The Natural Law Bridge Between Private Law and Public International Law

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The Natural Law Bridge Between
Private Law and Public International Law
Richard A. Epstein*

Abstract

One key similarity between natural law and international law is that they seek to obtain a stable social order without the intervention of any state authority capable of issuing and enforcing its commands to those subject to its rule. Among ordinary individuals in a state of nature that weakness tends to lead to a stripped-down libertarian regime that features simple rules of acquisition, contract, and protection. The system gains its relative stability from the brute fact that between rough equals the party in the defensive posture will win out, so that great disparities in power are needed to disrupt the basic equilibrium. Similar constraints apply to nations in international affairs. Only within sovereign states is it possible to seek (but not necessarily to obtain) gains from the use of taxation or eminent domain powers. The dangers implicit in the use of these powers caution against the adoption of strong centralized forces in international affairs, where the risks of misapplied power are likely to outweigh the possible gains from greater centralization of political power in international organizations.

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I. INTRODUCTION

The purpose of this short article is to examine, in broad strokes, the analytical connections between the system of private law that governs the relations between ordinary individuals and the system of international law that governs (at least in its classical formulation) the relationships between states. Section I examines the relationship between natural law principles and the command theory of law stemming from the nineteenth-century author John Austin. Section II explains why the enterprise is worth undertaking notwithstanding the obvious differences between domestic and international legal systems. Section III then applies that analysis to the key rules of private law dealing with individual autonomy, the acquisition of property, the transfer of labor and property by contract, and the protection of both through tort law. In so doing, it notes that the key ingredient that state power adds into the mix is its ability to coerce individuals though the imposition of its powers to incarcerate persons, take property, and tax ordinary people. Under a system of limited government these extra powers are exercised cautiously, ideally only in those cases where they expand overall welfare when measured by this one criterion: those individuals who are coerced in any instance are on average made better off by the systematic use of force as applied to all members of the community. Section IV then examines the question of whether it is wise to strengthen the overall structure of international law, and concludes that, in general, the risks of that expansion of state power exceeds any gains that it might produce.

II. NATURAL LAW AND THE COMMAND THEORY OF LAW

It is best to begin with a few fundamentals. In ordinary private law, the state will enforce any obligations that arise out of interactions between the two parties, so that it becomes possible to treat private law as law in its strongest sense, that is, as a set of commands to both ordinary citizens and public officials, which allow for the imposition of state sanctions in the event of noncompliance. International law in contrast cannot plausibly claim to operate under, or benefit from, any centralized system of social control. If, therefore, the command theory of law offers an accurate description of the subject, international law is not law per se, but solely a rarified part of international relations. The contrast between a
command-like system of private law and the diffuse systems of social control in international law seem to preclude learning anything about the one system of law from the study of the other.

In large measure, this realist effort to distance international law from national law does not offer any clear-cut solution to the larger question. The command theory of law, which was originally developed by John Austin in the Province of Jurisprudence Determined, has itself been subject to a number of criticisms, which, taken together, tend to soften the sharp distinction between private law within a domestic law system and international law. First, critics like H.L.A. Hart have often pointed out that it is a mistake to conflate the notion of law with the notion of a command, where the latter often connotes a specific order given by a superior to an inferior. That position has an evident appeal, for whatever the definitional confusions, a system of laws does not look much like orders that go down what is called “the chain of command” in military circles. In military settings, effective control requires a clear understanding of what is or is not required by each person at each link in the chain of command. Law in social settings differs in obvious ways from the physical laws of nature, but they do share at least this one characteristic: both of them are stated in a rule-like form that allows for their general application in particular cases. The modification of the Austinian theory to require rule-like statements does not, in and of itself, work to narrow the gulf between private domestic and public international law, because that body of international law has neither general commands nor specific orders but deploys a decentralized system that operates along wholly different principles.

Second, the Austinian notion of command, even when reformulated to cover general rules, applies most naturally to legislation and administrative orders. It does not have any obvious application to the accretion of customary practices, whose evolution over time, often by trial and error, seems the polar opposite to the chain of legislative command referred to above. But once this point is acknowledged, the gap between private and international law can narrow, especially in common law countries where judges are responsible for the articulation of most of the key rules of property, contract, tort, and restitution, especially in formative times before legislation takes hold as the dominant mode of law-making. These common law rules, of course, are backed by the force of


3 For further discussion of the concept of command and control, see David S. Albert and Richard E. Hayes, Understanding Command and Control (CCRP 2006).
the sovereign, so that the change of the locus of power within various national legal systems does not amount to a refutation of the extended Austinian notion of command. It only counts as an acknowledgment that the distribution of law-making power within any nation-state is decided by that state itself. That answer is, however, not decisive because in the civil law systems that explicitly rely on the natural law principles that Austin despised, commentators, not judges, were responsible for the articulation of the legal principles that judges used to resolve concrete disputes. Once again, however, the Austinian theory can be saved by noting that it is the acceptance of these norms by the judges, not their articulation by the commentators, that marks them as law.

Third, this last observation about the role of the commentators leads to the final objection to the command theory, which is that it sharply separates law and morals, so that the only test of a law is whether it was promulgated by or has the backing of a sovereign who exercises complete control over a legal system. It is just that hard-edged distinction that led to the conclusion that any command by the Nazis had to be regarded as law, no matter how odious its content, a position from which many German scholars recoiled in the aftermath of the Third Reich. The brutal Nazi experiment also influenced Lon L. Fuller, who, in his famous 1958 debate over the separation of law and morals with H.L.A. Hart, claimed that any true system of law necessarily has minimum substantive and procedural safeguards. Hart then seemed to accept this objection in his 1961 book, The Concept of Law, which acknowledges a place for the minimum content of natural law within positivist institutions, if only to accommodate the universal need for self-preservation. But even this point does not rehabilitate, in and of itself, public international law. It only shows that a command, suitably refined, is not the only notion needed to establish law. Unfortunately, standing alone, it does not deny a second precondition for law, namely, that even just commands must be backed by state force in order to count as a law. Some differences between public international and private domestic law systems thus survive.

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4 See, for example, Austin, Province of Jurisprudence Determined at xv (cited in note 1).

