Law decides and assigns according to its internal code of legal and illegal, and that which it accepts as legal is in fact merely sanctioned power, and the power that is not is illegal power.[66] Simply put, rather than being removed, power becomes institutionalised by law. Instead of making power irrelevant, international law is in fact a symbolic lingua franca for power. There is a legal and normative bond between the powerful states and those that he interacts with. International law as a symbolic medium of power means that power can be mobilised even without reference to actual circumstances. The institutionalisation of power means that even when a state does not have much power; it can refer to international law as a power

[56] Ibid.
[57] Ibid 123.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid 129.
[63] Ibid 130.
[64] Ibid 136.
[65] See D'Amato, *supra* note 39, at 38.
[66] See Luhmann, *supra* note 42, at 137.

source, by drawing upon the power of the pre-established norms.[67] Power becomes "stored" in international law and is made available to those that cannot act politically. It becomes a short-hand to mobilise power without having to re-enact the historical events that created the hierarchical order.[68] In other words it is not necessary to renegotiate the power balance each time states interact with one another.

This institutionalisation means that international law is a method of attaching credibility to power. Credibility implies that a power holder is actually recognised as having power, or is using its power in an acceptable way. That is why powerful states often cloak their displays of power under a veil of reluctance, or as if their hand had been forced somehow.[69] In the early days of international law, classicists had to prove the credibility of this formalisation process in order that it would not look like a symbol of power, and therefore had to create symbols of non-power.[70] In order to legitimise itself, one such symbol of non-power by international law was to spread its power across different states or power holders, such as the United Nations Security Council.

Luhmann states that power has to make itself legitimate through communications in another medium, and cannot function purely by itself.[71] That is why powerful states often cloak their displays of power under a veil of reluctance, or as if their hand had been forced somehow.[72] Byers also gives compelling reasons for why states surrender some measure of power to the international system. One he calls "specific reciprocity", where two states make a roughly equivalent exchange in a short-term negotiation strategy. The other is "diffuse reciprocity" between groups of states, where a particular State feels he might find some indefinite future reward for present cooperation.[73]

This however does not mean that paradoxes do not occur. It does occur that powerful states are on the wrong side of the law in regard to less powerful states. An example can be found in the South West Africa (now Namibia) cases. In the event of such contradictions there is a tension between which medium between power and law should enjoy priority. When law does indeed gain priority over power, this is not a proof of the independence of international law from power; it is instead an attempt at legitimizing the system of international law. International law is not concerned with fairness or justice, but like all other autopoietic systems is simply concerned with perpetuating itself. It therefore resists power to the extent that it is a threat to it (so as not to become subsumed by power) but will also cease this resistance if in its own interest.[74] It is then that notions of justice, fairness or

[67] Ibid 139.
[68] Ibid 170.
[69] Ibid 140.
[70] Ibid.
[71] Ibid 143.
[72] Ibid 140.
[73] See Byers, *supra* note 5, at 28.
[74] See D'Amato, *supra* note 39, at 33.

morality will be raised.[75] If one follows contemporary realist arguments the question of international law being morally compelling is dismissed. Some, such as Goldsmith and Posner, even claim that states always seek to justify their actions morally even when they are transparently done out of self-interest.[76] Even worse, these justifications can even be pretexts or guises in the bid for more power.[77]

This returns us to the notions of apologia and utopia to deny international law as being legal in nature. On the one hand, law is too political and dependent on state policy, and an apology for the exertion of power. The apology argument is an easy one to follow: law, like politics, is in pursuit of social goals, and the former is assumed to emerge for the state interests and political choice.[78] On the other hand it is critiqued as too political in that it is based on speculative utopias that are too moralistic in nature.[79] The utopian nature of international law is one based on natural law theories which refer to a morality outside of law. In order to avoid both apology and utopia the goal should be to find a norm system within law itself yet remain responsive to extra-legal stimuli of politics, power and morality.[80]

Niklas Luhmann claims that law has been cut loose from its "social moorings".[81] The result is that normative expectations have shifted from law to the realm of political demands, and in a conscious point to differentiate it from law, these claims are sometimes framed as matters of ethics. This makes it impenetrable for law, which can only classify problems as legal/illegal. Thus the normative expectations that form the true resources for law are circumnavigated. In this way these ethico-political demands take on a shape similar to law, but eventually become expressed as legal norms.[82] Law and politics both need one another to reinforce the other. Politics in this manner uses law to gain access to concentrated power. For Luhmann power is expressed in politics through superior authority and threat of force. The normative "ought" however does not necessitate superior power, and law and power are different forms of communication about the expectation of the conduct of others.[83]

