Affirmative Action and International Law

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The use of the conjunction 'and' rather than the preposition 'in' in the title of this essay is intended to convey both the descriptive limitations of the subject matter as well as the breadth of its potentialities. International law and its practitioners have devoted little attention to issues of affirmative action and currently dominant epistemic trends do not suggest any significant shift in focus occurring soon.[1] By contrast, municipal proponents of affirmative action in countries such as the United States, embattled as they are in defending an increasingly controversial policy, have tried to bolster their arguments by reference to international law (Park, 1987; Anaya, 1994; Stark, 1996). In some ways, this unequal form of exchange prefigures what is most problematic about the evolution of norms in international law and of theories of affirmative action. This essay is a preliminary effort at excavating the implicated dilemmas and at offering some tentative guideposts for future discussions.[2]

Parts I and II lay out the conceptual apparatuses for discussing affirmative action and international law. 'Equity' provides the conceptual philosophical thread that weaves through both. Parts III and IV explore the benefits and shortfalls of international affirmative action programs by examining prior efforts to apply affirmative action in the international economic arena, and by discussing the viability of such programs under current norms regarding the appropriate place of the individual, the state and organised interest groups in international law. Parts V and VI consider justifications for codifying the principle of affirmative action in international law. Within this context, a few brief comments are made about the importance of the emerging practice of enforcing 'customary international law' through adjudication in municipal courts.

Part I: Equity in International Law

Contemporary international law is in the midst of a pronounced transition in controlling paradigms. It is no longer simply the law of interstate relations (Sohn, 1982), and its scope extends well beyond the traditional spheres of peace-making and the maintenance of security. While we can catalogue the new arenas of involvement – the promotion and advancement of economic and social welfare, civil and political rights, individual rights, human rights, indigenous peoples' rights, the rights of women, self-determination, the environment, trade, investments and so on – the scope and content of these concepts, their relationship to one another and to prior norms, are highly contested and are very much in flux. Nonetheless, it is possible to identify features of the new order that distinguish it from the old.

The most distinctive dichotomy between emerging international law and the old order relates to the centrality of the state as the subject of the regime. Until quite recently, it was generally accepted that states were the sole subject of international law,[3] and that its primary function was to promote order among an otherwise 'anarchical' society of independent nation states. Even where individual or private interests were at stake, they were mediated through the state, which alone had the right and capacity to espouse claims arising from transnational interactions on behalf of its citizens or nationals, and to present them to international tribunals (ICJ, 1970).

A corollary of these doctrines was that all states were viewed as 'equals' before international law so that legal rights in the abstract did not depend on the territorial size, population, military or economic might of the particular state (Jones, 1991). This was enshrined in the legal doctrine of 'sovereignty,' which endowed each state with plenary control over matters within its borders to the exclusion of all other states. In time, this became the central pillar of international law, and as the United Nations Charter succinctly frames it, each state is required to respect the independence and territorial integrity of other states (Charter: 2(iv)), and not even the United Nations itself is authorised to invade this sacred precinct (Charter: 2(vii)).

Since states are not autarkies, the concept of equal sovereignty was an intellectual construct, but nonetheless a very powerful one. It delegitimised the use of force – and indeed most forms of coercion – except in self-defence. It also enshrined contractual arrangements among states as the dominant method of regulating interstate relations. Thus, states had only those duties that they voluntarily assumed and, at least within the territory of other states, those rights voluntarily granted to them by the sovereign state; an idea that came to be known as 'comity'.[4] But the tenuousness of these rights, dependent as they are on the whim and caprice of each sovereign, ran up against the dominant 20th century positivistic conception of law, and the desire to give them a firmer stance led to the doctrine of 'customary international law' or 'the general principles of law recognised by all civilised nations' (*The Paquete Habana*, 1900; Kennedy, 1987; ICJ Statute, Art 38).

During the past 30 years, much of this basic framework of international law has come under significant pressure. The framework was a product of the geopolitics of relations among European states in the 19th and first-half of the 20th centuries. The core concern of those states was the limitation or, failing that, the regulation of interstate warfare. While the United Nations Charter embodied the concerns and compromises flowing from a century and a half of internecine European wars, it did more. As indicated by the holding of the constitutive Charter conference in San Francisco and the location of the permanent secretariat and governing institutions of the Organisation in New York, the United States, in 1945, was the dominant actor on the international stage, and its concerns and interests merited special attention. Those interests were shaped by its own history. Thus, in addition to regional security (Charter: Art 51), economic and social justice (Charter: Arts 55-6) received special attention.

In the adoption of the Universal Declaration of Human Rights (1948), the international order seemed poised to incorporate social and economic justice as central themes of international law. Such change, however, was abruptly curtailed with the solidifying of the cold war through the formation of the competing regional military and political blocs of the NATO and Warsaw Pact nations, the Korean War, and the various self-defence pacts of the 1950s. Military security thus reasserted itself as the dominant concern of international law, and not even the decolonisation process changed its centrality. Indeed, the doctrines of 'self-determination' through 'wars of national liberation' and the associated debates over the characterisation of 'wars of aggression', and the permissibility of 'humanitarian intervention' further entrenched the classical doctrinal formulations of international law as the appropriate

norms for the regulation of relations among equal sovereigns. Assuring the 'territorial integrity and independence' of the decolonised political units of Africa and Asia became the battle cry of the new elites who inherited the newly decolonised states.

In two important senses, however, the emergence of decolonised African and Asian states as independent actors in the international arena dramatically shifted the operating paradigms in international law. First, the rhetorical challenges mounted by these states to the status quo exposed the empirical fallacies that underlay the intellectual construct of the 'sovereign equality' of states. The most obvious sense in which these states were not equal was in the economic realm. It was not simply that a wide gulf separated African, Asian and Latin American countries from West European and North American societies in such quantifiable yardsticks as gross domestic production, industrial output and per capita income, but that in practice – and notwithstanding the rhetoric of international law – these countries felt powerless to ameliorate their inferior conditions through the effective manipulation of their domestic resources. Invoking the traditional concept of 'national sovereignty', the Afro-Asian and Latin American countries sought to employ international law not as a constraint on external involvement in their domestic affairs, but affirmatively as the basis for the effective implementation within their own borders of powers that they already had – at least in theory (Jackson, 1991).

Second, in addition to the practical substantive change in the meaning of sovereignty that these 'nations of the South' thus sought to implement, was the method by which they went about trying to accomplish it. Rather than opting between authoritatively binding but unlikely to obtain treaties on the one hand or the moral suasion but legally irrelevant pronouncements of international conferences on the other, the 'Third World' states, invoking the democratic principle of majority rule, pushed their ideas through the General Assembly of the United Nations and contended that duly adopted resolutions and declarations of the Assembly itself constituted international law (Schachter, 1977: 6). Put another way, the Third World states exploited the amorphousness of the concept of 'customary international law' to establish 'legal rights' that otherwise were unattainable in a contract-driven regime of international law.

The contemporary flux in international law is, in many ways, a working-out of the shift in paradigms begun by developing countries. It is being spearheaded, however, by organised interest groups in the United States, in particular, and the West, generally. While these groups invoke the procedural stances and structures initiated by the developing countries, their substantive thrust is to enshrine as global the particular experiences and lessons of the currently dominant hegemonic West (Mutua, 1996).[5]

Within the United States and other Western countries, the successes of the civil rights movement (and in its wake those of other social groups notably women, the disabled and homosexuals) indicated the viability and importance of the involvement of the underprivileged in the affairs of the state through concerted challenges to established orthodoxies. For international lawyers, the necessity to mount such challenges was made evident by the fiasco of US intervention in Vietnam and the revelations of various Congressional investigatory committees in the aftermath of the Watergate crisis – notably the Church Committee – which brought to the forefront issues relating to unchecked governmental abuse of power in the conduct of foreign relations. At the same time, there was the evident failure in Africa, Asia and Latin America of experiments in law and development in which many US legal intellectuals had invested a good deal of their aspirations for the construction of a just and better world (Franck, 1972; Trubek, 1990). The pervasiveness of unconstitutional assumptions of power by the military, the use of emergency rule by otherwise democratically elected governments and the emergence of civilian authoritarian governments that trampled on civil and political rights in the name of promoting economic growth destroyed illusions about the creation of liberal democratic societies in much of the tropical belts of the world. The ruthlessness of many of these governments in suppressing opposition – from the systematic 'disappearances' of Central and South America, to the crude brutalities of such notorious African dictators as Idi Amin and Bookasa – called into question the moral rectitude of the principle of non-intervention.