5 On the well noted conversion of the German scholar Gustav Radbruch from positivism to a natural law theory, see Heather Leawoods, Note, Gustav Radbruch: An Extraordinary Legal Philosopher, 2 Wash U J L & Pol 489, 495 (2000).


7 Hart, The Concept of Law at 189 (cited in note 1) ("The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."). For my criticism of the minimalist nature of Hart's concession, see Richard A. Epstein, The Not So Minimum Content of Natural Law, 25 Oxford J Legal Stud 219 (2005).
III. PRIVATE AND INTERNATIONAL LAW: INSTRUCTIVE COMPARISON OR DANGEROUS ANALOGY?

The evident differences between private and international invite the question whether private law systems can still offer an important normative guide to our thinking about public international law. I believe that they can.

A. Rules Between Equal Legal Entities

The key parallel between both systems is that they address the same structural problem: what rules should be put into place between two legal persons—be they human beings, corporations, or states—that operate on a plane of equality in all their dealings. That equality is surely true with respect to private law subjects, where neither party commands some special status or advantage over the other. It is equally true in international law, where the basic norm presupposes that all sovereign states should be regarded as equal, so that no sovereign can question the decisions that any other state makes with respect to its own citizens in its own territory. In Underhill v Hernandez, this parity among nations was stated forcefully by Chief Justice Melville Fuller on behalf of a unanimous court:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

At the very least, under this rule, the actions that a sovereign takes within its own borders are not subject to challenge in any other jurisdiction. It is the simplest version of a live-and-let-live rule that forces all nations to refrain from interference by force in the internal affairs of other nations. Nations, in the exercise of their own sovereignty, may refuse to deal with other nations. But they cannot use force to undo the actions of these other nations. It is in this thesis that the parallel between ordinary private law and international law becomes conceptually closer: both private and international law ask what rules should govern the relations between any two separate parties to a dispute when neither party enjoys the kind of preferred status that sovereign immunity normally confers on a nation when it deals with persons within its territory.

B. Utilitarian Self-Preservation

The connection between private and international law is strengthened in a second fashion. Although some positivists like Austin despised the principles of natural law, these principles turn out to be of enormous value in setting out the

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8 168 US 250 (1897).
9 Id at 252.
basic elements of both private law and international law. Two features of the
natural law require some special attention. The first of these is its covert
utilitarian origins. As Hart reminds us, natural law is not just an abstract and
often incomprehensible speculation on the true and the just. It is a set of rules
whose origin rests on the universal human need for self-preservation and
survival. This element of self-protection entered into the discourse about law
and society at a very early, stage in the evolution of legal thought. To give but
one illustration, Cicero puts the question of self-preservation front and center in
his explication of natural law when in De Officiis he writes:

Nature has endowed every species of living creature with the instinct of self-
preservation, of avoiding what seems likely to cause injury to life or limb,
and of procuring and providing everything needful for life—food, shelter,
and the like. A common property of all creatures is also the reproductive
instinct (the purpose of which is the propagation of the species) and also a
certain amount of concern for their offspring.

Cicero notes that the power of reason, which is denied to other creatures,
allows human beings to form the associations needed for our individual and
collective survival. The faculty of reason also allows individuals to understand
the imperative need to avoid force and to support cooperation, both within the
family and among strangers. This brief passage of Cicero offers, of course, no
sustained utilitarian account of how the various natural law principles mesh
together, although this simple question stands at the gateway to a major project
to which I have devoted much time over my legal career. But it is clear that
natural law in Roman thought is directed toward desirable human ends. It
should not be regarded as some mysterious, inevitable, or bedrock ontological
truth that neither calls for nor allows any further explanation.

Treating self-preservation as the sumnum bonum, or highest good, is also the
imperative that lies behind the normative structure of public international law.
Mutual aggression all too often leads to mutual destruction. Mutual cooperation
leads to mutual prosperity. Cooperation and peace beat war and mutual
destruction every time—if they can be achieved. That common objective does

10 See note 7 and accompanying text.
11 Id.
13 Id.
14 Id at 15.
15 See, for example, Richard A. Epstein, Skepticism and Freedom: A Modern Case for Classical Liberalism
18–27, 83 (Chicago 2003); Richard A. Epstein, The Utilitarian Foundations of Natural Law, 12 Harv J
16 For those approaches, see generally, for example, Ernest J. Weinrib, The Idea of Private Law
(Harvard 1995); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (Harvard
2009).
not, of course, rule out in practice the grim possibility that the survival of one nation or individual will, as historically it often has, come at the expense of another. Indeed, the melancholy truth is that individuals and nations all too often come to destructive ends. But the basic insight does explain the strong desire for peace. The survivors of earlier conflicts often want to renounce the use of force, except in self-defense, lest they perish in the next conflict. If they can achieve that goal, at the least, they obtain some short-run breathing room that allows for internal recuperation and growth. The most impassioned appeal to the natural law rhetoric, however, offers no ironclad guarantee of success. But what the hard-edged realist misses is that Cicero’s general natural law rhetoric, if widely imitated, might improve the odds of survival and advancement for all. Indeed, the charge against the realist is still graver: his rhetoric increases the risk of the social breakdown that everyone desperately needs to avoid.

C. Private Disputes Prior to the Formation of a State

The final reason for looking at natural law is conceptual: its approach to disputes between private individuals does not at any point depend on a *deus ex machina*; in other words, the existence of a state. Both historically and analytically, private relations within the extended family or tribe long antedated the creation of a state, which presupposes a fixed territory over which the sovereign enjoys a monopoly of force. Thus, under natural law theory, it is impermissible to posit that the state owns any property for the simple reason that there is no state in the first place. It is equally wrong in this context to think of public property as if it were owned by the state, when in a state of nature the more accurate description is *res commune*; in other words, property that is open to all, but which cannot be reduced to private ownership by *occupatio*, the only known natural mode of acquisition of things in the state of nature. Needless to say, early legal systems had serious difficulties in dealing with corporate or collective ownership, which limited the conceptual tools that they could bring to bear to organize their own internal constitutions.