Power has manifested itself in international law in several different ways. An important example is decision-making, most notably in the oft-criticised Security Council. Power can manifest in the shape of the ability to block decisions from being made, which can prevent events from occurring without responsibility being incurred. A separate but subtly different manifestation is the ability not to make decisions or take action at all.[84] When the power of these states comes under threat, their willingness to take both positive and negative decisions becomes less likely, which means less action is taken and the status quo in general remains stable. The

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[75] Ibid 34.
[76] JL Goldsmith and EA Posner, *The limits of international law* (2005), at 169.
[77] Ibid 170.
[78] Ibid 17.
[79] See Koskenniemi, *supra* note 31, at 24.
[80] Ibid 21.
[81] See Luhmann, *supra* note 37, at 162.
[82] Ibid.
[83] Ibid 163.
[84] See Luhmann, *supra* note 42, at 163.

ability to slow down change is a major source of power in international law without being directly threatening. It has also been recognised by international relations theory and has been labelled as "hegemonic stability".[85] The interdependency of the United Nations system means it is difficult to form opposition against it. This kind of ability to slow down change is a source of power that Luhmann calls "parasitic" in that it undermines the functioning of the very system that it is living off.[86] This form of power is effective precisely because it is able to uphold the mechanisms of international law as a supposedly power-free system whilst powerful states use this symbolic legitimacy to exert their power in a non-threatening way. In order for its own continued existence, international law encourages norms of interdependence rather than independence, for that leads to a more expansive and thus stronger international legal system.[87] It is part of an ideological Kantian project of a democratic peace theory that believes that a more interdependent global society would lead to less conflict. Somewhat paradoxically however, international law needs conflict (a more complex environment) in order to build up its own complexity. As D'Amato notes, international law is stronger and more stable the more complex it becomes.[88]

4 CRITICAL DISCUSSION

4.1 Introduction

In the second section the most dominant historical and contemporary views of the international law and power debate were discussed, illustrating their development and shortcomings. Constructivism was presented as a contemporary framework which was best suited to the application of Luhmann's abstract thesis on power onto international law, particularly when understood as an autopoietic system. This is because not only does it welcome sociological insights into law, but also has the most dynamic understanding of international law's constitutive effect on power, whereas other theories only typified power as the opposite of international law.

In the third section international law as an autopoietic system was explained in the light of the most contemporary theorists, a model of law which was particularly suited to apply this theory of power to. A model for international law was developed and presented that has a novel relationship with power.

In this fourth section the previous claims presented will be synthesised and be illustrated through more practical examples. The relationship between international law and power, recast in this novel light, will be applied to the constructivist premise. When encountering theoretical arguments, it is tempting to ask "what does it all mean?" This chapter should go some way in answering that question.

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[85] D Snidal, 'The limits of hegemonic stability', 1985, *International Organization,* Vol 39(4), at 579.
[86] See Luhmann, *supra* note 42, at 169.
[87] See D'Amato, *supra* note 39, at 46.
[88] Ibid 47.

4.2 Constructivism as a theoretical foundation

As has been illustrated, the concession of power from dominant states causes the emergence of an even greater corpus of international law. This can be seen in the emergence of even more treaties, international organisations, agreements and soft law instruments.[89] This has become such a problem that the UN General Assembly's International Law Commission had a report, finalized by Koskenniemi, in order to make recommendations on the vast changes and on how to engage with them.[90] Dominant states submit themselves to this greater degree of regulation on order to gain (some) legitimacy in the global sphere. This illustrates the complicated relationship between power and law: whilst states sacrifice some power to law, the law itself becomes a source of power, in its attempts regulate the international order. This is not the same as considering law as a simple expression of power. Instead it usurps some apparent power from the state, but allows some of it to be expressed in other, more subtle, ways such as through the inside working of an organisation. According to Krisch, dominant states employ international organisations in order to regulate, pacify and stabilise.[91] Regulation of international politics through international law gives the dominant state greater predictability in the international environment that it finds itself in, making its future projects more effective. Second, the pacification of smaller states is achieved by giving them a greater voice on the international platform, and provides a simpler and less costly manner to ensure compliance with the wishes of the dominant state in exchange for compromises that the dominant state is willing to make. Lastly, international organisations provide for a more stable international environment by making the environment less vulnerable to later shifts in power. In other words even if a dominant state loses power, the international legal landscape will still more-or-less reflect its wishes.[92] An example of this can be seen in the United Nations Security Council. This body has had the effect of allowing members to keep a modicum of control over the legal landscape, despite a country like Russia having lost a significant amount of its material power in global politics.