Furthermore, the severe economic crises in the developing world during the 1980s, contrasted with the resilience of most Western economies to such externally induced shocks as the various oil and debt crises, undercut the habitual defence of the use of state terror as serving national welfare. And, then, there was the collapse of communism in

Eastern Europe. In the refutation of communism, East Europeans not only pointed to the economic underperformance of their societies, but they were equally scathing in the denunciation of the repression of the individual's liberties and of civic life that had become integral to the maintenance of the state under communist rule. Thus, with the fall of communism went the last vestiges of the defence of the state as the benevolent bulwark of collective socio-political interests.

The cumulative effect of these geopolitical changes is that US international law scholars and, increasingly, many in other parts of the world have returned to the social justice themes of the Universal Declaration of Human Rights that the cold war had rendered stillborn. Three tenets underpin this emerging normative conception of international law.

First and foremost is a 'rights orientation' to the statement of international legal principles. Under this approach, international law does not simply describe interstate relations, nor are treaties and conventions simply the voluntary undertakings of the signatories, binding if at all only on them. Rather, international law is argued to create specific and enforceable rights which may flow directly from treaties or conventions, be involuntarily imposed by the operation of customary international law, and which may extend in either case to third parties as beneficiaries.

Second, as a related matter, such rights may accrue to and be enforceable just as readily by the individual, private groups or other substate entities as by the nation state. In other words, under international law, standing to enforce rights is not limited to the nation state, but applies directly to the equitable beneficiary of the right.[6] Similarly, but as yet less well articulated, international legal obligations do not only flow from the commitments of states, but may also be embodied in the practice or generally accepted declarations of non-state actors, such as those of 'non-governmental' and 'grassroot' organisations.[7]

Third, enforceable legal rights demand an effective compliance mechanism that is backed up by the certainty of sanctions for non-compliance. Domestic courts are the most institutionalised of such mechanisms and international law should encourage their use as a means of enforcing international norms. To this end, traditional obstacles to 'transnational public litigation' such as limitations on extra-territorial jurisdiction, concerns over sovereign immunity, and the act of state doctrine should be modernised to make it easier to bring and maintain privately initiated transnational suits in domestic courts.

These tenets of the new legal order have been most elaborately framed in the context of international human rights. They nonetheless have obvious and potentially significant relevance for affirmative action claims. Before exploring that significance, however, it is helpful to discuss the concept of affirmative action and to flesh out those elements of the concept most apt to have international law ramifications.

Part II: Defining Affirmative Action

The concept of 'affirmative action' is a diffuse one, and the debate over its legitimacy highly contentious. The idea is very much a product of late 20th century jurisprudential politics and it is grounded in what is perhaps our era's most strident claim: that all persons ought to be treated alike (Rawls, 1971; Fishkin, 1983; Pojman and Westmoreland, 1997). It is not the purpose of this section to canvas that debate, nor to explore the moral or philosophical intricacies – let alone the pragmatic particularities – raised by the debate.[8] However, in order to facilitate the discussion in the next part of what contemporary international law has (or ought) to say about affirmative action, a few of the jurisprudential themes of the affirmative action debate are presented here.

The debate over affirmative action is integrally related to the issues of 'equality' and of 'equity in distribution'. While these ideas are often conflated in the catch-all terms of 'equality' or 'equal rights', it is important for the purposes of this essay to distinguish affirmative action (or, as the British and Canadians more colourfully and informatively term it 'positive discrimination') from the idea of 'non-discrimination'. The latter proposition operates entirely in the present and expresses a commitment to equal treatment of similarly situated persons within society. Non-discrimination, at least in theory, takes a neutral stance about the distributive consequences of the status quo as long as that status quo embodies formal legal equality. In the event that such equality is deemed not to exist, the non-discrimination principle challenges the status quo's criteria of distribution only to the extent of restoring formal equality of distributive procedures.

By contrast, affirmative action is about the legitimacy of a limited departure from established modes of selection in order to afford to

members of identified 'underrepresented' or 'disadvantaged' groups in a society preferential access to social, economic and political goods including employment, education, contractual opportunities and the ballot box.[9] The means by which such preferential access is afforded varies, ranging from the mildly procedural such as increased advertising, to the decreeing of fixed substantive outcomes; but in each case affirmative action goes beyond the use of established selection criteria to mandate, as a matter of law, the conferring on the members of the underrepresented group easier access to the good. Thus, while affirmative action typically does not challenge the legitimacy of the standard selection criteria, it nonetheless insists that the standard alone, however neutrally applied, is insufficient to meet the task of creating a just and equitable society; that is, a society that affords 'real' rather than 'formal' equality (Chibundu, 1993; Rosenfeld, 1989).[10]

Affirmative action starts out as a highly defensive theory of justice with three distinct branches: a moral past grounded in the need for rectification, a pragmatic present tethered to the dynamics of politics and prognostications about the future that lean heavily on conceptions of social utilitarianism.

In the first case, the argument for affirmative action is grounded in the belief that, but for past injustices, the status quo would reflect a better distribution to members of the disadvantaged groups. Affirmative action thus is simply corrective, restoring the group to the position it would have occupied but for the past injustice (Chandola, 1992). But rarely can a mathematically precise causal relationship be conclusively demonstrated between a past wrong and current under-representation (*City of Richmond v JA Croson*, 1989). Nonetheless, where causation between past wrongdoing and present under-representation can be shown with some degree of correlation, affirmative action may be seen as remedial, even though its beneficiaries are not identical to the victims of the past (*Bakke*, 1979; *United Steel Workers v Weber*, 1979; *Sheetmetal Workers v Equal Employment Opportunity Commission*, 1986; *United States v Paradise*, 1987).

Few affirmative action programs meet the test of proximity in causation and the cost of establishing such proximate cause may well exhaust the benefit that might arguably ensue.[11] Furthermore, in a legal system that treats claims to rights as individual rather than collective, it is often difficult to demonstrate the connection between past wrongdoing

and present entitlement. Affirmative action is thus also defended as necessary to guarantee access to important structural institutions or opportunities such as education, the ballot box or policing. In these situations, affirmative action serves to open-up the 'life chances' of individual members of the underrepresented group (Ely, 1974; Fishkin, 1983; Wilson, 1987) and to foreclose the perpetuation of a caste system (Fiss, 1976). The promotion of 'diversity' which is said to enrich society at large by opening up social interactions among members of groups that might not otherwise interact may be viewed as an elaboration on this prophylactic or structural goal of affirmative action (cf Carrington, 1992).

But there are probably as many critics of affirmative action as there are proponents. The need to depart from established selection criteria for only a subset of the community, critics argue, undercuts the normative objective of equal treatment for all (Reynolds, 1987; Eastland, 1996). Further, it devalues the achievements of the beneficiaries of affirmative action and it may impose actual costs on society as a whole since the selection criteria may be seen as embodying a social determination that only those who have satisfied them are competent or meritorious enough to perform the activity screened by the criteria, and any departure from the standard selection criteria necessarily means selecting the unqualified (cf *City of Richmond v Croson*, 1989; *Missouri v Jenkins*, 1995). Moreover, given the reality of scarcity – which is after all the raison d'etre for the use of selection criteria – offering opportunities to some persons notwithstanding their performance on established yardsticks means that others who have validly satisfied the criteria will nonetheless be denied what should otherwise be their just due – an infringement of the Aristotelian principle of equity. Affirmative action thus creates 'innocent victims' or 'reverse discrimination' (*City of Richmond v Croson*, 1989; *Missouri v Jenkins*, 1995; but cf Chang, 1991).

Affirmative action is thus related but distinguishable from non-discrimination. It raises both problems of formal equality as well as of substantive equity. It is both retrospective and prospective in its outlook and it addresses issues of group status as well as of individualised benefits and burdens.

A profound issue raised by this complex network of relationships is the extent to which affirmative action is (or should be) a 'right'. Most members of a society, for example, may agree that the severe under-

representation of women in law schools and the legal profession is detrimental to the social order and the quest for justice within the society, and that it is in society's interest to remove the under-representation. Depending on their evaluation of the reasons for the under-representation and the attendant costs of the ameliorative measures, they will differ on the efficacy and propriety of particular steps to correct the under-representation. Should the steps be taken voluntarily or should they be mandated? And ought society as a whole or only a segment of it bear the costs? Thus, while some will favour special advertisements targeted to women as being less intrusive than other departures from the established selection criteria, others will find it an inadequate means of correcting the disparity expeditiously. By contrast, while the latter group may press for specific allocation of places in a law school to women, the former group would consider the costs too high to be acceptable.