17 For a defense of this position, see generally Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford 2010).

18 For the relevant distinctions, see Justinian, *The Institutes of Justinian* Book II, Title I, 50–64 (Cambridge 1994) (William Grapel, trans). The discussion starts with *res commune*, talks about those forms of property, such as government buildings and city walls that are indeed owned by the state, and then reverts to the discussion of *res nullius*—that is, those things that were of “of no one” in the state of nature, which may then be reduced to ownership by occupation. Id. Justinian’s scheme here is lifted from Gaius, *Institutes*, Book II, with the important difference of explicit treatment of *res commune*, which is not found in Gaius. See Gaius, *The Institutes of Gaius*, Book II, 65–150 (Oxford 1946) (Francis de Zulueta, trans).

19 For signs of this difficulty, see Gaius, *The Institutes* at 67 (cited in note 18). The Latin reads: “Quae publicae sunt nullius uidetur in bonis esse; ipsius enim universitatis esse creduntur. [sic] privatae sunt quae singularum hominum sunt.” Id at 66. The standard translation reads: “Public things are regarded as
Set against this background, the discussion of private law as an analog to public international law necessarily operates on two levels. The first offers a utilitarian norm that deals with individual self-preservation in the state of nature. The second addresses the more robust set of private institutional arrangements between individuals when their interpersonal relations can be governed by a well-functioning state. The regime of international law in place today looks a lot more like the relations between private individuals in a state of nature than it looks like those relationships as altered or strengthened by the state-enforced system of private law. In fact, the difference between them is quite precise. The natural law in the state of nature fits the contours of strong libertarian theory in which property rights are inviolate and forced exchanges, either by eminent domain, regulation, or taxation, are off-limits. The legal rules that dominate this setting deal with the preservation of individual autonomy; the acquisition of private property through first possession, except of course in cases of inherently public property; the rules of transfer of property by contract; and the rules for protecting property from external aggression by the use of tort.\footnote{Quite simply, the feeble enforcement mechanisms available to individuals in the state of nature cannot support the complex institutions needed to go beyond this libertarian quartet. The same limitation applies to international relations. The central challenge of international law is whether it seeks to develop the institutions that allow it to increase its operations by one more level, which would require it to have the same neutral enforcement mechanism found in the private law. It would be easy to support that approach if the expansion of government power were limited to overcoming the deficiencies of the natural law rules. But powerful institutions often go far beyond the logic that calls them into existence. That proposition is true with the creation of the state as with anything else. But in this context, the gains from going that second step are large for individuals without the protection of the state, but far smaller for states that can live in}

belonging to no individual, but as being the property of the corporate body. Private things are those belonging to individuals.\" Id at 67. Even to a determined non-Latinist, this translation does not capture the difficulty that this issue presented to the Romans. \"In bonis\" refers to the notion that certain goods are located \"in the goods\" of a given person, which does not mean that they are owned by him. See id at 75–77. The private law origin is with goods that have been transferred without the requisite formalities so that they are within the goods of the owner who does not yet own them. Clearly public structures, like buildings and city walls, do not have that structure. \textit{Universitas} speaks of universal ownership, that is, by all, but does not make reference to any corporate body. The institutions of the sovereign meshed only with difficulty with the catalogue of private law interest. That is equally true in early English law, where the differences between property and sovereign are hard to explicate within the early feudal system.

For the development of these rules, which I have termed the \"libertarian quartet,\" see Richard A. Epstein, Book Review: \textit{The Libertarian Quartet}, Reason 61 (Jan 1999), reviewing Randy E. Burnett, \textit{The Structure of Liberty: Justice and the Rule of Law} (Clarendon 1998); Richard A. Epstein, \textit{Simple Rules for a Complex World} (Harvard 1995).
some uneasy harmony with each other. My own sense is that the gains from strengthening international law are fraught with risk, so that we are on balance better off with the current uneasy situation than we would be with any grander synthesis that could easily take the question one step too far.

IV. THE NATURAL LAW BUILDING BLOCKS IN PRIVATE AND INTERNATIONAL LAW: THEIR USES AND LIMITATIONS

This Section turns to a discussion of the four major common law rules that emerge from the natural law theory.

A. Private Versus Common Property


The law of property has two parts, one that deals with common property and another that deals with property that can, in the state of nature, be reduced to private ownership through occupation or capture. All too often in the discussion of property, the emphasis is placed exclusively on the rules that deal with the acquisition, protection, and transfer of private property. That is a perfectly legitimate inquiry, to say the least, but the antecedent question in all cases is whether property should be private, open to all, or some mixture of public and private uses, as is typically the case with water, which simultaneously has both instream (recreation, transportation) and consumptive (drinking, fishing, irrigation) uses.\(^21\)

In cases where the natural law is operative, the historical response is identical under both domestic and international law. The logic in the private law system is that those things that function as network elements may not be reduced to private ownership, lest they destroy the connectivity that allows individuals who own private property for their homes, farms, and businesses to trade and cooperate with each other, which is why rights to access to public highways and rivers are a vital, if somewhat neglected, element in the bundle of rights. Hence the classical system always found that rivers and beachfront property were held common, in that no individual could take exclusive possession of resources that were by design open to use by all. The same could be said of customary trails first carved out by animals, which later become either footpaths or roads, depending on the intensity of their use. The key element in this system is that the entitlements in question were all phrased in ways that restricted one individual from denying access to another. The classical system also limited the amounts of water that individuals could withdraw from rivers, under what was called the natural flow doctrine, so as to leave sufficient water to

maintain the (what else?) natural flow, while assuring a like supply for other riparians.22

So described, the key feature of this system is that it requires no public infrastructure or public finance. In that form, it can persist quite well in the state of nature, where no individual or institution is in place with the power to tax either users or the public at large for the provision of any public goods. But once the intensity of traffic on these rivers and other bodies of waters increases, successful governance requires some internal improvements. For that task, the rules governing *res commune* fall short, and some provision has to be made for collection of revenues, whether by tolls or from the central treasury. That money in turn has to be spent on improvements that some centralized institution must design and implement. The entire process then has to invite the question, which forms an important if misguided chapter in American constitutional law,23 whether the new investments should be allowed to abridge customary rights on matters of access and use, and, if so, whether the sacrifice of these rights should be compensated. It is not possible to address these questions here. But it is vital to point out that it would be impossible for any system of private rights in the state of nature to gravitate in this direction.