Thus we can see that the relationship between power and law is a mutual one, and the two concepts define one another. This appears to be the most useful model for presenting this relationship in that it neither completely disregards power like classicism, nor does it disregard law like realism. Like rationalism, constructivism concedes the importance of both elements, but unlike rationalism, constructivism still leaves room for the notion of the utopian subject that will participate in the global order out of more than mere self-interest. Constructivism allows us to define ourselves through power relationships, and also allows for law to come into conflict with power. It is in this disruption that the ability to make ethical judgments can be introduced, and can hopefully provide us with a model that is more hopeful than the selfish jungles of realism or rationalism.

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[89] See Krisch, *supra* note 6, at 373.
[90] Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, UN International Law Commission report by Koskenniemi M.
[91] See Krisch, *supra* note 6, at 373.
[92] Ibid 374.

Constructivism presents an opportunity to deconstruct this interdependent behaviour. Since this link is not a fixed but a complex and changing one, the instability allows room for critique on the relationship. It becomes apparent that through international law, states have defined themselves as the holders of power, as much as international law allows these said states to be legitimate. In other words, the debate is already framed by certain presuppositions over whom and what the actors are.[93] It is also relevant for the matter of territorial disputes, in that the criticism can be charged that these state actions presume national and foreign identities. It creates a binary of "inside" and "outside", an "us" *versus* "them" that is at best only one way of organising political community, and at worst artificial and arbitrary.[94] This concept of binary logic and the internal/external dichotomy is also central to autopoietic theories of international law.

4.3 How states manifest power in international law

It is held that law is not a power-neutral field but still reflects power-relations between states. Whilst smaller states follow international norms through either coercion or for their own benefit, dominant states (that hold significant material power, such as the USA) cede a degree of power in order to seem legitimate in the eyes of the rest of the world.[95] If it is seen to have legitimacy, it can achieve its projects through cooperation rather than coercion, at less cost to itself. Thus the actions of dominant states carry internally- and externally-imposed normative expectations. Internally-imposed norms are those norms that a State (its population and its representatives) expects itself to abide by, whether it comes from its municipal legal system, or how its people feel that the State should behave toward other states. Externally imposed norms are generally those arising from international law, or in other words the duties that a state is expected to honour by other states and the global community at large. State interests are socially constructed, and in this way a constructivist international law not only defines dominant States, but also socialises them toward other states. As poststructuralism shows us, the concept of states and what their interest might be are not inherently apparent or obvious, but have come into being because the international sphere has been constructed in a manner that encourages certain behaviour.[96] It can thus be said that when a dominant power restrains itself through establishing an international organisation, it legitimises itself to and pacifies the rest of the world.[97]

This general position does have some variables that modify the typical actions of dominant states in these circumstances. One such variable is whether the dominant State is interested in either changing or maintaining the current status quo. If it sees its interest in changing the current order, it will more likely attempt legitimate

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[93] L Hansen 'Poststructuralism', in J Baylis, S Smith and P Owens (eds.) The globalization of world politics: an introduction to international relations (2011) 171.
[94] Ibid 174.
[95] K Raustiala and A Slaughter 'International law, international relations and compliance', in W Carlsnaes, T Risse, BA Simmons (eds.), The handbook of international relations (2002), 538.
[96] See Hansen, *supra* note 91, at 177.
[97] See Raustiala and Slaughter, *supra* note 93, at 540.

change through cooperation. Conversely if it is going "against the current" so to speak, it will be more willing to employ its power to affect law. Another variable is whether it sees its interests as long- or short-term.[98] States are more likely to participate in the concession of power to international organisations in the hope of achieving long-term goals, thereby sacrificing short-term gains in favour of international stability and later benefit to itself in the mid- or long-term.[99]