The societal legitimacy of these competing positions is strongly dictated by the extent to which the presence of women in law-school classrooms can be framed as a legal obligation of society or (what is the same thing) the specific legal right of women to consideration different from that for men in access to legal education or the legal profession. The position one takes on this last point very much depends on the socio-political space occupied by lawyers in the society; a space that might very well vary with time and geography.

In short, the transformation of aspirational objectives into legally binding undertakings enforceable by the beneficiary against the obligated party is a core problem of affirmative action. This concern is related to but distinguishable from our moral or political commitments to a just and more equitable society. The extent to which contemporary developments in international law, particularly its rights orientation, facilitate or hinder affirmative action as a legal right within the international community constitutes the focus of what follows.

Part III: International Affirmative Action

Ought the international community (and through it, international law) endorse and promote affirmative action? And if so, what ought to be the dimensions of the doctrine? The answers to these questions are not self-evident and, in this part, I delineate the parameters within which those answers must be fashioned.

As a threshold matter, the principle of non-discrimination (or the like treatment of similarly situated persons), as the *sine qua non* of justice is well embedded in international law. The norm of anti-discrimination – ie opposition to irrational biases – also underpins much of what is accepted as international law. In recent years, international law has gone out of its way to embrace measures such as the 'decade of development', the 'international year of the disabled' and the 'international year of the woman' that symbolically recognise and affirm the equal 'human dignity' and worth of the economic and socially disempowered or disadvantaged vis-à-vis those of the powerful. These ideas and measures are distinguishable, however, from the concept of affirmative action in international law.

Borrowing from the discussion in the previous part, affirmative action in international law refers to the existence in the international realm of an authoritative doctrine for regulating on preferential grounds the allocation and use of scarce resources so that the disadvantaged are made better off than they would be in the absence of such regulatory intervention. The resources may be procedural – such as voting rights and educational opportunities – or substantive – for example, employment opportunities, access to technology, terms of trade, finance and investments, and the distribution of the products of the global commons.[12]

Affirmative action is often the product of the confluence of two factors: (1) the existence of a persistent status of inequality along readily identifiable and not easily transcended social, cultural and/or economic cleavages (race/ethnicity, language, religion, gender and profound disability being the most obvious); and (2) effective articulation of a legal right to relief by representatives of the underprivileged group. Under the classical international law model, such a claim on the international community could be asserted only by the nation state. And so it was. More recently, so-called 'international non-governmental organisations' have become prominent advocates of particularised interests in the international arena and are, therefore, as likely as the nation state to undertake the special pleadings that are involved.

One of the most obvious cleavages in international society is that between wealthy and poor nations. This stratification has been expressed using several fault lines: civilised/backward; temperate/tropical; industrial/non-industrial; developed/less developed (or developing);

modernised/modernising; North/South; Western/non-western; people of European ancestry/people of colour. Whatever the etymology, the consequence of the divide is that a dispassionate observer can predict with a high degree of certainty, and on the basis of nationality or citizenship, the quality of the life that would be led by members of each group. Moreover, that correlation has been longstanding, and looks likely to remain into the indefinite future.

This was the backdrop against which, in 1964, the impoverished nations of the world, gathered under the umbrella of the United Nations Conference on Trade and Development (UNCTAD), sought to restructure the terms of global trade, in particular, and economic exchange, generally (Rothstein, 1979). For the next decade and-a-half, UNCTAD provided the intellectual and empirical grounding for affirmative action demands by developing countries in international trade.

Contending that the terms of international trade discriminated against the traditional exports of the poor, the 'group of 77' countries sought revisions in the law of international trade that affirmatively would promote their exports. They seem to have succeeded when, in 1971, the international community appeared to depart from a core principle of the international trade regime through the adoption of the Generalised System of Preferences (GSP). Under the program, individual countries were authorised, when dealing with developing countries, to depart from the 'most favoured nation (MFN)' principle.

MFN, traditionally considered one of the twin pillars of international trade law – the other being national treatment – ordinarily requires a contracting party to the General Agreement on Trade and Tariffs (the constitutive document of international trade law) to extend to all other contracting parties the most favourable term of trade in a product that it agrees to make generally available. Thus, MFN bars a GATT contracting party from discriminating among GATT members on the basis of national origin in the contracting party's treatment of the imports of identical products. The GSP principle, however, permits a wealthy GATT member to extend a more favourable term of trade to a developing country on a particular product than it would to wealthy GATT members.

Under the aegis of the GSP, members of the then European Economic Communities (now the European Union) negotiated a series of arrangements with a collective group of countries from Africa and the

Caribbean and the Pacific island countries ('the Lome Conventions') that set up not only a structure of preferential tariff treatment for trade between these groups of countries, but also provided a platform for wide-ranging discussions on the terms of international economic relations between the rich and the poor nations of the world. Those discussions led to far-reaching agreements extending well beyond preferential treatment of trade tariffs to encompass other forms of aid transfers (Matthews, 1992; Onyejekwe, 1995).[13]

The United States initially was lukewarm to GSP. It was said to undermine the idea of a level playing-field in international trade law that was the object of GATT and, to the extent that its purpose was to aid the poorer nations of the world, there were more direct and less disruptive means for doing so. In enacting GSP, then, the US made explicit that the preferences were the unilateral privileges of the wealthy to confer or withhold as the grantor sees fit. Congress thus conditioned the extension of the grant on a number of socio-political criteria, including a putative recipient's policies on 'workers' rights', 'human rights', and the democratisation process (Belanger, 1996), and the President was given virtually unreviewable discretion to determine beneficiary countries and products.

The United States, between 1974-1995, operated a GSP program that gave the exports of many developing countries preferential access to the US domestic market. Indeed, in the 1980s under the conservative Reagan administration, the US went beyond the GSP to create other preferential programs for the Caribbean islands and for Israel. These programs were dictated, however, more by political than economic considerations; a perhaps unavoidable component of any international affirmative action program.

In many ways, the internationally sponsored GSP mirrors and highlights the vicissitudes of domestic affirmative action programs. It was the product of an aggressive push by a group that had only recently gained its voice in the community. The developing countries, while arguing that the prevailing international trade law regime did not benefit them as readily as it did the wealthy industrialised nations, nonetheless did not question the basic premises of the regime – notably open and liberalised trade sustained by competitive reduction of tariffs and non-discrimination in the treatment of like products from similarly situated countries – but sought only modest modifications in the

application of these principles to their particular situations. They justified their claim by appeal to the inequities of their colonial past and their contemporary unequal status in a community that asserted equality as a blanket norm.

Nor was the timing of the adoption of GSP by the contracting parties to GATT accidental. By 1971, developing countries had demonstrated their capacity not only to engage in the rhetoric of framing demands within the accepted legal framework, but the power to exploit institutional weaknesses within that framework to advance their rhetoric. Thus, developing countries, using their numerical dominance in the United Nations General Assembly, pushed through resolutions (such as those on 'permanent sovereignty over natural resources' and charter of rights and duties of states') that simultaneously asserted the unilateral right of individual states to dispose of their resources as they see fit and the obligation of wealthy states to help the poor. The confrontational stance of many developing states as they formed resource cartels, successfully restructured (sometimes at sword point) natural resource concession arrangements, unilaterally decreed price increases in such strategic products as crude oil and non-ferrous metals, indicated the potentiality for much more radical challenges to the status quo than the demand for GSP.

The stratagem employed in the adoption of GSP is equally familiar to observers of domestic affirmative action programs. Initial pronouncements from GATT defended GSP as a temporary program that was simply an extension of the already pre-existing provisions of the law. Then in 1979, the program was made a permanent aspect of international trade law. Contemporaneous with this permanent institutionalisation of GSP was its declining significance. The benefit conferred by GSP to a beneficiary developing country grew out of the comparative difference in the MFN tariff rate and the duty-free treatment of the export. Yet, the effect of the Tokyo Round of negotiations was radically to reduce the MFN rates, thereby cutting into the value of the benefit. This reduction in tariff rates continued with even more vigour in the Uruguay round, so much so that few people consider differentials in tariff rates of much moment in evaluating trade flows today. Rather, the concentration in the Tokyo round on the significance for the international trading regime of such non-tariff-based discriminations as subsidies, preferential procurements by governments

and skewed technical standards, restated the marginal role of developing countries in the making of international trade law. Similarly, notwithstanding the increased participation of developing countries in the Uruguay Round negotiations (Preeg, 1995), the near-unanimous view is that for those developing countries most in need of preferential treatment, the effect of the shift in focus from the reduction of tariffs on manufactures to the regulation of trade in services, intellectual property and agriculture is to render their involvement marginal, if not to worsen their terms of trade (Gravelle and Whalley, 1997; Note, 1995; Lawrence, 1992).