In line with the central thesis, the pared-down system of private rights for the state of nature turns out to offer the closer parallels to the system of international rights. Again, the key element is to find ways to stop people from severing the connections between parties. It was never to find ways, apart from treaties, to assess every nation some fee to arrange for improvements on waterways of various sorts that were held in common. Efforts to achieve this first goal of free passage, however, were of major importance, but not easy to come by. Indeed, one of the great contributions of the Treaty of Westphalia was its long-overdue contribution to that common end. Much can be gleaned from its title, “Treaty of Westphalia: Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies,”24 whose key provision deals with “the antient Security, Jurisdiction and Custom,” which “shall be re-


23 The general tendency in American eminent domain law is to assume that the customary uses all must retreat before some “paramount” navigation easement. For cases trending in that direction, see *Scranton v Wheeler*, 179 US 141 (1900); *US v Chandler-Dubber Co*, 229 US 53 (1912); *US v Willow River Co*, 324 US 499 (1944). The notable exception to this rule is *US v Cress*, 243 US 316 (1916). For my defense of the latter, see Epstein, *Playing by Different Rules*, in Cole and Ostrom, eds, *Property in Land* at 317, 342–51 (cited in note 22).

establish’d and inviolably maintain’d in the Provinces, Ports and Rivers.”

That treaty was much needed because of the easy ability of every local magnate to choke off a river, thereby disrupting river traffic with a series of tollgates that utterly eviscerated its value. In that same period, but only after some controversy, the long debate between Mare clausum and Mare liberum—the closed sea versus the free sea—was resolved in favor of the latter, with Hugo Grotius as its most notable champion. Closed-sea status was always accepted with respect to bodies of waters that were located within the territory of a single nation. That decision is correct: so long as only one party has access to the body of water, there is no reason to treat it differently from land. But that condition never held for the oceans and major seas that abutted many nations. These were held to be open to all, so that the border nations could not by their combined action exclude others that wished to use the high seas.

The overwhelming social gains from free trade over water essentially led to the modern equilibrium of open waters, which was more easily achieved with oceans than it could ever be with rivers. The delicate cases involve travel in narrow straits, where the ultimate rule called for a regime of “innocent passage,” whereby the physical bottleneck could not be obstructed by any nation on either side of the strait. But the differences between rivers and oceans become more apparent when the discussion turns from access to upkeep. Rivers need maintenance and repair, which requires expenditures that must be raised from some source. Oceans tend to maintain themselves. Oceans are large enough that

25 Id at Art LXIX, 339. The treaty itself explicitly prohibits tolls in two sections. See id at Arts LXIX, LXXXIX, 339, 344–45.


28 Id at 7.

29 For the complex provisions today, see UN Convention on the Law of the Sea, Part II, Straits Used for International Navigation (Dec 10, 1982), 1833 UN Treaty Ser 3, 410 (1994). The rules here deal with such matters as access and rights of way. They contain no affirmative duties of support.
the rules of the road, which work to everyone’s advantage, need not be tailored, as with rivers, to account for distinctive obstacles in particular settings. It is very difficult for any single nation to maintain dominance over the sea from its shore presence. The nations with the largest navies were often the most interested in using the highways for trade. These rules, of course, were suspended between two nations at war with each other, but even here the general rule was to preserve the open shipping for neutrals within the larger framework. The stability of this system is by no means guaranteed, but it is worth noting that basic dichotomy mentioned above holds true. The only rules between ordinary persons that carry over to the international arena are those that address access and rules of the road. The kinds of improvements that depend on taxation and control are not part of that body of law, unless and until they are implemented by treaty.

2. Privatization by occupation.

The second major point of comparison deals with the acquisition of private property in a state of nature. In the law of property, for example, the general rule for acquisition follows the rule that prior in time is higher in right, so that the earlier person to occupy some land has superior title to those who follow him. Thus even if one wrongdoer dispossesses a second wrongdoer from the land, the prior wrongdoer is entitled to recover it from the second one. Under this theory, the party in first possession has claims that exceed everyone else’s. But it is absolutely critical to maintain some hierarchical order even if the first party has vanished from the scene. A rule that establishes a hierarchy of possession provides a clear decision rule for any and all cases.

The most important application of this rule, of course, involves first possession, whereby the party who first occupies land, seizes an animal, or grasps a chattel, takes ownership good against the rest of the world. This is classified as rule of natural law.30 That rule is found in virtually all private legal systems. Its great object is to allow one individual to engage in unilateral conduct that necessarily forecloses the access of other individuals to that discrete resource. But the offsetting advantages of the rule are that it does give each resource a single determinate owner who is in a position to deal with that resource in ways that permit its useful use, development or consumption. One person, moreover, is not likely to obtain ownership of any significant portion of total available resources owing to the competition from others. The desire in many cases is to limit the scope of the claim in order to create defensible boundaries against other persons, and indeed against wild animals that could pose a threat to safety and agriculture. In a thinly populated and isolated environment, having neighbors of a like mind is, moreover, more of an asset than a liability. In these settings cooperation is far more likely than defection,

30 See, for example, Gaius, The Institutes at 67 (cited in note 18).
for whatever the short-term gains of that strategy, it is in most instances more than offset by the greater vulnerability. In contrast, developing networks in which closely related individuals provide mutual aid and assistance helps solidify the position of all.

Frequently, this first possession rule is attacked for its excessive individualism, but that indictment is overstated for at least four reasons. First, nothing prevents two or more individuals to lay claim jointly to a single asset, at which point contract rules can divide the object acquired. Second, even single individuals are likely to be parts of larger family structures, such that what they acquire can be shared with others in accordance with a set of status-like obligations. Third, the acquisition of property by one person creates new opportunities for other individuals to enter into contracts with that person, whereby they can either work on the land or purchase it outright. Fourth, this decentralized system avoids the risk of paralysis that would arise if all individuals in a community, let alone all individuals everywhere, had to give consent for any given person to acquire a particular asset, as was well understood by John Locke. Excessive individualism expresses itself, if anything, more clearly in holdout situations than it does in cases of occupation.