An example of how international law often merely reflects State behaviour rather than regulating it can be found in Britain's stance on neutral ships during the Second Anglo-Boer War. Following the discovery of diamonds in Kimberley in the Orange Free State in 1866 and subsequently the world's largest deposit of gold-bearing ore in Witwatersrand in the South African Republic in 1886, an overwhelming influx of especially British foreigners came to the sovereign republics in search of riches. Eventually these prospectors, in light of heavy taxes and trade restrictions, demanded suffrage in national elections. The Boer Republics realised that this would effectively hand over control of their countries to the British Empire. On 9 October 1899 the Transvaal Republic issued an ultimatum to the British crown to withdraw all British troops from the borders of the Republic and its ally, the Orange Free State. The British ignored the ultimatum, and the Boer republics declared war on 11 October 1899. Since the two Boer republics were landlocked, and because the British did not believe the Boers were dependent on neutral trade, they announced at the start of the war that they would not search or detain neutral ships.[100] After early setbacks in the war and reports that the Boers were indeed receiving supplies from the Portuguese port in Lourenco Marques, the British Navy began seizing German and US ships in the port. It ignored internal advice that this could violate customary international law and that there was not enough ground to believe that goods were destined for the Boers. It also employed a very broad definition of the continuous voyage doctrine.[101] Both the USA and Germany threatened retaliation, which caused Britain to cease in its attempt to legitimise its actions through maritime law. It is thus clear that Britain followed international law at the outset of the war when it saw it as being inconsequential, but then violating it when it had strategic interest to do so. Eventually when the threat of retaliation from the US and Germany outweighed this strategic advantage, it returned to compliance with the law.[102]

It seems then that power has a double code, that is a code of politics as well as a code of law. Power needs legal violence to operate. It is not simply political power being exercised, because it creates legal normative expectations and can be said to

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[98] See Krisch, *supra* note 6, at 375.
[99] Ibid.
[100] Ibid 49.
[101] Ibid 50; The doctrine of continuous voyage is a sea voyage that is considered a single voyage albeit interrupted for the shipment of war supplies. It means that despite the ship and goods being neutral and sailing between neutral ports, the seizing party could seize materials bound for its enemy belligerent. Thus despite the period of neutral possession the voyage was continuously geared towards trade with the enemy, and not a neutral trade shipment. See CB Elliot 'The doctrine of continuous voyages' in *The American journal of international law* (1907) Vol 1 No 1 65 in this regard.
[102] Ibid.

fully manifest in the legal sphere. Thus power is dispersed and externalised (or usurped, to return to earlier vocabulary) into law whilst at the same time being reinforced, split over two areas which remain individually inoperable.[103] This shows that power, rather than being fully part of the political, is in fact the leitmotif in both politics and law.

Thus we can see that over the last century scholarly opinion has moved from a utopian understanding and conception of international law that hoped to escape power, to a pessimistic understanding of law as power, and finally to the much more complex and nuanced interplay that is being explored in contemporary literature. Yes, international law reflects power, but it is also a somewhat independent system that can produce results variably shaded by considerations of power.

4.4 Power and law-making

International law is unique in that not only are states the primary subjects of it, but also its creators. This is borne from the doctrine of sovereign equality as articulated in Article 2(1) of the United Nations Charter. In reality however states differ greatly in power. Although these power differences are recognised in domestic system, for example in contract law, it has not been normatively reflected in international law. For example, states can enter into treaties under duress, as long as the use of force has not been applied. Therefore according to Byers it would be naïve not to consider the possible influence of power in the creation and functioning of international law.[104] This is also a factor in customary law where explicit agreement is not as important, but focus is placed on legally relevant behaviour which can in some cases then be construed as agreement. Although Byers makes no reference to autopoietic theories, this concept of legally relevant behaviour sits perfectly with the notion of law only seeing those actions which it deems of interest to law. He sees the creation of customary law as a kind of negotiation through actual deeds than the formal negotiations of treaties. These informal negotiating acts are to his mind even more susceptible to considerations of power.[105] He claims that powerful states have a broader range and frequency in their relevant activities, display greater interest in the development of international law, and are more likely to be specially affected.[106] Byers claims that powerful states have more resources, perhaps through diplomacy or being better able to publicise their legal opinions, and have a bigger pull in how international law develops. He cites the example of how the law of the sea has mainly been created by the great naval powers of the world.[107] Byers makes a compelling case that states use their power to develop and maintain particular international legal norms.[108]

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[103] See Philippopoulos-Mihalopoulos, *supra* note 36, at 130.