Two other features of the implementation of the GSP anchor the issues raised by the program firmly within the sphere of contemporary debate over affirmative action. First, there is the question of who is truly benefited by the program; and second, there is the issue of the appropriate termination point, if any.

As indicated previously, the GSP is a voluntary program that leaves it up to the individual grantor to determine the terms of the program. In the United States, for example, the scope and administration of the program – from the identity of the country and product to be benefited, to the form of required documentation – was the product of highly competitive lobbying by diverse interest groups, most of which had domestic constituencies. Whether a particular product would be allowed under a GSP program depended as much on the relative political clout of the importers and domestic manufacturers as on the particular needs or impoverishment of the developing country exporter. Similarly, the hypertechnical rules of origin, national content and refabrication seemed geared as much to enrich US trade and customs lawyers as the developing country producer.

Not surprisingly, GSP like most affirmative action programs, appeared to benefit the strongest of the weak – those who arguably could have made it without the preference – rather than the genuinely hard-up. Thus, the so-called 'Asian Tigers' (Hong Kong, Taiwan, Singapore and South Korea) were the largest beneficiaries of both the US and the West European programs (Brown, 1994; Lester, 1995). The effect of this skew between the justifications for affirmative action (whether past colonial exploitation or present need) and actual beneficiaries (the strongest of the developing countries) undermined support for the GSP in two crucial quarters: domestic manufacturers in the developed

societies who argued that the GSP – at least as implemented – unduly favoured the well-off in the developing countries while unfairly punishing them and the trade intelligentsia whose moral and pragmatic arguments in favour of the GSP lost much of their vigour. The result was a compromise requiring that 'sunset' or 'graduation' provisions be made a part of the GSP. Countries thus were disentitled to participate in the GSP after a specified period or on having reached stated export targets or per capita income growth (Lunt, 1994; Lester, 1995).

Part IV: Affirmative Action and the New International Law

A conspicuous feature of the post-World War II period has been the varied programs of international assistance from the wealthy nations to the poor. Yet, whether these take the form of extensions of credit on concessional terms or of outright grants in cash or technical assistance, their essential characteristic is that of discretionary benevolence. Such generosity is not legally compelled and the beneficiaries possess no legally enforceable claim or 'right' to it. It is extended or withdrawn at the moral or political whim of the donor, subject only to whatever indirect influences the recipient can exert on the donor.[14]

At the other end of the spectrum, much of the structure of international relations is grounded on the allocation of rights and privileges solely on the basis of nationality. Typically, obtaining employment as a mid – or top – level member of staff in an international organisation often depends less on one's competence than on the passport carried. And yet, the resulting under- or over-representation in employment opportunities at international bureaucracies, properly viewed, does not present an issue of affirmative action; for these are the ordinarily accepted rules of the game, and no recipient or beneficiary of the largesse made available under these terms considers him/herself a beneficiary of affirmative action.

What then does the parlance of affirmative action represent in international law? I think the concept may be viewed from two perspectives.[15] First is the issue of identifying a coherent set of doctrines within the international community that confers or withdraws exemptions from status quo rules on the basis of criteria other than those typically accepted as standard yardsticks for obtaining the good in

question. Second, it may be that even in the absence of such a unitary body of international law, there are nonetheless uniform or standardised transnational principles or practices which seek to effectuate the same end and compliance with which is demanded by membership in the international community. The first perspective implicates joint or mutually enforceable responsibility, while the second may require no more than a normative statement of applicable principles.

As has already been shown, classical international law with its focus on states as equal and independent actors developed few enforceable principles that accorded preferential access to shared resources on the basis of disadvantage. Of course, individual states or groups of states were free to negotiate asymmetric relationships inter se and, as in the case of the GSP, some did. A few international institutions, notably the International Bank for Reconstruction and Development and its affiliate, the International Development Association, existed expressly for the purpose of assisting the temporarily disadvantaged, but the rules of their operation were sui generis, having been created specifically for the poor, rather than as departures from rules of general application.[16] The attention-grabbing effort of developing countries in the 1970s to reshape the international economic order, while appearing as a radical challenge to the status quo, did not fundamentally alter the applicable international legal principles. Indeed, the doctrines of the suggested new order were based explicitly on the classical concepts of the 'sovereign equality of states'.

One doctrine potentially available to proponents of affirmative action under classical international law jurisprudence was that of 'equity' in the sharing of those international resources that were considered 'the common heritage of mankind' (Schachter, 1977). But the equity doctrine was limited to the so-called 'res communes', access to and the exploitation of which depended on the possession of special skills and knowledge. Such skills and knowledge were scarce in the developing societies, while in the developed societies they resided primarily in the private domain. The use of the equity doctrine thus entailed limiting affirmative action to a very narrow sphere of operation: the res communes, notably the resources of the high seas (including the deep seabed), outer space (including the moon), international rivers and waterways, and perhaps the Antarctic. Even here, the contemplated sharing of physical resources was frequently bound up with and

ultimately undermined by arguments that asserted the inviolability of the proprietary and ownership rights of the wealthy nations and their nationals in such incorporeal resources as technological know-how and trade secrets without which the physical exploitation of the 'common heritage' resources could not take place. Crucial to the debate was the development of legally acceptable mechanisms for transferring these resources from private hands into the public domain (Epstein, 1997; Hendel, 1996; Hoffstadt, 1994; Rana, 1994).

The state-based jurisprudence of classical international law was a hindrance to the legal institutionalisation of affirmative action in yet another way. Most developing countries declined to view the idea of the 'sovereign equality of states' as simply an intellectual construct, and very few of them were willing to assume the humble posture that might have generated sympathy for their plight among the powerful. Juxtaposed to the private parties in the developed societies who exercised effective control over the resources to be redistributed, most developing country governments thus clothed in the power of sovereignty seemed anything but weak supplicants for redistribution. Rather, the threat of the use of such power – and its occasional actual use – to compel redistribution through such measures as expropriation and indiginisation undercut the moral force within many developed societies of claims for equity as the basis for reordering international law.

The end-product was that concerns about equity in the sharing of the world's resources which commanded some attention in the 1970s have been overtaken in the 1980s and 1990s by the lauding of the efficient regulatory functioning of the market mechanism, the effectiveness of private ordering of resource allocation and uses, and the deadweight costs and outright injuries of the unchecked use of governmental power. Taken with the increasingly asserted position that international law is less about interstate relations than it is about individual and human rights, less about the economic well being of the group than it is about the environmental health of the globe, less about the justification of moral claims rooted in past oppression than it is about current capacity to make effective use of available resources, the change in outlook poses significant issues for the place of affirmative action in a reconceived international law regime.

But the quest is not a hopeless one. As a preliminary matter, that affirmative action is a central concern of epistemic legal communities in

many contemporary Western countries gives it presumptive cachet in international law. More to the point, because of the close proximity of the issues raised by affirmative action programs to those implicated in the norm of non-discrimination, the current preoccupation with human rights in international law would seem to render affirmative action a natural object of concern in international law. And, indeed, affirmative action has featured significantly in the discussion of such contemporary international law issues as the rights of women and of indigenous peoples or cultural minorities (Andrews, P, 1997; Naqvi, 1996; Venter, 1995; Anaya, 1994; Mahoney, 1992; Cook, 1990).

Yet, the place of affirmative action in the emerging international legal order is far from being self-evident or secure. The emphasis on rights as the prerogative of individuals may militate as much against affirmative action programs as for them. If one accepts that affirmative action is grounded less on individual entitlement than it is on the desire to obliterate group hierarchies, its promotion is bound to meet with resistance from those who see the current role of international law as offering space for individual entrepreneurial activism and as a check on group identification (cf Venter, 1995; Naqvi, 1996). Such persons are bound to ask why anyone is entitled to differential treatment solely on account of membership in a group. In a world already too familiar with the horrors of group classifications on the basis of birthright, would not the imprimatur of the international community's acceptance of affirmative action be to endorse group-based discrimination? Such detractors are bound to point out that unrepresentative autocratic regimes are just as likely to employ affirmative action to entrench the interests of their narrow cadre of supporters as democratic governments are to employ it to ameliorate the poverty or under-representation of cultural or ethnic minorities in access to economic and political opportunities.