Moreover, within the natural law system, the sole duty that this mode of acquisition imposes upon others is that of forbearance. In practice, others will have all sorts of reasons to breach even that limited duty, but the widespread and public legitimation of the rule surely counts as a solid first move in that direction. The impetus that reinforces the descriptive claim that defense of land once acquired is in most cases easier to maintain than is an offense to acquire property already occupied by others. It follows, therefore, that if parties are of roughly equal strength, one highly likely outcome is that the one party will not use force in an effort to overwhelm the position of the second. Indeed, if two or more persons have positions of roughly equal strength, each may take that defensive posture. The situation is still more complex in multi-party situations. Here, caution is further encouraged, as all parties know that mounting a frontal assault could easily be fatal to the winning party, for if its energy is sapped it becomes vulnerable to attacks by third persons who had stood to one side during the initial conflict. The initial parties know what awaits them in any


32 John Locke, The Second Treatise of Government 18 (Liberal Arts 1952) (Thomas P. Peardon, ed) (“And will anyone say, he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.”).
subsequent confrontation. In line with these expectations, the first (or prior) possession rule generates a convenient balance of power that allows the creation of stable relationships even in the absence of a common sovereign wielding undisputed enforcement powers.

Nations do not act as individuals. But the principles for acquisition of territory follow those of the private law. Prior in time is higher in right. First in time gives the highest right of all. Certainly, sovereign control over territory is not identical to a claim of state ownership of all land. Just this regime could exist with respect to national territories. To be sure, the acquisition of territory is rarely undertaken by individuals. In the most stylized sense it is done by tribes or clans that make, with the advent of agriculture, the decision to settle down in a given location. Just as in the private law, these groups claim possession on behalf of those with whom they are bound by ties of family or contract. The costs of clearing land can be recovered only over the long haul, which means that the state property institutions in land have to switch from the usufruct that gives, as its name suggests, only rights of use and fruits, to something more akin to indefinite outright ownership. At this point, the boundary lines will again be chosen with the eye toward defense, so that rivers and mountains may well form essential boundary elements reducing the costs of fortification and defense. It is no accident that many fortified towns are built on high grounds with secure sources of water, located near arable lands that can be tilled in close proximity to defensible fortifications. So long as the rule holds that the offensive must be far stronger than the defense, a stable political equilibrium can be strengthened by the overt insistence upon the priority of possession as part of natural law, just as that rule operates at the individual or family level. One reason, therefore, to be leery of, if not hostile to, the hyper-realist accounts of law is that this rhetoric promotes the very rule-breaking that could bring the structure down, whether we speak of individual neighbors or nearby nations. Talk, in my view, matters, which is an essential driver of the strong “moral” reaction to accounts of naked self-interest. Or, to put the point otherwise, the strict, Hobbesian view of individual self-interest would make the emergence of every civil society highly unlikely. The more accurate account of human nature draws on the Humean vision of self-interested individuals with “confin’d generosity.”

There is no starry-eyed optimism in that account, which does, however, offer the following advantages. At a descriptive level, it explains why some, but not all, efforts at community- or nation-building can succeed. At a normative level, the ability to keep those beliefs alive increases the likelihood of their occurrence. Social capital is hard to come by. It is a tragic rhetorical error to knock down the human

33 David Hume, A Treatise of Human Nature 495, Book III, Pt III, § 1 (Oxford 1964) (L.A. Selby-Bigge, ed) ("'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin.").
The Natural Law Bridge Between Private Law and Public International Law

sentiments most needed to build peaceful communities on both the domestic and international level.

The basic rules on prior possession are not without drawbacks that apply with equal force in both domestic and international settings: the common pool problem.\textsuperscript{34} The taking of land and inanimate objects normally does not dissipate the value of the land in question. Animals and fish do give rise to the common pool problem whereby overconsumption by a large number of individuals, acting separately, does reduce, perhaps below replacement level, the stock available for capture in future periods. Anyone who captures a wild animal not only takes some portion of today’s stock, but also reduces the stock available for breeding to produce the next generation. The individual who takes the good gets its full use value, but only suffers a small fractional bit of the overall loss. Each individual actor has an incentive to overconsume, which creates the perfect prisoner’s dilemma. It is well understood that all these parties would be better off if the level of consumption could be reduced below that which takes place when the first possession rule is in effect. The coordination problems to reach that common solution are legion, for the larger the number of the parties, the more likely it is that noncooperators can shipwreck the overall pool. It is normally fruitless to ask individuals to adopt inefficient modes of capture, as with whales, in order to limit the rate of depletion of the common pool. But it is, within domestic societies, possible to create enforceable regimes that limit the rate of capture of fish, game, and birds, with any eye to long-term preservation. The optimal design of these arrangements can vary in major features, but the overriding insight is that no set of private contracts can bring them about. At that point, more extensive state-based institutions are necessary for enforcement. Here, these institutions should be subject to a variety of side constraints to insure that favoritism does not affect what access each potential claimant has to the common pool.

The prisoner’s dilemma problem replicates itself at the international level. Many forms of wildlife live outside the boundaries of given nations or cross over national borders and public waters as part of their orderly pattern of migration. The resulting coordination problem remains at least as severe on the international level as within national boundary lines, in settings where no state enjoys coercive power. By default, therefore, multilateral treaties become the only device to attack the common pool problem, and these can be effectively neutralized by a single nation that refuses to join in with the common solution. Since what is desired is a catch allocation system, the effort to achieve that treaty control is certainly a worthwhile undertaking. But in practice, international allocation treaties are always elusive, as exemplified by the decisions of Japan.

\textsuperscript{34} See generally Richard James Sweeney, Robert D. Tollison, and Thomas D. Willett, \textit{Market Failure, the Common-Pool Problem, and Ocean Resource Exploitation}, 17 J L & Econ 179 (1974).
and Russia to stay out of the moratorium on commercial whaling, which has, in any event, ad hoc exceptions for aboriginal cultures. The implementation of these regimes, even with full cooperation, is not an easy matter. This is because it is necessary to adopt rules fixing a variety of key factors, which could easily vary by species, location, and time of year. But, on balance, the stakes are so large that the endeavor looks to be one worth undertaking, even as the complications of enforcement trouble the enterprise when domestic law oscillates between the use of state sanctions and private negotiations in setting policies for the control of common pool resources.