[104] See Byers, *supra* note 5, at 35.

[105] Ibid 37.
[106] Ibid 38.
[107] Ibid 39.
[108] Ibid 7.

As has been shown in the previous chapter, international relations theory has for a long time recognised that in certain cases power can lead to the creation of normative structures, which can affect State behaviour.[109] It is not disputed that international law controls and qualifies the application of power by states.[110] It is however imaginable that change in international power relations can change the face of the international legal regimes.[111] International legal scholarship has however maintained that international law dictates State behaviour that norms have a power in and of themselves that create a sense of obligation through their very existence. It is however not often questioned how power interacts with this obligation.[112]

When speaking of power and international law, the obligation under international legal norms cannot be ignored. As Young states:

> *Why is it that an actor acquires and feels some sense of obligation to conform its behaviour to the dictates or requirements of a regime or an institution? There are a number of reasons, and for the most part we have conflated them. For example, I think that there are differences in being obligated to something because of a moral reason, a normative reason and a legal reason.* [113]

Usually this is a question that international relations theorists have been more comfortable in dealing with than international law scholars.[114] Lawyers tend to shy away from studying their field beyond its norms as a social fact, and tend to believe that if non-legal considerations should become part of law, it would make the law a tool of politics.[115] Yet critical theorists have shown that this is already the case to a greater or smaller degree, and that it is better to be aware of these shortcomings than ignoring them. This has to be considered if the question of power and law is to be honestly engaged.[116] Byers acknowledges that without acknowledging this international lawyers are participating in an illusion of objective and determinable rules whilst ignoring the impossibility of objectivity and determinacy even existing.[117]

Thus international law as an autopoietic system does not only simply arise from secondary rules or even a *Grundnorm*, but also from social processes creating and recreating itself.[118] As lawyers it is not enough to simply look at the creation process of the rules, but also how they are determined. This leads us to power, and the conclusion that more powerful states do have a bigger influence on the creation of these rules.[119] Power turns into obligation through legal norms, and these obligatory

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[109] Ibid 8.
[110] Ibid 25.
[111] Ibid 29.
[112] Ibid 15.
[113] Ibid 31.
[114] Ibid 47.
[115] Ibid 48.
[116] Ibid 47.
[117] Ibid 49.
[118] Ibid 204.
[119] Ibid 205.

legal norms qualify subsequent applications of power through demanding compliance, thus reinforcing the initial power.[120] This gives international law a dual nature, not only protecting and promoting the interests of certain states, but on the other hand also regulating these very states.[121] This dichotomy not only makes a clear separation between international law and politics impossible, but it also makes it undesirable.

4.5 Conclusion

It is posited that despite the claim of legal positivists, international law is not depoliticised but is in fact a code to define and formalise political power.[122] Although the relationship between international law and power has been studied in international law and particularly international relations, there does not seem to have been many serious inquiries on the exact nature of power. In this chapter a sophisticated sociological theory of power has been applied to international law, displacing many of the assumptions that lawyers have made regarding the subject.

Through autopoietic theory we can separate international law and international politics as separate systems, but have power as an analytical category that straddles both. Thus power can be understood as something that influences the persuasiveness of communication between systems. A system can only observe that which it judges to be part of itself, and therefore it cannot be said that international law is the same as politics. It is a unique social system whose primary objective is to preserve itself, and make itself stronger and more complex. Thus far international law has been successful in making itself stronger and more influential (and there is little reason to believe that this trend will change), and political power will have to become increasingly persuasive in order to affect law. It is however true that international law will bend to political power in cases where this is in its interest.

It is important to remember the poststructuralist lesson that the international system is nothing other than a structure of the human mind and its ideas, and that it is always possible to theorise about alternative organisation.[123] Yet as long as states are the primary actors of international law and can influence how other states behave, state power will play a part in law that cannot be ignored.[124]

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[120] Ibid 206.
[121] Ibid 214.
[122] See Luhmann, *supra* note 42, at 170.
[123] See Byers, *supra* note 5, at 219.
[124] Ibid 220.

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