Furthermore, rarely can it be stated unambiguously that a particular group is deserving of the special solicitude inherent in the concept of affirmative action. In many societies, members of a cultural, ethnic or religious group may compose, numerically speaking, a 'minority group', but wield economic or political power disproportionate to their number. And, there is of course, the particular case of women. Is the resolution of the under-representation of women in economic and political activity a transient phenomenon that will be corrected with the seemingly

inexorable universalisation of 'Western values?' If so, it makes little sense to impose on contemporary society the distorting moral and economic costs of affirmative action to combat what might be a self-correcting problem.

But international law, like any legal regime, embodies more than logic or principled consistency. Its pragmatism assures that those with the power and resource to shape its direction will do so in a manner that reflects the distribution of usable power within the community. Thus, its current transitional character not only permits but perhaps requires searching examination of the appropriate balance for affirmative action; an inquiry that must be framed against the backdrop of contingent arguments and circumstances. In this environment, viable arguments for affirmative action as a component of evolving international legal doctrine can be made at three levels: the descriptive, the comparative and the normative.

While the norm of individualised treatment has made inroads into the contemporary conceptualisation of international human rights and economic laws, as a functional matter, international law remains predominantly about the regulation of interstate relations. An individual's nationality or citizenship continues to be the most important single factor in determining her treatment under international law. In 1997, no less than in 1947, the rights of starving children under international law depend as much on the sins and omissions of their national government; and the right of a banker to appointment as the President of the World Bank depends no less on the wealth and power of his country today than it did half a century ago. That it may no longer be fashionable in intellectual circles to explore the distribution and consequences of national hegemonic power does not mean that such power or lack of it has become irrelevant or even secondary in the making of international law. To the contrary, one of the clear consequences of the demise of a bipolar world has been the resurrection of the law-making powers of the Security Council of the United Nations Organisation; a power that is inherently political in nature and state-based in fact.

To the extent then that the validity of affirmative action programs under international law entails the privileging of membership in a national group over the atomistic individual as the unit for policy-making purposes, current practices in international law offer ample

support by way of precedent. More than that, the international community remains polarised along distinct cleavages of social and economic 'haves' and 'have-nots' with manifest consequences for stability and justice in the international order. For example, notwithstanding the much-touted globalisation of the international economy and society, the flows of migrants and refugees continue to be disproportionately unidirectional from the South to the North, and from the East to the West. It is middle-class westerners who adopt children from the East and South – not vice-versa – and the 'brain-drain' continues to afflict the South, not the North. We do not thus have an integrated international community where the distribution of rights and opportunities readily cut across group cleavages.[17]

As a practical matter, then, those anxious about the future and who are troubled by the perpetuation of a global caste system can point to the present as evidence of the past and of the likely future unless something is done to forestall it. Whether something ought to be done is, of course, a normative issue that will be addressed shortly. As a descriptive proposition, however, affirmative action programs are not precluded by current international legal doctrine, especially when that doctrine is viewed not only in terms of its rhetoric, but also the practice that it tolerates.

The above conclusion is bolstered by practice within national legal systems and the relationship of such practice to the generation of international legal doctrine. Some states clearly undertake affirmative action programs for the explicit purpose of redressing acknowledged past societal wrongdoing,[18] but equally common is the use of affirmative action as a means of bridging what might otherwise be destructive inequalities among the component parts of multinational, multiethnic or other highly heterogenous societies (Sowell, 1990). From the special disadvantaged areas and gender preference programs of the European Union, to the preferential Bumiputra and regional quota programs of Malaysia and Nigeria, respectively, affirmative action programs are used actively both to promote the interests of the underprivileged members of the society and to balance internal inequalities of economic and political power, with the hope of pre-empting social unrest (Chua, 1995; Groves and Broderick, 1985). Even in such countries as the United States where affirmative action is subject to strong scepticism, disagreements tend to

be less about the wisdom of affirmative action, per se, as about the legality and efficacy of particular programs (Finkelman, 1993).

This broad acceptance of affirmative action by national legal regimes has significance for the doctrine under international law. While the boundaries of international law remain ambiguous, the idea that such law can emanate from the domestic practices of states or from principles that are generally recognised by 'civilised states' as law is a well developed one (Danilenko, 1993; Kennedy, 1987; D'Amato, 1971; Statute of the International Court of Justice: s 38). The recognition of affirmative action as a principle of international law thus poses no unique conceptual difficulty within the present international legal order.

That international law can accommodate affirmative action programs is not the same thing as saying that it should. The normative judgment requires proponents of affirmative action to recognise candidly that the programs impose costs on society that will have to be justified on their own terms.[14] Further, the efficacy of programs in domestic settings is not, without more, a justification for according them the supranational legitimation inherent in their embodiment in international law.

Although each affirmative action program must be judged on its own terms – ie with regard to the special benefits and costs attendant to it – in general, three kinds of costs must be considered. First, the extent to which the classification that underpins the affirmative action program contravenes or threatens our normative conception of the rule of law as requiring that similarly situated persons be treated alike. Phrased differently, can the decision to depart from the formulaic norm of equality by conferring preferential treatment on members of a class be justified by the superior norm of avoiding the injustice of treating differently situated persons alike? The norm of equal treatment has a strong pull on our moral attachments and it should not be too readily abandoned. Establishing a past history of injustice with its attendant investigative costs and reminders of past faults is one price that society pays for the right to depart from the norm, but it need not be the only one.

A purely prospective approach to affirmative action entails its own costs including, for example, calling into question (if not the outright undermining of) the validity of tried and true selection criteria. Similarly, some classifications may be worth the cost of departure from the criteria that underpin maintenance of the status quo, while others

would not be. In a multiracial but religiously homogenous society, for example, it may be that the need to correct imbalances in the racial or ethnic distribution of economic or political power sanctions affirmative action programs, but that the correction of such imbalances along religious or disability lines imposes too high a cost on other cherished belief systems such as secularism or economic efficiency.

Thus, in the international setting, an affirmative action program that distinguishes among beneficiaries on the ground of whether they are 'indigenous peoples' may receive approbation because it arguably enhances the international legal principle of 'self-determination'; but in doing so, it may undercut the equally valid international legal principle of territorial sovereignty. To conclusively prefer the promotion or denigration of one or the other of these principles without regard to the particular circumstance of time and place would ultimately undercut the validity of affirmative action as an international legal concept. In proselytising for affirmative action, then, one needs to weigh the tradeoffs that are inherent when law intervenes to redefine or reshape the generally accepted method of doing things.

Second, minimising the social costs of affirmative action requires that there be a 'close fit' between the gains sought to be transferred to the identified beneficiary class and the measures adopted to obtain those gains. Adhering to the fit is essential because it provides the only meaningful way of defining and limiting the scope of an affirmative action program. Without such boundaries, an affirmative action program runs the risk either of being an open-ended but empty promise to the purported beneficiaries, or a draconian restructuring of the status quo with the attendant loss of support that would follow inevitably.

Consider, as an illustration, the often-heard demand by some African leaders for 'reparations' by the international community as a means of atoning for the destructive consequences to the continent of the slave trade and the exploitations of colonial rule. Even if one accepts the underlying factual descriptions and that they entail a morally and legally justifiable entitlement to compensation, the translation of the claim from rhetoric to reality would require the sort of intrusive fit that might force the claimants to agonise whether the benefit is worth the cost. If the claim for reparations were ever to be viable, it cannot take the form of the unsupervised physical transfer of material resources from the rest of the world to the continent. Africa's post-colonial experience of

gargantuan mismanagement and outright corruption makes such a claim unlikely to attract serious attention. A gradualist affirmative action program geared towards improving the life chances of the general population in Africa – for example, through the building and staffing of schools – is a good deal more likely to generate less derision and perhaps even sympathy from the non-Africans being asked to bear the cost. Such contributors will not only be entitled to assert as a legal right that the affirmative action program be tailored to redress the ills said to flow from the wrongs of the past, but they may be morally entitled to demand such a fit. They may thus rightfully ask: are the children of Africans who live along the coast more entitled to foreign assistance in the building of schools than those who live in the Sahel? If they are not, is the past the real justification for the transfers envisioned by proponents of reparations?