B. Contracts and Treaties

The next obvious point of comparison is between, on one hand, domestic contracts between private individuals, and, on the other, international agreements among states. In a state of nature, neither party can rely on state power to enforce an agreement. Indeed, even in the mature Roman system, certain contracts were styled *obligationes naturales*, a phrase that is translated literally and accurately as “natural obligations,” not as “unenforceable obligations.” The advantage of the literal translation is that it suggests that the obligations do not only arise in civil society, where commonly they refer to obligations undertaken by individuals who are within the *potestas* of another individual, and thus are not fully enforceable. However, it is critical to note that this term describes the situation for all obligations among all persons that arise in a state of nature. The use of the term suggests that no one doubts the presumptive moral force of these obligations, even as they recognize the


36 See id at Art V (listing among the matters for regulation: “(a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.”).

37 For some sign of difficulty under the ICRW, see *Japan Whaling Association v American Cetacean Society*, 478 US 221, 232 (1985), which deals with unilateral enforcement mechanisms that the US can deploy against the system, by mandating the imposition of economic sanctions in US waters against foreign nations whose activities in taking and trading whales “diminishes the effectiveness of the ICRW.” The Supreme Court, by a five-to-four vote, concluded that the Secretary of Commerce was not obliged to impose unilateral sanctions under the Act if it thought treaty negotiations were preferable. Id at 241. In its opinion, the Supreme Court rejected the argument that the political question doctrine of *Baker v Carr*, 369 US 186, 217 (1961), precluded hearing the case by giving extensive discretion to the executive branch. Id at 230.

38 For discussion, see Reinhard Zimmerman, *The Law of Obligations: The Roman Foundations of the Civilian Tradition* 7 (Jud and Co 1990), where the translation given is indeed “unenforceable obligations.”
heightened risk of nonperformance in the absence of a system of state-enforced sanctions. Thus, for example, it is widely understood that title to goods transferred pursuant to a natural obligation vests in the buyer or the donee, wholly apart from the enforcement question.  

This result lies within the joint expectations of the parties, who did not treat the transaction either as a theft or a bailment, both of which represent categories of legal obligation that are also intelligible in a state of nature.

It does not follow that natural obligations by way of gift or sale never arise in the state of nature. Rather, the real question is how often these obligations are assumed in light of the manifest risk of nonperformance by the other side. Since there are no state devices that can overcome this assurance problem, parties will typically tailor their agreements by reducing the anticipated gains from trade by cutting back on those types of transactions that present the greatest risk of non-reciprocation in the state of nature. Note that in the state of nature the want of money makes sale impossible among strangers. Given that large gap, the most obvious form of exchange that works in the state of nature is the simultaneous barter, which removes the risk of nonperformance when the two obligations are set up as sequential. With simultaneous performance, each party tenders performance at the same time, so that either side can withhold performance if the other side has not tendered delivery. There is greater difficulty entering into contracts of service, given that simultaneous performance is not possible, thereby increasing the risk of nonpayment for services tendered, or nonperformance of services for which payment is made in advance.

Contracting parties may deploy certain devices to deal with this assurance problem, but each has its own difficulty. In lending agreements, the borrower could give a written document to the seller, while remaining in possession of the land or chattel that is given as a security for payment. But the risk here is two-fold. First, the debt may not be repaid but the borrower nonetheless does not vacate the premises. Alternatively, the debt may be repaid, but the lender does not return the title papers to the buyer. Even before these security agreements, the giving and taking of hostages was one possibility under the early Roman contract of nexum, in which seizure of the person was the price for nonperformance.  

A second way to avoid this difficulty is to call on third persons to guarantee obligations or to act as escrow agents who receive instructions on how to dispose of money or property under the various scenarios. But so long as that party is not subject to binding constraints, he could easily disappear with both cash and property.

Therefore, perhaps the best way to expand the scope of trade is to rely on repeat performance that satisfies one dominant constraint. The transactions are

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39 Id.
40 Id at 4–5 & n 18.
limited to goods whose value can be determined by inspection. There need not be a face-to-face transaction, thus obviating the risk of violence, so long as one constraint is observed. The party who performs first knows that the second party has more to gain from the preservation of the relationship than he does from taking the goods for which he offers no goods in exchange. In effect, this system of barter—remember, there is no currency—works best when the amounts that are left for the other side are small enough so that defection is costly, and frequent enough, so that the relationship can keep its overall balance so as to operate in repeated cycles. The first constraint reduces the gains from defecting from the cooperative solution. The second increases aggregate gain and makes it easier to keep track of the relative value of the goods supplied in both directions. The system, therefore, stays on track only by limiting the nature and scope of these forward transactions.

One reason it is useful to think of these exchanges as creating natural obligations is that this thinking shifts the odds in favor of compliance. This allows the size and frequency of the forward transactions to increase, to the mutual benefit of both sides. Mutual self-interest is not the only way to achieve this result. In situations where third persons comply with natural obligations, reputation adds yet another powerful bond to performance. Legal enforcement expands the opportunities for gains from trade still further. Now it is not only possible to bring contractual actions for breach of contract in a state. Once the right to sue is in place, it can be supplemented by real and personal security, recordation, and a variety of other assurance devices.

In complex commercial settings, it is always difficult to ascertain the relative strengths of the natural obligation, the reputation of the counterparties, and the legal sanctions available. At a guess, for smaller transactions the first two are more important than the third, even in well-functioning legal systems. Yet, whatever the precise proportions, there is no reason whatsoever to use cynicism to undercut the moral force of these obligations, which can only reduce the possibility of compliance both in the state of nature and in civil society. The visceral objection to the cynical view of contracts is that it gratuitously destroys a piece of social capital that is so difficult to build up in the first place. It is for just this reason that the so-called legal doctrine of “efficient breach” generates such a uniform and hostile response by people in business, all of whom see the willingness to engage in deliberate breaches for short-term advantage as compromising the overall operation business relations which depend heavily on trust. The point of this response is not to be unduly naïve about the curative powers of moral force in all social settings. Rather, it is to insist that moral

41 For a discussion of how these play out, see generally Benjamin Klein, Self-Enforcing Contracts, 141 J Institutional & Theoretical Econ 594 (1985).
obligations form one factor that helps improve the overall level of compliance, which is as important in international relations as it is in domestic ones.