That a fit between past wrongs and present needs cannot be readily established argues not against affirmative action, but against the justification for it. A forward-looking justification – one that anchors Africa's claim for redistributive justice not on the sins of the past, but on the needs of the present and the aspirations for the future – would impose less strain on the vagaries of archaeological reconstruction, and would focus attention on where it properly belongs: the pragmatic merits of the present claims of Africans for the particularised preferential consideration of their needs by the international community.[20]

A third set of costs that are relevant for the normative structure of an affirmative action program relates to its impact on non-beneficiaries. An affirmative action program does not necessarily create a zero-sum relationship between beneficiaries and the other members of the community. It is fallacious, however, to contend or pretend that its redistributive consequences – even when in the long run beneficial for society as a whole – impose no socially cognisable costs on the legitimate expectations of some segments of the population. Whether or not one views non-beneficiaries as 'innocent victims', the immediate costs to them (and to society's overall harmony) of their relative disadvantaging under an affirmative action program should not be dismissed lightly. Those costs, however, can be significantly ameliorated by careful attention to the nature, scope and, above all, level of diffusion over the community as a whole of the affirmative action program. Thus, a gender-based affirmative action program in education which disperses its costs throughout society is more likely to be acceptable than a gender-based program in employment limited to a sub-specialty of a fully employed profession (cf *Wygant v Jackson Board of Education*, 1986). In other words, an affirmative action program ought to be justified not only by the morality of its objectives, but also by the manner in which it is implemented.

Part V: Justifying Affirmative Action in International Law

If justice and equity require that an affirmative action program surmount the various hurdles detailed above, is the task of enshrining it in international law worth the candle? After all, many of the objectives of an affirmative action program already can and are being achieved through the voluntary donating behaviour of institutions and member states of the international community, and the weak enforcement mechanisms of international law do not necessarily guarantee higher rates of participation. Two important reasons argue strongly in favour of making affirmative action an international legal doctrine: the institutional legitimation that would thus be conferred on the practice at the international level and, perhaps more consequentially, its enabling effects on domestic legal practices.

The 'age of rights' in which we are said to live (Henkin, 1991) is characterised by the dominance of two paradoxical but rationally related forms of argumentation: entitlement and interpretivism. In a world where we are told that all relationships are dynamic and highly contested, we find safety in the formal technocratic statement or restatement of those relationships as rules, even as we acknowledge their ephemerality and the contingent nature of the interactions they generate or to which they respond. In this framework, formalism is important not because it defines the scope of the entitlement that it declares to exist or purports to withhold – it does not – but because it creates the starting presumption of legitimacy which forms the backdrop against which all contestation of the entitlement is thus compelled to take place. Formalism's role is not as the ultimate arbiter of a right (or more accurately of the scope of a right), but as the gateway without which contestation over the right is unintelligible.

In other words, formalism is to the substance of a right (or entitlement) what text is to interpretation; that is, although postmodern interpretive approaches strain against the limitations of text (Chibundu, 1994), even the most freewheeling of interpretations cannot be understood but as a rebellion against the particularities of the specific text in question (Fish, 1989).

Codifying affirmative action as an international legal doctrine is useful then, not necessarily because it will automatically alter behaviour nor because it would insulate the idea from contestation and denial, but because without such codification the idea meaningfully may never be in play. For those who believe that the equities of entitlement demand that laws reflect societal commitment to the satisfaction of needs as well as to the compensation of ability, making affirmative action a constant component of the debate over legal rights must rank close to the top of the norms of the emerging international legal order. Here, the very mildly redistributive character of affirmative action as commonly understood may be its pragmatic and moral strength.

Consider, as an illustration of the role that affirmative action might play in the shaping of an international regime at its creation, the debates over the structure and rules of the emerging international environmental regime. Perhaps the most central feature of that debate is the responsibility of each state to regulate the output from sources within its control of the so-called 'greenhouse gases'.[1] From the international legal standpoint, while none of the participants disagrees with the overall goal of lowering the offensive emissions, nor over the centrality of the role of the state in achieving that goal, two highly contested issues pose starkly the need for and the role of affirmative action in the order being negotiated. The issues relate to the supplantation of state fiat by market mechanisms, and of the relationship of 'proportionality' in emissions to the granting of 'naked preferences' in the form of exempt or reduced state regulatory responsibility for controlling the emissions.

Although the ultimate determination of the structure of the environmental regime will be a product of the conventional international legal process of obtaining binding obligations through the assent of states, the incorporation of privately ordered economic arrangements as the primary method of obtaining compliance with a state's undertaking constitutes a significant departure from traditional international legal

norms. Yet, the transcending of national boundaries to make private actors direct participants in the international regulatory framework is quite in keeping with the emerging developments in international law discussed earlier in this essay. But the 'trading of emissions' (or more accurately, of the right to pollute the environment) has significant social and moral costs.

It is a truism (even if an objectionable one) that the life of a US or French citizen is worth a good deal more in the economic arena than that of an Indian citizen or a Sub-Saharan African. It would be remarkable if that difference (and what it of course entails, namely differences in capacities to produce, consume, save and transfer scarce resources) does not get reflected in the terms of the arrangements that private parties enter into. Put another way, we may expect either higher incidents of pollution occurring in those environments inhabited predominantly by the disadvantaged (a phenomenon in the United States referred to as 'environmental [in]justice': Torres, 1996), or the relative overpricing of the assets in those areas with the consequent misallocation of resources and the further impoverishment of the disadvantaged. In either case, to restore some kind of morally tenable equilibrium would entail governmental intervention.

The Hobson's dilemma thus presented to a developing country that is engaged faithfully in the representation of the interests of its disadvantaged citizens can be countered by an *ex ante* acceptance of affirmative action as a constitutive norm in the negotiating process. The efficacy of the market mechanism as a means of apportioning the global environmental costs of nationally driven economic activity in a multijurisdictional state-based regulatory climate is based on no more analytical coherence (or intellectual leap of faith) than that demanded by affirmative action as a long-run guarantor of peace and harmony flowing from distributive justice. The market orientation in such a setting lacks the legitimating force of history and of experience. Its acceptability is determined by the force of logic, the vigour of advocacy and, of course, the material power of its proponents. With the exception of this last condition (about which more will be said shortly), proponents of affirmative action have equally cogent bases for its institutionalisation in the international environmental regime.

The logic of affirmative action is found in the justice of proportionality as the measure of 'desert' and in the community's

responsibility to define and to meet the basic minimal welfare requirements of its members (Schachter, 1977). This logic legitimates the claim by developing countries for a context-based allocation of the right to pollute that takes account of, among other factors, their past history of minimal contribution to the pollution catastrophe, their future developmental needs, and the resources that they have at their disposal to meet their international regulatory obligations. The market, unaided by politics, is unlikely to account for these factors. However, with an initial allocation that reflects these concerns and a willingness to adjust the allocation periodically, market exchange and affirmative action can be made to work in tandem in the new international environmental regime.

While the recent developments in international law have sought to justify holding nation states accountable for how they treat their citizens by reference to the existence of an 'international community', it is notable that this notion of 'community' has been absent in the context of the international distribution of social and economic goods. Affirmative action as a principle of international law infuses content into the rhetoric and asks that the 'international community' be a participant – not simply a solomonic judge – in dealing with the actual inequities that pervade the current structure of the community.

One need not subscribe to the idea of an 'international law of development' (cf Paul, 1995) or of 'the right to development as a human right' (Weeramantry, 1997) in order to argue with cogency that the international legal order must affirmatively reflect in its application the disparities in access to and use of resources, particularly where these disparities directly cause harm to the global community in proportion to their use.[22] And, 'trickle-down' theories notwithstanding, an unmodified market orientation is incapable of equalising access and opportunities, and what experience we can go by suggests that it is more likely to exacerbate the inequalities of history than to rectify them.

This says little, of course, about the nature and scope of the appropriate affirmative action program. Like all legal rules, the structure of the particular program will embody and mirror the power relationships in society. That is not necessarily a bad thing. In any event, it is practically unavoidable. Unlike unadorned power, however, law provides more or less instantaneous legitimation of the structure and, as stated earlier, it influences directly the boundaries within which discussion takes place.

Part VI: International Law, Affirmative Action and Domestic Justice

One final argument for affirmative action in international law is worth taking notice of. The claim is that international law's recognition of affirmative action would facilitate its acceptance within national legal orders and, in doing so, further strengthen international law as an authoritative source of the 'rule of law'. There are four ways in which this may occur. First, in those countries such as the United States that already possess a well developed affirmative action jurisprudence – albeit an embattled one – the internationalisation of the principle provides succour to its proponents, permitting them to defend it not simply as a matter of 'domestic politics', but as a normative international project.[23] Second, for the many societies that engage in affirmative action but which lack the jurisprudential articulation for it, international law provides a starting basis for developing one. Third, in the many societies that are oblivious to the moral and practical consequences of the inequitable distribution of economic wealth and social opportunities, the internationalisation of affirmative action norms affords an alternative 'objective' structure for critiquing the stratifications of those societies, and for constructively urging their reordering. Finally, and perhaps most fundamentally, in an age in which domestic courts increasingly play a dominant role in the enforcement of international obligations, affirmative action programs which create specific entitlements are sufficiently similar to the regular business of courts so that they present a particularly attractive platform for enticing domestic courts into the business of enforcing international norms with few of the scruples that typically beset them when they are asked to enforce international security or international economic obligations.