These principles surely carry over to the international law of treaties, which likewise are not subject to any mode of direct enforcement. But in these cases, a good treaty is one that works to the mutual advantage of the parties, such that each thinks that the loss of future cooperation or future peace is more costly than the gains from the short-term unilateral abrogation of the agreement. In these cases, both sides to the agreement are hemmed in by reputational constraints, for if they dishonor a treaty in the one case, it will influence for the worse their dealings with other nations with which they hope to have good relations. As with individual treaties in the state of nature, the weakness of the enforcement mode will often lead to a relative simplicity of the terms of the agreement. But, on balance, these types of agreements are performed with sufficient levels of regularity to count as an overall improvement. The strong realist critique that regards treaties as mere ploys in the endless pursuit of self-interest has the same destructive effect that it does in other contexts. The moral force of these agreements is fragile enough. It does little good to take public positions that depreciates what little political capital we have.

As with the first possession rule, the want of enforcement of individual or government agreements makes it difficult to attack some major problems that can be addressed within a system of domestic law that has strong mechanisms of enforcement. Most critically, in many settings, one party may have a monopoly on the provision of a particular service. In domestic systems, antitrust laws are routinely invoked to deal with these monopoly issues by placing prohibitions on price fixing arrangements and territorial divisions that amount to a restraint of trade. These laws also seek, far more ambitiously, to attack various kinds of vertical arrangements like tie-ins, resale price maintenance, and exclusive dealing. In those cases where the division of a single firm is not possible—with either natural or legally protected monopolies—it is common for governments from the earliest times to impose service obligations on common carriers, who do not have the absolute right to refuse service, but must extend it to all comers on a reasonable and nondiscriminatory, or RAND, basis. It is just these rules that form the basis of the complex system of public utility regulation that is applied to power, gas, electricity, trains, and communications.

There is no question that setting and enforcing the system of rates requires an elaborate form of administrative structure that cannot be duplicated in the state of nature, nor, as it turns out, in international relations, except by

\[\text{Footnotes:}\]
\[\text{Footnote 43:}\] For the leading case, see Allnutt v Inglis, 104 Eng Rep 206 (1810) (UK).
\[\text{Footnote 44:}\] For the original incorporation of this doctrine into American law, see Munn v Illinois, 94 US 113 (1876). For an historical account of the transition, see Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 282–87 (Perseus 1998).
agree. Thus, in the US, the various barriers that the states could set up to interstate transportation are in part minimized by the actions of the federal courts, which prevent any excessive favoritism for local businesses that could disrupt national commerce. But in international affairs, the matter is quite different on both the antitrust and rate regulation side. On the antitrust side, the well-established decision in *International Association of Machinists and Aerospace Workers v OPEC* categorically rejected these private antitrust claims because it was well aware of the huge political risks of seeking political solutions to the oil cartel while subjecting its operations in the US to private law suits under the Sherman Act. It is not news that "OPEC and its activities are carefully considered in the formulation of American foreign policy." It is, therefore, the case that neither international nor national law tries to deal with cartels through traditional antitrust remedies. No traditional antitrust remedy ever is invoked to counteract either the use of force and fraud. The entire antitrust law disappears under the spare libertarian norms that dominate in the state of nature.

By the same token, the RAND duties used for common carriers and public utilities are never invoked in the international context, either. The duty of universal service, for example, is not invoked to give the ships and aircraft of one nation guaranteed rights of access to the seaports or airports of another. Instead, elaborate bilateral treaties decide who is in a position to sail or fly into other nations, often on an ad hoc basis, which in practice is plagued by severe holdout problems. The question here is whether it would be possible to create some supranational institutions to bring all nations under a single sovereign that could resolve these matters, much as Public Utility Commissions do for natural companies under domestic law. Speaking only with the grandest terms, that risky enterprise is probably not worth undertaking, for the elimination of the holdout issues brings in its wake high risks of its own: partisanship in the operation of these institutions or the creation of monopoly institutions, which is of course what happened with the major expansion of the commerce power in the US.

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45 See, for example, *Southern Pacific v Arizona*, 325 US 761 (1944) (rules that require shorter trains held to be an impediment to interstate commerce).

46 649 F2d 1354 (9th Cir 1981) (*LAM*).


48 *LAM*, 649 F2d at 1361. The principles behind the *LAM* decision have been endorsed by the leading treatise on antitrust law. See Phillip E. Areeda and Herbert Hovenkamp, 1B *Antitrust Law* § 274(b)(2) at 365 (Aspen 3d ed 2006) ("The [LAM] court's deferential approach . . . seems appropriate, particularly where, as here, there is no judicial remedy that can control the foreign governments and their OPEC decisions. . . . If contrary judgments are to be made on such matters, it is surely the political arms of our government that should decide.").

49 See, for example, *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1 (1936) (sustaining the National Labor Relations Act, with collective bargaining duties); *Wickard v Filburn*, 317 US 111 (1942) (sustaining agricultural cartels under the Agricultural Adjustment Acts).
Subtle diplomatic pressure is, on balance, a better way to proceed, even if it is likely to fail in a large number of cases. The use of treaties in the state of nature, where sovereigns are jealous in giving up their powers except by consent, may well be the best of all possible solutions in a decidedly second-best world, that is one that admits of no ideal solutions.