The central tenet of all of these arguments is that a norm of international law – however it comes into being – can (and should) be made to function within domestic legal systems. This is a dominant theme of the emerging post-cold war international legal order – at least that branch of it spearheaded by academic lawyers in the United States (Koh, 1988; Trimble, 1990). At one level, the theme simply reflects the postmodern ethos which views with scepticism such bipolar divides as 'international' and 'internal' as no more than an artificial dichotomy whose privileging of one set of relationships rather than the other can just as easily (and with equal rationality, or lack of it) be reversed as

reinforced (Balkin, 1987; Chibundu, 1994). The argument is usually dressed up, however, in more substantive hegemonic garb, whose internal contradictions are often overlooked. To simplify the discussion that follows, I focus on the fourth set of assumptions: that the internationalisation of a legal principle such as affirmative action is worth undertaking because it thereby facilitates its universal enforcement by domestic courts. I think similar evaluations can be made with regard to the other three themes.

Until very recently, a persistent threat to the professionalisation of international law has been qualms about its authenticity as law. What distinguishes it from international politics or international relations? Contemporary efforts to individualise the rights said to flow from international law, and attempts to enforce these rights through domestic adjudication, are largely a robust response to those who view international law as 'soft law'. The successes and limitations of the approach are best indicated by the litigation of human rights claims in US courts (Stephens and Rattner, 1996).

There is little doubt that forcing domestic courts to grapple with the issues raised in the litigation of purportedly internationally created rights has enriched the intellectual development of those issues, and that the publicisation of the suits has garnered for the issues a much broader audience and awareness than would otherwise be the case (*The Economist*, 1997A). There is no evidence, however, that domestication has resulted in any greater pay-offs to alleged victims,[24] and the effect of these law suits on the wrongdoers is far from certain. Yet, because these law suits encourage the professionalisation of a cadre of specialists with distinct political agendas, we may expect growth in the use of domestic courts to enforce international legal obligations.

Assuming that affirmative action attains the status of an international legal doctrine, there is the question of how paradigmatic the international human rights experience in domestic adjudication would be for its vindication.[25] In terms of access to the courts and the power of the courts to hear and dispose of affirmative action cases (ie jurisdictional matters), international affirmative action cases are likely to raise the same sort of issues posed by the domestic litigation of international human rights claims. In the United States (as is probably the case in most other jurisdictions), this is predominantly (if not exclusively) a matter of the interpretation of domestic statutory

provisions rather than of internationally imposed limitations on the sovereign prerogative of domestic courts. We may expect then that domestic adjudication will likely reach the substantive questions posed by international affirmative action and that it would go some way in fleshing-out and popularising the legality and boundaries of claims arising under it: who is covered? What are the rights created? When are those rights infringed? What are the remedies available to correct violations of those rights?

In two significant ways, however, the domestic litigation of international human rights cases provides a flawed example for international affirmative action. First, human rights cases are usually brought for retrospective damages. It is the unusual situation where the claimant continues to remain subject to the alleged violation during the pendency of the suit. Monetary compensation is thus usually all that is demanded of the wrongdoer, and a judicial judgment to that effect pretty much extinguishes judicial involvement in the case.[26] Not infrequently, affirmative action cases will be about the present right of the litigant to have, hold or be returned to a position or status. Available relief in such situations might have to take the form of an injunction requiring the defendant to do or refrain from doing something, including that the claimant be hired, or that the defendant adopt a particular policy or enact a particular piece of legislation.[27] Regardless of one's view on the continuing relevance of the concept of sovereignty for the promotion and maintenance of international law and justice, the possibility of the issuance of such orders by the courts of one state to authorities in another state surely entails a revolutionary rethinking of international legal norms.

Secondly, unlike human rights cases, international affirmative action cases are as likely to involve domestic as foreign defendants. The dynamics of the litigation, therefore, will be quite different. For a variety of reasons, most human rights cases are brought against foreign defendants.[28] The focus of the adjudicating court is typically about balancing the plaintiff's interest in having her case heard against the systemic interests of the adjudicating tribunal (US Ct App DC, 1984). The interests of the foreign country, the propriety of whose officials, policies and practices are necessarily being adjudged, are almost never factored into the balance. This is hardly surprising. To the extent that the rule of law is simply another mechanism for assuring accountability

by rulers to the governed, the interests of the foreign defendant merit and receive no protection, unless those interests can somehow be equated and made a corollary part of those of the adjudicating system.

Because affirmative action claims lack the opprobrium traditionally associated with human rights cases,[9] it is likely that even those defendants who ground their affirmative action claims on international legal norms will bring them in the domestic courts of the defendant, rather than having to shop for a foreign forum. After all, a decision for the plaintiff is more likely to be enforced in such circumstances than if the action were brought in a foreign tribunal. The likely consequence is that, in affirmative action cases, an adjudicating court in pronouncing on the applicable international legal norms will consider in addition to the interests of the plaintiff and the adjudicating tribunal, those of the defendant and indeed the systemic interests of the international legal system in having the case tried before that tribunal.

Thus, in thinking about the precedent value of the domestic litigation of human rights cases for potential affirmative action claims, an observer is pushed in two opposing directions. At one level, international affirmative action cases by presenting the potential for injunctive relief offer up the possibility of even more radical revision of the international legal order than does the use of domestic tribunals in human rights cases. On the other hand, by infusing domestic adjudication with the need to consider the extent to which a defendant's systemic national interests are interwined with those of the plaintiff and the adjudicating tribunal, affirmative action cases may assure that their results reflect due consideration of the principle of accountability to the entire community without which the idea of the rule of law is simply another rhetorical slogan.

Conclusion

This is a period of transition in the generation and institutionalisation of international legal norms. Affirmative action, as a modest claim for departure from conventional selection criteria in the allocation of goods to the disadvantaged members or underrepresented interests in the global community, deserves attention as part of this process. Affirmative action will not alter radically the distribution of power and influence in the international community. It is no panacea for high infant mortality rates, poor education, hunger or internecine warfare; nor will it make

poor countries rich. What it can do is change the terms of bargaining at the margins. Many institutions and occupations may achieve the same outcome informally, but the adoption of affirmative action as an international legal norm has the potentiality of systemically embedding the idea, thereby shifting the burden in the particular case to those who oppose allocations that lessen disparities in the distribution of communal goods.

Notes

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1. As will be evident from the references in the text, Professor Oscar Schachter's 1977 monograph *Sharing the World's Resources* although technically not a book on 'affirmative action' is an exceptionally noteworthy contribution to the jurisprudence of many of the issues implicated in any discussion of the place of affirmative action in international law. See also Onyejekwe, 1995 (describing international trade law preferences extended by Western Europe and the United States to certain developing countries); Magraw, 1990 (arguing for 'international environmental norms' that take into account in appropriate circumstances the 'special capabilities and needs' of developing countries.
2. This essay does not address the positive incorporation of international law as part of the domestic law of a country (cf s 39(1) of the Constitution of the Republic of South Africa (1996)). In such situations, the incorporated law is effectively domesticised, and within the territory of the incorporating state may be viewed for interpretative and practical purposes as no different from any other municipal law of the territory.
3. Whether the wide acceptance of 'international law' in preference to 'the law of nations' is purely semantic, or whether it conveys substantive information about the nature (and more particularly the identity of the subjects) of international law has generated some interesting discussion among scholars of international law. See generally D'Amato, 1986. For the practical impact of this distinction on case law adjudication, see *Tel Oren v Libyan Arab Republic*, US App DC (1984).
4. Areas that were outside of the jurisdiction or sovereignty of any particular state, such as the 'high seas' and unappropriated lands (the so-called *terra nullius*), posed difficulties for this conception of international law.
5. These experiences and the lessons that they teach are not necessarily malevolent. In fact, they may sometimes be quite salutary. Thus, much of the push for international human rights can be traced quite directly to the effective struggle for equality and civil rights in the United States. Affirmative action claims are the direct offsprings of those movements.