C. Aggression and Self-Defense

The last of the major problems that arise in a state of nature deals with the use of force by aggression and self-defense. It takes little imagination to understand the fearful consequences of the Hobbesian war of all against all, which explains the strenuous efforts that most people make to do something to obviate that ever-present risk. The Lockean insight that the private exercise of executive power is enough to drive individuals from the state of nature into civil society has a lot of pop to it even today. But prior to the formation of the state, other devices had to be used to fill in the gaps. The creation of natural obligations not to attack others and natural rights of self-defense were surely high on the list. In private situations, the organization of extended families and the creation of defensible territories, discussed earlier, are an essential part of the overall picture. But so too are the rules that guide the operation of self-defense. These include the rules that prohibit the use of excessive force relative to the needs of the situation. In most dangerous contexts, all people are sensitive to the use of force prior to an actual attack, knowing the powerful interests on both sides. Too much force too soon could escalate a dispute that would otherwise disappear. Too little force and the delay could be fatal. In those cases where force has not been employed, the principles of natural justice, in general, call for retreat, except in those cases where the situation requires the abandonment of one’s home. In those situations where a direct threat does not involve immediate use of force, requests should precede action, and action should not involve wounding force if the actions in question pose no threat to personal life. The hardest cases deal with the use of disproportionate force in those circumstances where the minimum amount of force necessary to repel an attack may well be disproportionate to the interest that is protected by that force. One cannot kill a stranger if that is the only way to pry a penny that he has taken out of your hand. Instructively, these rules on individual use of force also create a window of discretion in which persons may choose to intervene by force in order to help other individuals, but judge this conduct more closely, lest individuals use the altercations between strangers as a pretext that allows them to attack others.

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50 Locke, *Second Treatise* at 14 (cited in note 32) (“To avoid this *state of war*—wherein there is no appeal but to heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders—is one great reason of men’s putting themselves into society and quitting the state of nature. . . .”) (emphasis added).

51 See, for the common law views, *M’Ivy v Cockran*, 9 Ky 271 (Ct App Ky 1820).
There are many other refinements in individual cases, but they all seek to walk the delicate line between excessive and insufficient force by seeking to prevent private escalation of force that could easily get out of hand between the parties.

In this regard, it is clear why the intervention of the state can do so much to improve the overall situation. By limiting the rights of self-help through the interposition of third persons, violence between the parties, which could easily envelop third persons, is effectively curtailed. It is for that reason that it is far better for the sheriff to evict a tenant than the landlord, and to do so only after process has been served. The successful intervention of police forces led to the early recognition, in constitutional law, that the power of the police was a necessary abridgment of rights of liberty and property because its use increased security of all persons within country. It is for no small reason that the mutual renunciation of force lies at the core of any vision of the social contract.52

These oversimplified observations about the use of force in self-defense highlight the problem in international law that a cry of distress cannot summon an all-powerful police force. Nations are in a state of nature with each other, which is why the great treatises of international law, such as Hugo Grotius's,53 all try to develop the analogies to the cluster of issues around self-defense to define the relationships among nations who are subject to no common sovereign. It is, therefore, no accident that Grotius begins his systematic account of this issue with a chapter that is devoted to “Defense of Person and Property.”54 The issues with two individuals are surely less complex than those involving two or more nations that are able to engage in much more complicated strategies against their enemies. But that is precisely the point. If there is no agreement on the simple cases, the hard cases will sink the system, which is why Grotius’s program of working from private law analogies is so compelling. In both settings, as noted above, the relative advantage that the defense has over the offense contributes to the stability of nations, as does the willingness of large powers to serve as the policeman of the world in order to control dangerous actions of aggression by smaller powers. These relationships are far from perfect, yet, once again, the willingness to design and create coercive supranational agencies to cope with these difficulties is fraught with serious risks of its own. At this point, the same theme comes through. The references to natural law cannot introduce a system of universal peace. But the constant repetition of the condemnation of naked aggression—yes, there are easy cases—is indeed well served. This approach does not get rid of the many difficult questions, here as in ordinary private law, of the use of force in anticipation of an attack, but at least it helps cabin the accounts. The principles of natural law are all calibrated to minimize the risk of escalation.

52 Hume, Treatise of Human Nature at 503 (cited in note 33).
54 Id at 73.
in private conflicts. The legal realist critique of natural once again has the unfortunate consequence of destroying the social capital that is always in short supply.

V. MOVING BEYOND THE NATURAL LAW IN INTERNATIONAL AFFAIRS

In dealing with these issues, I have shown how the same tensions that arise in domestic law pervade the field of international law. With regard to the former, it is quite clear that everyone but extreme anarcho-libertarians assume that it is proper to develop a government that uses coercion against its own citizens to enforce, at the very least, the basic rights dealing with individual autonomy, public and private property, contract, and tort. It is altogether proper to do so given the risks of breakdown that take place without the rise of the common sovereign. But making this claim is far from a full-throated endorsement of the larger proposition that, once societies move out of the state of nature, the sovereign should be given massive control over the basic operation of economic and social life. The move from the classical liberal state to the modern social democratic state is no small transformation. The former has little or no use for huge interference in labor markets that, in the eyes of many, justify state-protected unions and heavy regulation of the employment relationship. It has equally little use for extensive programs of redistribution by extensive high levels of taxation coupled with major regimes of positive rights that feature guaranteed incomes, jobs, health care, housing, and the like. Indeed, if forced to identify one major failure of modern democracies, my answer is that social democrats of all stripes assume that the admitted shortfalls of libertarian theory justify a sharp move to the other side of the political spectrum in which the only effective limits on state power arise from political institutions, not any strong conviction of individual rights, natural or otherwise.

For those who regard these new activities as desirable, the case for a strong international law with centralized authority seems quite compelling. For those like myself who are skeptical of these new efforts, the willingness to create stronger international institutions is likely to fall on deaf ears. At this point, the creation of the current world order has done much to constrain violence and facilitate trade, even though much remains to be done. But the gains from this transition in the international sphere are far lower than they were for ordinary individuals operating in the state of nature. At the same point, the risks of international meddling in sensible business and social arrangements look to be far greater. Given where we are, it appears, therefore, that the classical liberal becomes more libertarian in international affairs than he is in the state of nature. At the highest level of generality, the second-order problems dealing with such matters as wildlife, fish, and antitrust laws seem insignificant compared to the dangers of a powerful supranational government that can impose counterproductive tax and regulatory policies on a grander scale. Better that we
scrape though under current practices than risk greater system breakdown under a more ambitious international order.