6. Whether obligations may be enforced directly against private actors under international law (at least in the absence of a direct undertaking by the private actor such as that in an arbitration agreement) is at the outer boundaries of the evolving conception of the new international legal order. Two recent decisions by domestic courts of appeals in the United States suggest an affirmative answer to this question (*Siderman de Blake v Republic of Argentina*, 1992; *Kadic v Karadzic*, 1995).
7. The 'international non-governmental organisations' involved in the environmental, human rights and human development areas have sought to formalise this regime by holding parallel conferences to those organised by the member states of the United Nations. Particularly noteworthy are those held in conjunction with the United Nations Conference on the Environment and Development (Rio De Janeiro, 1992); The United Nations Human Rights Conference (Vienna, 1993); The International Conference on Population and Development (Cairo, 1994); the United Nations Fourth International Conference on Women (Beijing, 1995); and the World Summit on Social Development (Copenhagen, 1996). These parallel conferences which are increasingly being institutionalised and indeed integrated into the network of international governance are defended as promoting 'people centred' development.
8. These issues are dealt with elsewhere in this collection.
9. Much is often made of the distinction between 'equality of opportunities' and 'equality of outcomes'. An affirmative action program can function within either paradigm of equality. See generally, Ely, 1974; Rosenfeld, 1986.
10. Affirmative action is thus only mildly redistributive. It is not difficult to conceive of a much more radical conception of justice; one that challenges the selection criteria themselves and seeks fundamentally to restructure them in a manner that would not only aid the disadvantaged at the margins, but that would reorder the structure of privilege within the society (cf Sturm and Guinier, 1996). It is also possible to conceive of an affirmative program that further entrenches the privileges of the already privileged (Sniderman, 1996: 7). But perhaps this is so much a part of what law conventionally does that it cannot be readily separated out from the general understanding of legal norms and principles
11. The cost is not only financial, but the process of establishing 'wrongdoing' by members of the society may well strain the social fabric of the community.
12. Another way of thinking about this dichotomy is that the effect of the distribution of 'procedural resources' is felt relatively, while that of substantive resources is felt absolutely. Because procedural resources seemingly can be increased by fiat, it is therefore possible to disguise – at least in the short run – its redistributive consequences.
13. For example, 'Lome IV' states as its purpose promoting and expediting the 'economic cultural and social development' of the Afro-Caribbean and Pacific countries, and the European states undertake to fund, among other things, 'sustainable development', 'human rights' and 'food security'. See 'African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lome, Dec 15, 1989', reproduced at 29 ILM 783 (1990).
14. This is not to suggest that decisions about foreign aid from the wealthy to the poor are made arbitrarily, nor that the decision to withdraw such aid is arrived at capriciously. Indeed, only in a technical legal sense are these decisions voluntary or unilateral. As a practical matter, there has long been a general commitment (although rarely ever fully realised) by the wealthy nations represented in the Organisation of Economic Cooperation and Development to contribute as much as 1 per cent of their gross product as aid to developing countries. Moreover, virtually every wealthy country has institutionalised aid giving, and they all now have domestic constituencies of non-profit charitable organisations as well as profit-maximising exporters whose continued existence and prosperity depend no less on the funding of foreign assistance as do the wellbeing of the recipient countries. Thus, decisions relating to both financial and technical assistance from the wealthy to the poor are subject to most of the political forces that shape the domestic politics of the wealthy nation, as well as additional external pressures. Nonetheless, the dichotomy suggested in the text remains valid for, as Professor Oscar Schachter has pointed out in a slightly different context, there is an important difference between treating need as a matter of charity and linking it to the notion of justice. In the latter case, the satisfaction of needs is perceived as an entitlement to be embodied in norms and institutions, and the relationship between donor and recipient is seen in terms of mutual rights and responsibilities. On the other hand, when the provision of need is regarded as an act of charity, the relationship between the parties involved tends to be characterised by a sense of inequality, often with expectations of submissive behaviour on the part of the recipient (Schachter, 1977: 9).
15. This section is limited to exploring the operation of the concept of affirmative action within the domain of international law. The related but distinguishable issue of municipal legal regimes applying the concept by borrowing from or incorporating such international law into their domestic legal order is addressed in Part VI.
16. The operation of the various 'facilities' at the International Monetary Fund – for example, the 'Enhanced Stabilisation' and 'Global Environment' facilities may be viewed as instances of affirmative action because they constituted departures from otherwise quite standardised rules of general application to all member states of the organisation.
17. The starkness of these inequalities of life chances – and their likely consequences – were all-too-harshly (if, as *The Economist* succinctly put it, 'simply) and cruelly)) revealed in the recent controversy over the deliberate denial to pregnant women in Africa, the Caribbeans and South-East Asia of readily available medication for the treatment of the Acquired Immune Deficiency Syndrome on the ground that such denial was essential to determine scientifically the lowest affordable effective dose of such medication that these impoverished societies can make available to their citizens. While it was readily accepted that such experimentation would be unethical if carried out in the West, not only was its appropriateness for African societies vigorously defended by Western professionals, but some of these professionals found its criticism by an Editor of the renowned *New England Journal of Medicine* sufficiently impolitic that two of them resigned from the Board of the journal. See *The Economist*, 1997B; Altman, 1997; Day, 1997; French, 1997; Trafford, 1997.
18. The United States, Canada, South Africa, Australia and India appear to rely heavily on a history of past wrongs as justification for their affirmative action programs. See, for example, *Missouri v Jenkins*, 1995; Ford, 1996; Naqvi, 1996; Weinrib, 1996; Sniderman, 1996. The law on affirmative action

in the European Union appears to be unsettled. Cf ECJ 1996 (discussed in Moens, 1997) in which the European Court of Justice rejected the use of affirmative action to increase the numerical representation of women in the work-place on the ground that such affirmative action infringes the goal of 'equal opportunity'; and ECJ, 1997 (discussed in Andrews, EL, 1997), where the court approved an affirmative action program for women in public sector employment apparently on the ground that the latter program left room for 'case by case' judgment, while the former had been too rigid, and had applied 'automatically to all job seekers'. Although both opinions approve the remedial use of affirmative action, the opinions cannot be read consistently to limit affirmative action to the correction of past wrongs.

19. The idea of social cost is inherent in the definition of 'affirmative action' as a departure from 'established standards or practices'. It may be that such costs are compensated for by socio-political or economic benefits (which is usually the argument for 'diversity'), but the balance of such cost-benefit analysis will vary from one program to another.
20. This analysis is equally applicable to other underrepresented or disadvantaged groups that seek affirmative action programs. There is, of course, no assurance that a forward looking justification will be successful in procuring a uniformly popular affirmative action program. For one thing, it dispenses with the sometimes legally powerful and emotionally appealing shroud of victimhood.
21. Whatever may be the scientific controversy over the long-run global effects of these gases, the legal technocratic community has accepted their emission as a challenge to the global environment, and the discussion here is based on that determination.
22. On the idea of an 'international law of development', see Paul, 1995; Garcia-Amador, 1990; Snyder and Slinn, 1987; Bulajic, 1986. Affirmative action is clearly a less ambitious principle for restructuring the international order, although its reach may be more pervasive since its application can extend not only to issues of 'economic development', but to those of social empowerment (employment and education, for example), and, as demonstrated here, to the environment.
23. Cf Dudziak, 1988 (discussing the influence of the politics of international norms on US government reactions to domestic civil rights claims in the United States).
24. Many of the cases have resulted in the award of financial compensation – usually following a default judgment. There is no record that any of these judgments have yet been collected. One case – *Siderman de Blake v Republic of Argentina* (1992) – was ultimately resolved through a settlement (Golden, 1996), but it is unclear that the outcome would have been fundamentally different without the lawsuit; for the settlement was with a subsequent government that rejected and disassociated itself from the human rights abuses of the prior government.
25. As rhetorically enticing as it might be, this presentation is not intended to equate the 'right' to affirmative action with a 'human right'. The analysis here is by way of analogising processes, not the equation of underlying substantive rights.
26. It may of course be that a victorious claimant would need to resort to the courts to enforce the judgment, but that is usually a separate proceeding, almost always disposed of on procedural grounds, and rarely involving litigation of the underlying merits of the claim.
27. Cf, for example, *Missouri v Jenkins* (1990, 1995) (involving whether a US court could order a State to enact tax legislation in order to fund a judicially mandated school desegregation program).
28. Two notable exceptions in the United States are *Sale v Haitian Refugee Center* (1994), *and Sanchez Espinoza v Reagan* (1985). The outcomes in these cases, however, are fully consistent with the argument on systemic accountability advanced in the text.
29. This assertion is likely to be true only if affirmative action is not restricted to instances of proven past invidious discrimination, but is allowed for the purpose of correcting structural imbalances deemed unacceptable by the society, without regard to how they arose. This may be an argument for disfavoring a purely retrospective concept of affirmative action. Such 'pull and tug' may well explain the seeming inconsistencies of the decisions of the European Court of Justice with regard to affirmative action for women (cf Andrews, E, 1997).

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